This invention appertains to toys and more particularly to a wheeled figured toy.

One of the primary objects of my invention is to provide a novel wheeled toy simulating the appearance of an animal, such as a rabbit, provided with automatic means for depositing candy eggs on the ground during the pulling of the toy over a surface.

Another salient object of my invention is to provide a novel wheeled toy figure so constructed that the same will not only deposit eggs as the same is being drawn over the ground, but it will also have a jumping animated appearance.

A further important object of my invention is to provide a wheeled toy embodying pivotally connected front and rear sections with means operatively connecting said sections together to produce the animated jumping effect.

A still further object of my invention is the formation of a hopper in the rear section of the figure for receiving the candy eggs with a ground wheel supporting said rear section having a dispensing notch in its periphery for receiving and carrying one of the candy eggs at a time from the hopper and for depositing such egg on the ground.

A still further important object of my invention is the provision of novel means for actuating the mechanism for giving the figure the jumping or bouncing effect from said ground wheel.

A still further object of my invention is to provide a child's toy of the above character, which will be durable and efficient in use, one that will be simple and easy to manufacture and one which can be placed upon the market at a reasonable cost.

With these and other objects in view, the invention consists in the novel construction, arrangement and formation of parts, as will be hereinafter more specifically described, claimed and illustrated in the accompanying drawing, in which:

Figure 1 is a side elevational view of my novel wheeled toy, parts of the view being shown broken away to illustrate structural detail.

Figure 2 is a top plan view of my toy.

Figure 3 is an enlarged, transverse, sectional view through the toy taken on the line 3—3 of Figure 1 looking in the direction of the arrows.

Figure 4 is a view similar to Figure 1, but taken on a smaller scale and showing a different position of the toy.

Figure 5 is a view similar to Figure 4, but showing a different position of the figure and immediately after a candy egg has been deposited on the ground.

Referring to the drawing in detail, wherein similar reference characters designate corresponding parts throughout the several views, the letter "T" generally indicates my novel toy and the same includes a front main section 10 and a rear section 11. These sections 10 and 11 are pivotally connected together by a pivot pin 12, for a purpose which will later appear.

The toy is formed to simulate the appearance of a known object such as a hen or some animal. In the drawings, for the purpose of illustration, I have shown the toy constructed to simulate the appearance of a rabbit. Hence, the front section 10 includes a body portion 13, a head 14 and forwardly projected front legs 15. An axle 16 is carried by the front legs and front ground wheels 17 are mounted on the axle. This front section 10, with the exception of the axle 16 and wheels 17, is preferably cut from a single block of wood.

The rear section 11 is shaped to simulate the hind quarters of the rabbit and hence, includes an upper main section 18 and depending rear legs 19.

In accordance with my invention, the rear section 11 includes side plates 20 secured to and held in spaced relation by a block 21. This block 21 is so formed as to provide, in conjunction with the side plates 20, a receptacle or hopper 22 for the reception of the candy eggs. The upper end of the hopper can be left partly open so as to permit the filling of the hopper with the eggs and, if desired, the opening can be closed by a suitable door. The lower end of the hopper is provided with an outlet opening 23 for the eggs.

The side plates 20 extend below the spacing block 21 and the side plates below the blocks rotatably support a rear axle 24. Keyed, or otherwise secured, to the rear axle is a rear ground wheel 25 and this wheel includes circular side wheel discs 26 and a central cylindrical body or spool 27. The spool or body 27 has formed in its periphery a dispensing notch 28. Normally the spool or body 27 closes the dispensing opening 23 of the hopper, but as the rear wheel 25 rotates and the dispensing notch 28 passes the hopper, a candy egg will drop into said notch and upon continued rotation of the wheel, and as the notch passes the ground, the egg will be deposited on the ground.

Also keyed, or otherwise secured, to the rear axle 24 is a crank 28 and the outer end of the crank has pivotally connected thereto a pitman or link 30. The forward end of this link is piv-
otally connected, as at 31, to the front section 10 of the figure forwardly of, and below, the pivot 1.

The toy is adapted to be pulled over the ground by a pull-cord and during the movement of the figure over the ground the wheel 25 will be rotated and each time the dispensing notch 28 passes the hopper an egg will be picked up from said hopper and deposited upon the ground. During the turning of the rear ground wheel the crank 29 will be turned which will actuate the link 30 causing the sections 10 and 11 of the figure to pivot one on the other which will give a jumping or running effect to the rabbit.

Thus it can be seen that I have provided a novel animated figure which will give a child a maximum amount of amusement and which will deposit eggs on the ground and thus create in the minds of children the laying of eggs by an Easter rabbit.

Attention is called to the fact that the side plates 20 of the rear section 11 project forwardly of the block 21 and that these side plates receive therebetween the rear section of the body portion 13 of the front part 10 of the figure.

Changes in details may be made without departing from the spirit or the scope of my invention, but what I claim as new is:

1. A wheeled toy comprising a front and a rear section pivotally connected together, front ground wheels carried by the front section and a main rear ground wheel carried by the rear section, means operatively connecting the rear ground wheel to the front section and swinging said sections on their pivot during the travel of the toy over the ground, a hopper formed in one of said sections for the reception of candy eggs and means operatedly connected with said rear ground wheel for depositing one candy egg at a time on the ground from said hopper.

2. A wheeled toy shaped to simulate the appearance of an animal, or the like, comprising a front and a rear section, means pivotally connecting said sections together, front ground wheels for supporting the front section, a main rear ground wheel supporting the rear section, a crank rotatable with the rear ground wheel, a link pivotally connected to the crank and to the front section, a hopper for the reception of candy eggs in said rear section and means controlled by said rear ground wheel for receiving one candy egg at a time from the hopper and for depositing the same on the ground during the travel of the toy over the ground.

3. A wheeled toy constructed to simulate the appearance of an animal, or the like, comprising a front section, a rear section, means pivotally connecting such sections together, a front ground wheel supporting the front section, a main rear ground wheel assembly supporting the rear section, a hopper for the reception of candy eggs in said rear section having an outlet opening, a portion of said rear ground wheel assembly normally closing said opening and having a dispensing notch for movement past said opening during the rotation of said wheel assembly and receiving one candy egg at a time from the hopper and for depositing the same on the ground, a crank rotatable with the rear ground wheel assembly, and a link pivotally connecting the crank to the front section.

4. A wheeled toy constructed to simulate the appearance of an animal, or the like, comprising a body, front wheels supporting the front of the body, a rear ground wheel assembly supporting the rear of the body so that the toy can be pulled over the ground, a hopper in said body having a bottom outlet opening, said wheel assembly including a cylindrical portion normally closing said opening and having a dispensing slot movable past the opening for receiving candy eggs therefrom.

5. A wheeled toy constructed to simulate the appearance of an animal, or the like, comprising a front section formed from a single piece of material, front wheels rotatably carried by said front section, a rear section including spaced plates and a spacing block between said plates for securing the same together, said spacing block and plates forming a hopper for the reception of candy eggs, said hopper having an outlet opening, said plates extending forwardly of, and below, the block, the forward ends of the plates receiving the front section, a pivot pin connecting the forward ends of said plates to the front section, a rear ground wheel assembly rotatably mounted between the lower ends of the side plates having a cylindrical portion normally closing the opening in the hopper and provided with a dispensing notch movable past the opening for receiving candy eggs from the hopper, a crank rotatable with the rear ground wheel assembly, and a link pivotally connected to the crank and to said front section.

DANIEL E. GUMB.
OTHER PUBLICATIONS
"Court speeds justice by putting records and court papers on-line", PC Week Mar. 29, 1988, v. 5, n. 13 p. 27(1).

Primary Examiner—Donald E. McElhenny, Jr.  Attorney, Agent, or Firm—Engate Incorporated

ABSTRACT
The present invention provides attorney terminals which operate using an outline for storing, associating and managing case evidence, case law and work product for a given lawsuit at issue. Accessed through attorney terminals, the outline is structured based on a hierarchical categorization of the lawsuit into the law and fact at issue. Associated with each categorization entry in the hierarchical outline are groupings of case law, case evidence, relevance and draft discovery information for rapid access by the attorney. Each categorization entry in the tailored outline provides instant access to case law via headnotes, treatise selections, seminal cases, and preset searches. The disclosed invention also automatically: 1) tracks the use of Exhibits in a proceeding; 2) generates draft portions of a pretrial order including jury instructions; and 3) generates time-lines for analysis and use during a proceeding. Draft interrogatories, document requests and deposition or trial questions are also provided.

6 Claims, 20 Drawing Sheets
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DANIEL E. GUMB.
The USA PATRIOT Act: A Legal Analysis

April 15, 2002

Charles Doyle
Senior Specialist
American Law Division
Summary

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

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

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

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

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

Introduction

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


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

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

3 H.R. 3004 was introduced by Representative Oxley for himself and Represenatives LaFalce, Leach, Maloney, Roukema, Bentsen, Hooley, Bereuter, Baker, Bachus, King, Kelly, Gillmore, Cantor, Riley, Latourette, Green (of Wisconsin), and Grucci; and reported out of the House Financial Services Committee with amendments on October 15, 2001, H.R.Rep.No. 107-250. H.R. 3004, as reported out, included Internet gambling amendments that were not included in H.R. 2975/H.R.3108.
criminal cases. When approved by senior Justice Department officials, law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.

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

9 The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement), 1751 (presidential and presidential staff assassination, kidnapping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (launding of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnaping, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or nationalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
ed. Oct. 24, 2001), and H.R. 3162 was sent to the President who signed it on October 26, 2001.

**Criminal Investigations: Tracking and Gathering Communications**

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

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

Congress responded to *Berger* and *Katz*, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications, 18 U.S.C. 2511.7 At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious

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


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

7 Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
offense involving counterfeiting punishable under 18 U.S.C. 471, 472, or 473; (e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States; (f) any offense including extortionate credit transactions under 18 U.S.C. 892, 893, or 894; (g) a violation of 31 U.S.C. 5322 (dealing with the reporting of currency transactions); (h) any felony violation of 18 U.S.C. 2511 and 2512 (interception and disclosure of certain communications and to certain intercepting devices); (i) any felony violation of 18 U.S.C. ch. 71 (obscenity); (j) 49 U.S.C. 60123(b) (destruction of a natural gas pipeline), 46502 (aircraft piracy); (k) 22 U.S.C. 2778 (Arms Export Control Act); (l) the location of any fugitive from justice from an offense described in this section; (m) a violation of 8 U.S.C. 1324, 1327, or 1328; (n) any felony violation of 18 U.S.C. 922, 924 (firearms); (o) any violation of 26 U.S.C. 5861 (firearms); (p) a felony violation of 18 U.S.C. 1028 (production of false identification documents), 1542 (false statements in passport applications), 1546 (fraud and misuse of visas, permits, and other documents) or a violation of 8 U.S.C. 1324, 1327, or 1328 (smuggling of aliens); (p) 229 (chemical weapons), 2332 (terrorist violence against Americans overseas), 2332a (weapons of mass destruction), 2332b (multinational terrorism), 2332d (financial transactions with countries supporting terrorism), 2339A (support of terrorist), 2332B (support of terrorist organizations); (r) any conspiracy to commit any of these, 18 U.S.C. 2516(1)(crimes added by the Act in italics). Other than telephone face to face conversations (i.e., electronic communications), the approval of senior Justice Department officials is not required and an order may be sought in any felony investigation, 18 U.S.C. 2516(3).
Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public the agency shall ensure that a record will be maintained which will identify – (i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of the such device.

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

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

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

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

April 15, 2002

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The USA PATRIOT Act: A Legal Analysis

Summary

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

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

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

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

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

Introduction

Congress passed the USA PATRIOT Act (the Act) in response to the terrorists’ attacks of September 11, 2001.¹ The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to further close our borders to foreign terrorists and to detain and remove those within our borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it is not without safeguards, critics contend some of its provisions go too far. Although it grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough.


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

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

³ H.R. 3004 was introduced by Representative Oxley for himself and Represenatives LaFalce, Leach, Maloney, Roukema, Bentsen, Hooley, Bereuter, Baker, Bachus, King, Kelly, Gillmore, Cantor, Riley, Latourette, Green (of Wisconsin), and Grucci; and reported out of the House Financial Services Committee with amendments on October 15, 2001, H.R.Rep.No. 107-250. H.R. 3004, as reported out, included Internet gambling amendments that were not included in H.R. 2975/H.R.3108.
ed. Oct. 24, 2001), and H.R. 3162 was sent to the President who signed it on October 26, 2001.

**Criminal Investigations: Tracking and Gathering Communications**

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

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

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

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


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

7 Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
criminal cases. When approved by senior Justice Department officials, law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.8

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

9 The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement), 1751 (presidential and presidential staff assassination, kidnapping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2231 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnapings, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or naturalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations, 18 U.S.C. 2518. The court notifies the parties to any conversations seized under the order after the order expires, 18 U.S.C. 2518(8).

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

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

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

- offense involving counterfeiting punishable under 18 U.S.C. 471, 472, or 473; (e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States; (f) any offense including extortionate credit transactions under 18 U.S.C. 892, 893, or 894; (g) a violation of 31 U.S.C. 5322 (dealing with the reporting of currency transactions); (h) any felony violation of 18 U.S.C. 2511 and 2512 (interception and disclosure of certain communications and to certain intercepting devices); (i) any felony violation of 18 U.S.C. ch. 71 (obscenity); (j) 49 U.S.C. 60123(b) (destruction of a natural gas pipeline), 46502 (aircraft piracy); (k) 22 U.S.C. 2778 (Arms Export Control Act); (l) the location of any fugitive from justice from an offense described in this section; (m) a violation of 8 U.S.C. 1324, 1327, or 1328; (n) any felony violation of 18 U.S.C. 922, 924 (firearms); (o) any violation of 26 U.S.C. 5861 (firearms); (p) a felony violation of 18 U.S.C. 1028 (production of false identification documents), 1542 (false statements in passport applications), 1546 (fraud and misuse of visas, permits, and other documents) or a violation of 8 U.S.C. 1324, 1327, or 1328 (smuggling of aliens); (q) 29 (chemical weapons), 2332 (terrorist violence against Americans overseas), 2332a (weapons of mass destruction), 2332b (multinational terrorism), 2332d (financial transactions with countries supporting terrorism), 2339A (support of terrorist), 2332B (support of terrorist organizations); (r) any conspiracy to commit any of these, 18 U.S.C. 2516(1)(crimes added by the Act in italics). Other than telephone face to face conversations (i.e., electronic communications), the approval of senior Justice Department officials is not required and an order may be sought in any felony investigation, 18 U.S.C. 2516(3).

10 Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
permits pen register and trap and trace orders for electronic communications (e.g., e-mail)

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

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

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

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

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

encourages cooperation between law enforcement and foreign intelligence investigators

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

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

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

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

"(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof),” section 216(b)(1)."
The use of pen registers or trap and trace devices was limited at one time to the judicial district in which the order was issued, 18 U.S.C. 3123 (2000 ed.). Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States, 18 U.S.C. 3123(b)(1)(C), 3127(2).

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

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

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

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

13 Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user's true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” DoJ at §107.
Previously, only a federal court in the district in which the e-mail was stored could issue the order. Under section 220, federal courts in the district where an offense under investigation occurred may issue orders applicable “without geographic limitation,” 18 U.S.C. 2703.14

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

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

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

15 See e.g., DoJ at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement’s access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

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

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

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

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

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

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

20 “Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” DoJ at §153.
demanding standard than the “a purpose” threshold proposed by the Justice Department, but a clear departure from the original “the purpose” entry point. FISA once described a singular foreign intelligence focus prerequisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k), 1825(k).  

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

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

22 “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210[ subpoenas for communications provider customer records], 211[access to cable company communication service records], 213[sneak and peek], 216[pen register and trap and trace device amendments], 221[trade sanctions], and 222[assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005. “(b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers' communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices). Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees, but could not recover against the United States. Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

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

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

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

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26 Prior law already granted service providers immunity for disclosure of customer records in compliance with a court access order, 18 U.S.C. 2703(f).
27 “Existing law contains no provision that allows providers of electronic communications service to disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies that threaten death or serious bodily injury. This section amends 18 U.S.C. §2702 to authorize such disclosures if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.

“Current law also contains an odd disconnect: a provider may disclose the contents of the customer's communications in order to protect its rights or property but the current statute does not expressly permit a provider to voluntarily disclose non-content records (such as a subscriber's login records). 18 U.S.C. 2702(b)(5). This problem substantially hinders the ability of providers to protect themselves from cyber-terrorists and criminals. Yet the right to disclose the contents of communications necessarily implies the less intrusive ability to disclose non-content records. In order to promote the protection of our nation's critical infrastructures, this section's amendments allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems,” DoJ at
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

**Foreign Intelligence Investigations**

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

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA), something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President's authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, *United States v. United States District Court*, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage
lockers, 50 U.S.C. 1861-1863 (2000 ed.). Intelligence authorities gained narrow passages through other privacy barriers as well.\textsuperscript{32}

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


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

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

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

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

‘(e) ‘foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans ("United States persons," i.e., citizens or permanent resident aliens). The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

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

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

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

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

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

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

- carries a sunset provision

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

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

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

34 Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
**FISA.** FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases.\(^{35}\) It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

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

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

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

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

\(^{37}\) See e.g., S.Rep.No. 106-352, at 3, 6, 7 (2000) ("The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application
process, as interpreted by the OIPR is administratively burdensome and, at times, extremely slow. Many applications undergo months of scrutiny before submission to the court because the OIPR prescribes standards and restrictions not imposed by the statute. . . . In particular, the OIPR has been criticized for an overly restrictive interpretation of the FISA ‘currency’ requirement. This is the issue of how recent a subject’s activities must be to support a finding of probable cause that the subject is engaged in clandestine intelligence gathering activities. . . .

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

38 “When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevance, an additional factual showing that the communications device has been used to contact an ‘agent of a foreign power’ engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the ‘agent of a foreign power’ prong from the predication, and thus makes the FISA authority more closely track the criminal authority,” DoJ at §155.
Section 214 adjusts the language of the FISA pen register-trap and trace authority to permit its use to capture source and destination information relating to electronic communications (e.g., e-mail) as well as telephone communications, 50 U.S.C. 1842(d). The section makes it clear that requests for a FISA pen register-trap and trace order, like requests for other FISA orders, directed against Americans (U.S. persons) may not be based solely on activities protected by the First Amendment, 50 U.S.C. 1842, 1843.

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

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

40 When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court’s order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.’ This would enhance the FBI’s ability to monitor international terrorists and intelligence officers who are
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian. The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities, in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the—

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

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


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

42 Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.\footnote{H.R.Rep.No. 107-205, at 60-1 (2001)(“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement. “The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis. “Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual’s credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding--without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information”\footnote{See also, DoJ at §103, “This section facilities the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the}}

\textbf{Access to Law Enforcement Information.} Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community’s access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, \textit{Draft} at §103.\footnote{Draft at §103.}
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, *Draft* at §354.45

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

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion.47 It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions.”

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

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

47 *Blair v. United States*, 250 U.S. 273, 281 (1919)(the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
affairs are conducted in private and outside the presence of the court. Only the attorney for the government, witnesses under examination, and a court reporter may attend its proceedings, F.R.Crim.P. 6(d). Matters occurring before the grand jury are secret and may be disclosed by the attending attorney for the government and those assisting the grand jury only in the performance of their duties; in presentation to a successor grand jury; or under court order for judicial proceedings, for inquiry into misconduct before the grand jury, or for state criminal proceedings, F.R.Crim.P. 6(e).

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

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

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

49 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25 HARVARD JOURNAL OF LAW & PUBLIC POLICY 699, 719-20 (2002)(“There is a significant danger that the rule permitting disclosure will be treated as the de facto authorization of an expansion of the grand jury’s investigative role to encompass seeking material relevant only to matters of national security, national defense, immigration, and so forth. The grand jury’s awesome powers should not be unwittingly extended to a much wider range of issues... Since the grand jury operates in secret, there are no public checks on the scope of its investigations, and witnesses are not permitted to challenge its jurisdiction. Only the supervising court is in a position to keep the grand jury’s investigation within proper bounds. Requiring judicial approval of foreign intelligence and counterintelligence information disclosures would provide a natural check against the temptation to manipulate the grand jury to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6 (Nov. 2001)(“The grand jury secrecy rule is a rule of policy which has always had exceptions, and it has been frequently modified. The secrecy rule has no credible claim to constitutional stature”).
Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense of security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

"Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification.\(^5\) By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.\(^5\)

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

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

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\(^{52}\) *Duncan v. Walker*, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted) (“It is our duty to give effect, if possible, to every clause and word of a statute. *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)); see also *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879)(As early as in Bacon's Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

\(^{53}\) *Draft at §154,* “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”
computerized translation capability to be used in foreign intelligence gathering.\textsuperscript{54} Section 907 instructs the Director of the Central Intelligence, in consultation with the Director of the FBI, to report on the creation of a National Virtual Translation Center. The report is to include information concerning staffing, allocation of resources, compatibility with comparable systems to be used for law enforcement purposes, and features which permit its efficient and secure use by all of the intelligence agencies.

**Money Laundering**

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

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

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

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


\textsuperscript{56} See e.g., 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
**Records and Reports.** For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler’s checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

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


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

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

“While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement
Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action.\(^5^9\) Section 355 expands the immunity to cover disclosures in

\(^5^9\) “Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

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

“Subsection [351](b) amends section 5318(g)(2) of title 31—which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed—to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee’s official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
employment references to other insured depository financial institutions provided disclosure is not done with malicious intent.\textsuperscript{60}

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

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

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

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\textsuperscript{60} 31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 66 (2001).
laundryng concern. These special measures may require U.S. financial institutions to:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

“For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
**General Regulatory Matters.** The Act establishes several other regulatory mechanisms directed at the activities involving U.S. financial institutions and foreign individuals or institutions. Section 313, for instance, in another restriction on correspondent accounts for foreign financial institutions, prohibits U.S. financial institutions from maintaining correspondent accounts either directly or indirectly for foreign shell banks (banks with no physical place of business) which have no affiliation with any financial institution through which their banking activities are subject to regulatory supervision.

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

The Secretary of the Treasury is instructed in section 326 to issue regulations for financial institutions’ minimum new customer identification standards and record-
keeping and to recommend a means to effectively verify the identification of foreign customers.  

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

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

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

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

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

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

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

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

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

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

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

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

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

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exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.\textsuperscript{69}

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

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

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

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


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

“The Committee is concerned that inadequate information on the originator of wires transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime”).
Crimes. Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

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

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

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

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

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

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
Section 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

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

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

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

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

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

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

Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.73

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

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

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

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

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

74 “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual, 31 U.S.C. 5332(a)(2).

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

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

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

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

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75 “For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).
As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency – representing the proceeds of drug trafficking and other criminal offenses – is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad.

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

Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute,” H.R.Rep.No. 107-250 at 36-7 (2001).
under either circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.77

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

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering,78 in the state and district in which the monetary transaction takes place. The Supreme Court in *Cabrales* held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in dicta, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.79

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

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

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

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

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

80 For general background information, see, Doyle, *Crime and Forfeiture*, CRS REP.NO. 97-139A (Oct. 11, 2000).
This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App.U.S.C. §5(b).

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

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

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

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

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

The Justice Department also recommended enactment of an overlapping provision which ultimately passed as section 806 of the Act without any real discussion of the relationship of the two sections. Section 806 authorizes confiscation of all property, regardless of where it is found, of any individual, entity, or organization engaged in domestic or international terrorism (as defined in 18 U.S.C. 2331), against the United States, Americans or their property, 18 U.S.C. 983(i)(2)(D).

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

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

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

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

86 “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
981(a)(1)(G). Section 806 as discussed below also calls for the more common confiscation of property derived from and or facilitating acts of domestic or international terrorism against the United States or its citizens. Confiscations under 806 may be challenged under the procedures of 18 U.S.C. 983, since they are not exempted there. To the extent that forfeiture under section 806 is based on international rather than domestic terrorism, claimants may also use the procedures of section 316.

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

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

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

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


89 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal in personam proceedings following criminal conviction as a means of accomplishing confiscation.
Neither section 106 nor 806 require conviction of the terrorist property owner.\textsuperscript{90} Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

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

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

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

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

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

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

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

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

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

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

96 DoJ, at §403.

97 18 U.S.C. 1956(b). Cf., H.R.Rep.No. 107-250, at 54-5 (2001)(“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas.\footnote{18 U.S.C. 953.} Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted American Bank, 191 F.3d 30 (1st Cir. 1999).

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

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

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

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

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

“The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”).
defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation.\footnote{Cf., H.R.Rep.No. 107-250, at 58-9 (2001) ("Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of 'substitute assets' when the defendant has placed the property otherwise subject to forfeiture 'beyond the jurisdiction of the court.' Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

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

Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here.\footnote{18 U.S.C. 981(a)(1)(B).} Section 320 enlarges this provisions to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements.\footnote{H.R.Rep.No. 107-250, at 56 (2001)("This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act").} This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.\footnote{H.R.Rep.No. 107-250, at 59-60 (2001)("Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country.

"Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking}
A fugitive may not challenge a federal forfeiture. Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

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

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

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

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

Alien Terrorists and Victims

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

Border Protection. The border protection provisions:

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

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

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

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

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

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

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

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

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

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

- limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
• instruct the Attorney General to report on the feasibility of using biometric scanners to help prevent terrorists and other foreign criminals from entering the country, section 1008

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

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

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


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

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104 As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).
Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).


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

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

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

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

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

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

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

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

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

106 “The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks. “The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application.

“Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
• preservation of certain immigration benefits available to alien family members that would be otherwise lost as a consequence of the death of a victim of September 11, section 423

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

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

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

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

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


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

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

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

“Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien’s 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien’s 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
• a denial of benefits of the Act to terrorists and their families, section 427

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

Other Crimes, Penalties, & Procedures

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

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

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

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

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

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

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

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

111 “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2)(“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

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

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

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

¹¹² *U.S. Const.* Art.III, §2, cl.3 (“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . .”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . ..”); *United States v. Cabrales*, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from *Cabrales* when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnapping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280-81 n.4 (1999)(“By way of comparison, last Term in *Cabrales* we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).
The Justice Department sought the expansion along with the enlargement of the predicate offense list. “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of ‘material support or resources’ is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’),” DoJ, at §304.

Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.115


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


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

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

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

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

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

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

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

\(^{118}\) “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense;” *Draft* at §302.
• interfering with a flight crew within U.S. special aircraft jurisdiction, 49 U.S.C. 46504;
• carrying a weapon or explosive abroad an aircraft within U.S. special aircraft jurisdiction, 49 U.S.C. 46505; and
• sabotage of interstate gas pipeline facilities, 49 U.S.C. 60123.

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

120 Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

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

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

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders).122

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

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

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

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

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

123 When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001)(remarks of Rep. Sensenbrenner); for general background, see, Doyle, McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys, CRS REP.NO. RL30060 (Dec. 14, 2001).
Rewards. The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L.105-277, 112 Stat. 2681-66 (1998).

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

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

Posse Comitatus. The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.¹²⁵

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

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

¹²⁵ For a general discussion of the Posse Comitatus Act, see, Doyle, The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law, CRS REP.NO. 95-964 (June 1, 2000).
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

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

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

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126 “The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in United States v. New York Telephone Co., 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth
The Second Circuit was less convinced and preferred to hold sneak and peek searches to the demands of Rule 41, United States v. Pangburn, 983 F.2d 449 (2d Cir. 1993). The Fourth Circuit was, if anything, less convinced. Moreover, the facts in the case demonstrate the potential impact of the issue on computer privacy, United States v. Simons, 206 F.3d 392 (4th Cir. 2000).

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

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

128 In Simons, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
The Justice Department urged that the conflict be resolved with a uniform rule which permitted sneak and peek warrants under the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage.129

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

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

130 Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department’s initial proposal, the Department’s justification does not address the question.
ATTORNEY TERMINAL HAVING OUTLINE PREPARATION CAPABILITIES FOR MANAGING TRIAL PROCEEDING

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Assignee: Engate Incorporated, Chicago, Ill.

Filed: Oct. 20, 1994

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Field of Search ..................  364/401, 400, 409, 419.19

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Primary Examiner—Donald E. McElhenny, Jr.
Attorney, Agent, or Firm—Engate Incorporated

ABSTRACT

The present invention provides attorney terminals which operate using an outline for storing, associating and managing case evidence, case law and work product for a given lawsuit at issue. Accessed through attorney terminals, the outline is structured based on a hierarchical categorization of the lawsuit into the law and fact at issue. Associated with each categorization entry in the hierarchical outline are groupings of case law, case evidence, relevancy and draft discovery information for rapid access by the attorney. Each categorization entry in the tailored outline provides instant access to case law via headnotes, treatise selections, seminal cases, and preset searches. The disclosed invention also automatically: 1) tracks the use of Exhibits in a proceeding; 2) generates draft portions of a pretrial order including jury instructions; and 3) generates time-lines for analysis and use during a proceeding. Draft interrogatories, document requests and deposition or trial questions are also provided.

6 Claims, 20 Drawing Sheets
• for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;

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

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

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

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

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

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

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

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

One of the primary objects of my invention is to provide a novel wheeled toy simulating the appearance of an animal, such as a rabbit, provided with automatic means for depositing candy eggs on the ground during the pulling of the toy over a surface.

Another salient object of my invention is to provide a novel wheeled toy figure so constructed that the same will not only deposit eggs as the same is being drawn over the ground, but it will also have a jumping animated appearance.

A further important object of my invention is to provide a wheeled toy embodying pivotally connected front and rear sections with means operatively connecting said sections together to produce the animated jumping effect.

A still further object of my invention is the formation of a hopper in the rear section of the figure for receiving the candy eggs with a ground wheel supporting said rear section having a dispensing notch in its periphery for receiving and carrying one of the candy eggs at a time from the hopper and for depositing such egg on the ground.

A still further important object of my invention is the provision of novel means for actuating the mechanism for giving the figure the jumping effect from said ground wheel.

A still further object of my invention is to provide a child's toy of the above character, which will be durable and efficient in use, one that will be simple and easy to manufacture and one which can be placed upon the market at a reasonable cost.

With these and other objects in view, the invention consists in the novel construction, arrangement and formation of parts, as will be hereinafter more specifically described, claimed and illustrated in the accompanying drawings, in which drawing:

Figure 1 is a side elevational view of my novel wheeled toy, parts of the view being shown broken away to illustrate structural detail.

Figure 2 is a top plan view of my toy.

Figure 3 is an enlarged, transverse, sectional view through the toy taken on the line 3—3 of Figure 1 looking in the direction of the arrows.

Figure 4 is a view similar to Figure 1, but taken on a smaller scale and showing a different position of the toy.

Figure 5 is a view similar to Figure 4, but showing a different position of the figure and immediately after a candy egg has been deposited on the ground.

Referring to the drawing in detail, wherein similar reference characters designate corresponding parts throughout the several views, the letter "T" generally indicates my novel toy and the same includes a front main section 10 and a rear section 11. These sections 10 and 11 are pivotally connected together by a pivot pin 12, for a purpose which will later appear.

The toy is formed to simulate the appearance of a known object such as a hen or some animal. In the drawings, for the purpose of illustration, I have shown the toy constructed to simulate the appearance of a rabbit. Hence, the front section 10 includes a body portion 13, a head 14 and forwardly projected front legs 15. An axle 16 is carried by the front legs and front ground wheels 17 are mounted on the axle. This front section 10, with the exception of the axle 16 and wheels 17, is preferably cut from a single block of wood.

The rear section 11 is shaped to simulate the hind quarters of the rabbit and hence, includes an upper main section 18 and depending rear legs 19.

In accordance with my invention, the rear section 11 includes side plates 20 secured to and held in spaced relation by a block 21. This block 21 is so formed as to provide, in conjunction with the side plates 20, a receptacle or hopper 22 for the reception of the candy eggs. The upper end of the hopper can be left partly open so as to permit the filling of the hopper with the eggs and, if desired, the opening can be closed by a suitable door. The lower end of the hopper is provided with an outlet opening 23 for the eggs.

The side plates 20 extend below the spacing block 21 and the side plates below the blocks rotatably support a rear axle 24. Keyed, or otherwise secured, to the rear axle is a rear ground wheel 25 and this wheel includes circular side wheel discs 26 and a central cylindrical body or spool 27. The spool or body 27 has formed in its periphery a dispensing notch 28. Normally the spool or body 27 closes the dispensing opening 23 of the hopper, but as the rear wheel 25 rotates and the dispensing notch 28 passes the hopper, a candy egg will drop into said notch and upon continued rotation of the wheel, and as the notch passes the ground, the egg will be deposited on the ground.

Also keyed, or otherwise secured, to the rear axle 24 is a crank 29 and the outer end of the crank has pivotally connected thereto a pitman or link 30. The forward end of this link is piv-
ally connected, as at 31, to the front section 10 of the figure forwardly of, and below, the pivot 11.

The toy is adapted to be pulled over the ground by a pull-cord and during the movement of the figure over the ground the wheel 25 will be rotated and each time the dispensing notch 28 passes the hopper an egg will be picked up from said hopper and deposited upon the ground. During the turning of the rear ground wheel the crank 29 will be turned which will actuate the link 30 causing the sections 10 and 11 of the figure to pivot one on the other which will give a jumping or running effect to the rabbit.

Thus it can be seen that I have provided a novel animated figure which will give a child a maximum amount of amusement and which will deposit eggs on the ground and thus create in the minds of children the laying of eggs by an Easter rabbit.

Attention is called to the fact that the side plates 20 of the rear section 11 project forwardly of the block 21 and that these side plates receive therebetween the rear section of the body portion 13 of the front part 10 of the figure.

Changes in details may be made without departing from the spirit or the scope of my invention, but what I claim as new is:

1. A wheeled toy comprising a front and a rear section pivotally connected together, front ground wheels carried by the front section and a main rear ground wheel carried by the rear section, means operatively connecting the rear ground wheel to the front section and swinging said sections on their pivot during the travel of the toy over the ground, a hopper formed in one of said sections for the reception of candy eggs and means controlling the main rear ground wheel for depositing one candy egg at a time on the ground from said hopper.

2. A wheeled toy shaped to simulate the appearance of an animal, or the like, comprising a front and a rear section, means pivotally connecting said sections together, front ground wheels for supporting the front section, a main rear ground wheel supporting the rear section, a crank rotatable with the rear ground wheel, a link pivotally connected to the crank and to the front section, a hopper for the reception of candy eggs in said rear section and means controlled by said rear ground wheel for receiving one candy egg at a time from the hopper and for depositing the same on the ground during the travel of the toy over the ground.

3. A wheeled toy constructed to simulate the appearance of an animal, or the like, comprising a front section, a rear section, means pivotally connecting such sections together, a front ground wheel supporting the front section, a main rear ground wheel assembly supporting the rear section, a hopper for the reception of candy eggs in said rear section having an outlet opening, a portion of said rear ground wheel assembly normally closing said opening and having a dispensing notch for movement past said opening during the rotation of said wheel assembly and receiving one candy egg at a time from the hopper and for depositing the same on the ground, a crank rotatable with the rear ground wheel assembly, and a link pivotally connecting the crank to the front section.

4. A wheeled toy constructed to simulate the appearance of an animal, or the like, comprising a body, front wheels supporting the front of the body, a rear ground wheel assembly supporting the rear of the body so that the toy can be pulled over the ground, a hopper in said body having a bottom outlet opening, said wheel assembly including a cylindrical portion normally closing said opening and having a dispensing slot movable past the opening for receiving candy eggs therefrom.

5. A wheeled toy constructed to simulate the appearance of an animal, or the like, comprising a front section formed from a single piece of material, front wheels rotatably carried by said front section, a rear section including spaced plates and a spacing block between said plates for securing the same together, said spacing block and plates forming a hopper for the reception of candy eggs, said hopper having an outlet opening, said plates extending forwardly of, and below, the block, the forward ends of the plates receiving the front section, a pivot pin connecting the forward ends of said plates to the front section, a rear ground wheel assembly rotatably mounted between the lower ends of the side plates having a cylindrical portion normally closing the opening in the hopper and provided with a dispensing notch movable past the opening for receiving candy eggs from the hopper, a crank rotatable with the rear ground wheel assembly, and a link pivotally connected to the crank and to said front section.

DANIEL E. GUMB.
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DANIEL E. GUMB.
Summary

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

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

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

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

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

April 15, 2002

Charles Doyle
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The USA PATRIOT Act: A Legal Analysis

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

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The USA PATRIOT Act: A Legal Analysis

Introduction

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


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

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

3 H.R. 3004 was introduced by Representative Oxley for himself and Representatives LaFalce, Leach, Maloney, Roukema, Bentsen, Hooley, Bereuter, Baker, Bachus, King, Kelly, Gillmore, Cantor, Riley, Latourette, Green (of Wisconsin), and Grucci; and reported out of the House Financial Services Committee with amendments on October 15, 2001, H.R.Rep.No. 107-250. H.R. 3004, as reported out, included Internet gambling amendments that were not included in H.R. 2975/H.R.3108.
ed. Oct. 24, 2001), and H.R. 3162 was sent to the President who signed it on October 26, 2001.

**Criminal Investigations: Tracking and Gathering Communications**

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

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

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

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


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

7 Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
criminal cases. When approved by senior Justice Department officials,\(^8\) law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.\(^9\)

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

\(^9\) The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement), 1751 (presidential and presidential staff assassination, kidnapping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnaping, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or nationalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
Offense involving counterfeiting punishable under 18 U.S.C. 471, 472, or 473; (e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States; (f) any offense including extortionate credit transactions under 18 U.S.C. 892, 893, or 894; (g) a violation of 31 U.S.C. 5322 (dealing with the reporting of currency transactions); (h) any felony violation of 18 U.S.C. 2511 and 2512 (interception and disclosure of certain communications and to certain intercepting devices); (i) any felony violation of 18 U.S.C. ch. 71 (obscenity); (j) 49 U.S.C. 60123(b) (destruction of a natural gas pipeline), 46502 (aircraft piracy); (k) 22 U.S.C. 2778 (Arms Export Control Act); (l) the location of any fugitive from justice from an offense described in this section; (m) a violation of 8 U.S.C. 1324, 1327, or 1328; (n) any felony violation of 18 U.S.C. 922, 924 (firearms); (o) any violation of 26 U.S.C. 5861 (firearms); (p) a felony violation of 18 U.S.C. 1028 (production of false identification documents), 1542 (false statements in passport applications), 1546 (fraud and misuse of visas, permits, and other documents) or a violation of 8 U.S.C. 1324, 1327, or 1328 (smuggling of aliens); (p) 229 (chemical weapons), 2332 (terrorist violence against Americans overseas), 2332a (weapons of mass destruction), 2332b (multinational terrorism), 2332d (financial transactions with countries supporting terrorism), 2339A (support of terrorist), 2332B (support of terrorist organizations); (r) any conspiracy to commit any of these, 18 U.S.C. 2516(1)(crimes added by the Act in italics). Other than telephone face to face conversations (i.e., electronic communications), the approval of senior Justice Department officials is not required and an order may be sought in any felony investigation, 18 U.S.C. 2518(8).

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

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

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

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10 Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
• permits pen register and trap and trace orders for electronic communications (e.g., e-mail)

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

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

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

• adds terrorist and computer crimes to Title III’s predicate offense list

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

• encourages cooperation between law enforcement and foreign intelligence investigators

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

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

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

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

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

April 15, 2002

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The USA PATRIOT Act: A Legal Analysis

Summary

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

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

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

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

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

Introduction

Congress passed the USA PATRIOT Act (the Act) in response to the terrorists’ attacks of September 11, 2001.¹ The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to further close our borders to foreign terrorists and to detain and remove those within our borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it is not without safeguards, critics contend some of its provisions go too far. Although it grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough.


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

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

³ H.R. 3004 was introduced by Representative Oxley for himself and Represenatives LaFalce, Leach, Maloney, Roukema, Bentsen, Hooley, Bereuter, Baker, Bachus, King, Kelly, Gillmore, Cantor, Riley, Latourette, Green (of Wisconsin), and Grucci; and reported out of the House Financial Services Committee with amendments on October 15, 2001, H.R.Rep.No. 107-250. H.R. 3004, as reported out, included Internet gambling amendments that were not included in H.R. 2975/H.R.3108.
ed. Oct. 24, 2001), and H.R. 3162 was sent to the President who signed it on October 26, 2001.

Criminal Investigations: Tracking and Gathering Communications

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

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

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

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


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

7 Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
criminal cases. When approved by senior Justice Department officials, law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.9

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

9 The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement), 1751 (presidential and presidential staff assassination, kidnapping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnaping, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or naturalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations, 18 U.S.C. 2518. The court notifies the parties to any conversations seized under the order after the order expires, 18 U.S.C. 2518(8).

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

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

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

- offense involving counterfeiting punishable under 18 U.S.C. 471, 472, or 473;
- (e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;
- (f) any offense including extortionate credit transactions under 18 U.S.C. 892, 893, or 894;
- (g) a violation of 31 U.S.C. 5322 (dealing with the reporting of currency transactions);
- (h) any felony violation of 18 U.S.C. 2511 and 2512 (interception and disclosure of certain communications and to certain intercepting devices);
- (i) any felony violation of 18 U.S.C. ch. 71 (obscenity);
- (j) 49 U.S.C. 60123(b) (destruction of a natural gas pipeline), 46502 (aircraft piracy);
- (k) 22 U.S.C. 2778 (Arms Export Control Act);
- (l) the location of any fugitive from justice from an offense described in this section;
- (m) a violation of 8 U.S.C. 1324, 1327, or 1328;
- (n) any felony violation of 18 U.S.C. 922, 924 (firearms);
- (o) any violation of 26 U.S.C. 5861 (firearms);
- (p) a felony violation of 18 U.S.C. 1028 (production of false identification documents), 1542 (false statements in passport application), 1546 (fraud and misuse of visas, permits, and other documents) or a violation of 8 U.S.C. 1324, 1327, or 1328 (smuggling of aliens);
- (p) 229 (chemical weapons), 2332 (terrorist violence against Americans overseas), 2332a (weapons of mass destruction), 2332b (multinational terrorism), 2332d (financial transactions with countries supporting terrorism), 2339A (support of terrorist), 2332B (support of terrorist organizations);
- (r) any conspiracy to commit any of these, 18 U.S.C. 2516(1)(crimes added by the Act in italics).

Other than telephone face to face conversations (i.e., electronic communications), the approval of senior Justice Department officials is not required and an order may be sought in any felony investigation, 18 U.S.C. 2516(3).

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

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

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

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

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

• adds terrorist and computer crimes to Title III’s predicate offense list

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

• encourages cooperation between law enforcement and foreign intelligence investigators

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

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

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

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

“(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof),” section 216(b)(1).
The use of pen registers or trap and trace devices was limited at one time to the judicial district in which the order was issued, 18 U.S.C. 3123 (2000 ed.). Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States, 18 U.S.C. 3123(b)(1)(C), 3127(2).12

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

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

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

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

13 Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user’s true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” DoJ at §107.
Previously, only a federal court in the district in which the e-mail was stored could issue the order. Under section 220, federal courts in the district where an offense under investigation occurred may issue orders applicable “without geographic limitation,” 18 U.S.C. 2703.14

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

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

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

15 See e.g., DoJ at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement’s access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

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

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

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

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

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

Current law requires that FISA be used only where foreign intelligence gathering is the sole
or primary purpose of the investigation. This section will clarify that the certification of a
FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the
investigation. This change would eliminate the current need continually to evaluate the
relative weight of criminal and intelligence purposes, and would facilitate information sharing
between law enforcement and foreign intelligence authorities which is critical to the success
of anti-terrorism efforts,” DoJ at §153.
demanding standard than the “a purpose” threshold proposed by the Justice Department, but a clear departure from the original “the purpose” entry point. FISA once described a singular foreign intelligence focus prerequisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k), 1825(k).\footnote{21}

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

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

\footnote{22 “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210[subpoenas for communications provider customer records], 211[access to cable company communication service records], 213[sneak and peek], 216[pen register and trap and trace device amendments], 221[trade sanctions], and 222[assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005. “(b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers' communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices). 23 Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees, 24 but could not recover against the United States. 25 Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

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

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

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

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

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

“Current law also contains an odd disconnect: a provider may disclose the contents of the customer's communications in order to protect its rights or property but the current statute does not expressly permit a provider to voluntarily disclose non-content records (such as a subscriber's login records). 18 U.S.C. 2702(b)(5). This problem substantially hinders the ability of providers to protect themselves from cyber-terrorists and criminals. Yet the right to disclose the contents of communications necessarily implies the less intrusive ability to disclose non-content records. In order to promote the protection of our nation's critical infrastructures, this section's amendments allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems,” DoJ at
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

**Foreign Intelligence Investigations**

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

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

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

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

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

31 50 U.S.C. 1801 *et seq.*
In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs.  

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

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

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

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

“(e) ‘Foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans (“United States persons,” i.e., citizens or permanent resident aliens). The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

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

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

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

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

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

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

• carries a sunset provision

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

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

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

34 Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
**FISA.** FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases.\(^{35}\) It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

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

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

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

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

\(^{37}\) *See e.g., S.Rep.No. 106-352, at 3, 6, 7 (2000)(“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application*
Intelligence with the responsibility to formulate requirements and priorities for the use of FISA to collect foreign intelligence information. He is also charged with the responsibility of assisting the Attorney General in the efficient and effective dissemination of FISA generated information (50 U.S.C. 403-3(c)).

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

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38 “When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevance, an additional factual showing that the communications device has been used to contact an ‘agent of a foreign power’ engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the ‘agent of a foreign power’ prong from the predication, and thus makes the FISA authority more closely track the criminal authority,” DoJ at §155.
Section 505, in response to the Justice Department’s suggestion, allows FBI field offices to make the requests, see DoJ at §157 (“At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports”).

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

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

40 When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court’s order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.’ This would enhance the FBI’s ability to monitor international terrorists and intelligence officers who are
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian.41 The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities,42 in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

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

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

42 Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.\textsuperscript{43}

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

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

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

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

\textsuperscript{44} See also, *DoJ* at §103, “This section facilities the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, Draft at §354.45

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

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion.47 It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions.”

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

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

47 Blair v. United States, 250 U.S. 273, 281 (1919)(the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

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

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

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

49 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25 Harvard Journal of Law & Public Policy 699, 719-20 (2002)(“There is a significant danger that the rule permitting disclosure will be treated as the de facto authorization of an expansion of the grand jury’s investigative role to encompass seeking material relevant only to matters of national security, national defense, immigration, and so forth. The grand jury’s awesome powers should not be unwittingly extended to a much wider range of issues. . . Since the grand jury operates in secret, there are no public checks on the scope of its investigations, and witnesses are not permitted to challenge its jurisdiction. Only the supervising court is in a position to keep the grand jury’s investigation within proper bounds. Requiring judicial approval of foreign intelligence and counterintelligence information disclosures would provide a natural check against the temptation to manipulate the grand jury to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6 (Nov. 2001)(“The grand jury secrecy rule is a rule of policy which has always had exceptions, and it has been frequently modified. The secrecy rule has no credible claim to constitutional stature”).
Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person’s official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification. By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

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

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

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

53 **Draft** at §154, “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”
computerized translation capability to be used in foreign intelligence gathering.\textsuperscript{54} Section 907 instructs the Director of the Central Intelligence, in consultation with the Director of the FBI, to report on the creation of a National Virtual Translation Center. The report is to include information concerning staffing, allocation of resources, compatibility with comparable systems to be used for law enforcement purposes, and features which permit its efficient and secure use by all of the intelligence agencies.

**Money Laundering**

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

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

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

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

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

\textsuperscript{56} See e.g., 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
**Records and Reports.** For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler’s checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

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

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

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

“While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement
reflected in section 357 which asks the Secretary of the Treasury to report on the Internal Revenue Service’s role in the administration of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311 et seq.), and what transfers of authority, if any, are appropriate.

Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action. 59 Section 355 expands the immunity to cover disclosures in authorities as the various reports mandated by the Bank Secrecy Act, which can typically be retrieved electronically from a database maintained by the Treasury Department. The differential access to the two kinds of reports is made anomalous by the fact that Form 8300 elicits much the same information that is required to be disclosed by the Bank Secrecy Act. For example, just as Form 8300 seeks the name, address, and social security number of a customer who engages in a cash transaction exceeding $10,000 with a trade or business, Currency Transaction Reports (CTRs) mandated by the Bank Secrecy Act require the same information to be reported on a cash transaction exceeding $10,000 between a financial institution and its customer”).

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

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

“Subsection [351](b) amends section 5318(g)(2) of title 31—which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed—to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee’s official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
employment references to other insured depository financial institutions provided disclosure is not done with malicious intent.\textsuperscript{60}

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

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

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

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\textsuperscript{60} 31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 66 (2001).
laundry concern. These special measures may require U.S. financial institutions to:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

“For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
detect and report transactions that may involve the proceeds of foreign corruption. A private bank account is defined as an account (or any combination of accounts) that requires a minimum aggregate deposit of funds or other assets of not less than $1 million; is established on behalf of one or more individuals who have a direct or beneficial ownership in the account; and is assigned to, or administered or managed by, an officer, employee or agent of a financial institution acting as a liaison between the institution and the direct or beneficial owner of the account.

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

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

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

The Secretary of the Treasury is instructed in section 326 to issue regulations for financial institutions’ minimum new customer identification standards and record-
paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing 'customers' in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined 'customers' and 'customer relationship' for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a 'street name' or omnibus account in the broker-dealer's name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to 'look through' the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund's customers. Thus, the fund would not be required to 'look through' the plan to identify its participants.

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

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

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

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

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

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

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

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

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

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

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

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

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exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.\(^69\)

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

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

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

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


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

“The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime”).
**Crimes.** Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

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

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

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

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

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

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
expands 18 U.S.C. 1956 to cover financial transactions conducted in foreign financial institutions.\footnote{71}

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

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

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

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

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

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

\footnote{72}{Cf., H.R.Rep.No. 107-250, at 57.}
Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.  

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

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

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

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

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

74 “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
"For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual," 31 U.S.C. 5332(a)(2).

75 “For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).
“As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency – representing the proceeds of drug trafficking and other criminal offenses – is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad.

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

“Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute,” H.R.Rep.No. 107-250 at 36-7 (2001).
under either circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.77

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

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering,78 in the state and district in which the monetary transaction takes place. The Supreme Court in Cabrales held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in dicta, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.79

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

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

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

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

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

80 For general background information, see, Doyle, Crime and Forfeiture, CRS REP.NO. 97-139A (Oct. 11, 2000).
The section also permits the government to present secretly (ex parte and in camera) any classified information upon which the forfeiture was based should the decision be subject to judicial review. The Justice Department requested the section as a revival of the President's powers in times of unconventional wars. By virtue of section 316, property owners may initiate a challenge to a confiscation by filing a claim under the rules applicable in maritime confiscations. The section permits two defenses to forfeiture—that the property is not subject to confiscation under section 106 or that the claimant is entitled to the innocent owner defense of 18 U.S.C. 983(d). The characterization of the defenses as “affirmative defense” indicates that the claimant bears the burden of proof. The innocent owner defenses of 18 U.S.C. 983(d) are probably not available in cases under section 106, since that section is explicitly

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

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

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

82 “An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
excepted from the coverage of 18 U.S.C. 983. The challenge proceedings permit the court to admit evidence, such as hearsay evidence, that would not otherwise be admissible under the Federal Rules of Evidence if the evidence is reliable and if national security might be imperiled should dictates of the Federal Rules be followed, §316(b). The section recognizes the rights of claimants to proceed alternatively under the Constitution or the Administrative Procedure Act.

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

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

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

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

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

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

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


89 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal in personam proceedings following criminal conviction as a means of accomplishing confiscation.
Neither section 106 nor 806 require conviction of the terrorist property owner.\(^{90}\) Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

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

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

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

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

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

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

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

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

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

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95 See e.g., United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.), 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. Where there is a presumption against retroactive application in such instances, absent clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994).
96 DoJ, at §403.
97 18 U.S.C. 1956(b). Cf., H.R.Rep.No. 107-250, at 54-5 (2001) (“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas. Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.

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

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

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

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

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

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

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

“The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”).
defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation.99

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

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

“This section amends 21 U.S.C. 853 to make clear that a court in a criminal case may issue a repatriation order—a criminal defendant to transfer property to this country from overseas if the property is subject to confiscation."


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

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

“Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
A fugitive may not challenge a federal forfeiture. Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

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

Alien Terrorists and Victims

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

Border Protection. The border protection provisions:

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

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

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

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

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

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

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

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

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

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

- limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).

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


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

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104 As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).
Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).


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

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

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

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

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

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

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

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

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

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

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

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

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

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


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

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

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

108 “Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien’s 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien’s 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
• a denial of benefits of the Act to terrorists and their families, section 427

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

Other Crimes, Penalties, & Procedures

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

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

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

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

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

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

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

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

111 “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2)(“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

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

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

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

\(^{112}\) *U.S. Const.* Art.III, §2, cl.3 (“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . .”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . .”); *United States v. Cabrales*, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from *Cabrales* when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnapping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280-81 n.4 (1999)(“By way of comparison, last Term in *Cabrales* we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).
The Justice Department sought the expansion along with the enlargement of the predicate offense list, "18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of ‘material support or resources’ is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’)," DoJ at 306.

Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.115


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


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

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

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

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

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

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

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

118 “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense,” Draft at §302.
The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

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

- for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;
- for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;
- for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;
- for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and
- for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

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

- arson committed within a federal enclave, 18 U.S.C. 81;
- killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);
- destruction of communications facilities, 18 U.S.C. 1362;
- destruction of property within a federal enclave, 18 U.S.C. 1363;
- causing a train wreck, 18 U.S.C. 1922;
- providing material support to a terrorist, 18 U.S.C. 2339A;
- torture committed overseas under color of law, 18 U.S.C. 2340A;
- sabotage of a nuclear facility, 42 U.S.C. 2284;
• interfering with a flight crew within U.S. special aircraft jurisdiction, 49 U.S.C. 46504;
• carrying a weapon or explosive abroad an aircraft within U.S. special aircraft jurisdiction, 49 U.S.C. 46505; and
• sabotage of interstate gas pipeline facilities, 49 U.S.C. 60123.

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

120 Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

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

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

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders). 122

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

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

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

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

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

123 When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001)(remarks of Rep. Sensenbrenner); for general background, see, Doyle, McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys, CRS REP.NO. RL30060 (Dec. 14, 2001).
Rewards. The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L. 105-277, 112 Stat. 2681-66 (1998).

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

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

Posse Comitatus. The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.125

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

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

125 For a general discussion of the Posse Comitatus Act, see, Doyle, *The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law*, CRS REP.NO. 95-964 (June 1, 2000).
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

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

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

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126 The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in United States v. New York Telephone Co., 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth
Amendment, demands that surreptitious entries be closely circumscribed,” United States v. Freitas (Freitas I), 800 F.2d 1451, 1455-456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, United States v. Freitas (Freitas II), 856 F.2d 1425 (9th Cir. 1988).

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

128 In Simons, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
The Justice Department urged that the conflict be resolved with a uniform rule which permitted sneak and peek warrants under the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage.\footnote{129}

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

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

\footnote{130} Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department’s initial proposal, the Department’s justification does not address the question.
The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States.”

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

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

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

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133 United States v. Barona, 56 F.3d 1087, 1092 (9th Cir. 1995)(“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); United States v. Behety, 32 F.3d 503, 510 (11th Cir. 1994)(“if American law enforcement officials substantially participated in the search or if the
law apparently contemplated extraterritorial execution, *cf.*, F.R.Crim.P.41, *Advisory Committee Notes: 1990 Amendment* (discussing a proposal for extraterritorial execution that the Supreme Court rejected).\(^{134}\)

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

**Terrorists' DNA.** The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards *per se.*\(^{135}\) Existing federal law allowed the Attorney General to collect samples from foreign officials conducting the search were actually acting as agents for their American counterparts”); *United States v. Maturo*, 982 F.2d 57, 61 (2d Cir. 1992)(“where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials” or “where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials”); *United States v. Mitro*, 880 F.2d 1480, 1482 (1st Cir. 1989)(“where American agents participated in the foreign search or the foreign officers acted as agents for their American counterparts”); *United States v. Mount*, 757 F.2d 1315, 1318 (D.C.Cir. 1985)(“if American officials or officers participated in some significant way”); *United States v. Marzano*, 537 F.2d 257, 270 (7th Cir. 1976)(declining to adopt the “joint venture” standards, but finding level of American participation in the case before it insignificant); *United States v. Morrow*, 537 F.2d 120, 139 (5th Cir. 1976)(“if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts”); each of the decisions also suggests that evidence secured in a manner which shocked the conscience of the court would be excluded.

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

\(^{135}\)Roe v. Marcotte, 193 F.3d 72 (2d Cir. 1999); Shaffer v. Saffle, 148 F.3d 1180 (10th Cir. 1998); Rise v. Oregon, 59 F.3d 1556 (9th Cir. 1995); Jones v. Murray, 962 F.2d 302 (4th Cir. 1992).
federal prisoners convicted of a variety of violent crimes, 42 U.S.C. 14135a. The Act enlarges the predicate offense list to include any crime of violence or any terrorism offense, section 503.136

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

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

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


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

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

“This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in
The Act takes less dramatic action in section 809. It eliminates the statute of limitations for any crime of terrorism\(^\text{139}\) that risks or results in a death or serious bodily injury, 18 U.S.C. 3286. In the absence of such a risk or result, all other terrorism offenses become subject to the eight year statute of limitations unless already covered by the ten year statute for explosives and arson offenses, 18 U.S.C. 3286.

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

connection with the September 11, 2001 terrorist attacks. The constitutionality of such retroactive applications of changes in statutes of limitations is well-settled. See, e.g.,\(^\text{139}\) United States v. Grimes, 142 F.3d 1342, 1350-51 (11th Cir. 1998); People v. Frazer, 982 P.2d 180 (Cal. 1999).

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

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

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

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

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

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

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

\begin{footnotesize}
\begin{enumerate}
\item \textit{United States v. De La Matta}, 266 F.3d 1275, 1286 (11th Cir. 2001); \textit{United States v. Grimes}, 142 F.3d 1342, 1351 (11th Cir. 1998); \textit{United States v. Morrow}, 177 F.3d 272, 294 (5th Cir. 1999); \textit{Falter v. United States}, 23 F.2d 420, 425-26 (2d Cir. 1928).
\item \textit{People v. Frazer}, 24 Cal.4th 737, 759, 982 P.2d 180, 1294, 88 Cal.Rptr.2d 312, 327 (1999).
\item \textit{United States v. Layton}, 855 F.2d 1388 (9th Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); \textit{United States v. Benítez}, 741 F.2d 1312 (11th Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).
\end{enumerate}
\end{footnotesize}
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.\(^\text{144}\)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
• makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

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

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

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

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

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

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

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

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

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

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

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

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

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

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

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

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

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

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

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might to used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

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

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

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

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

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

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

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13 Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user's true identity... this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” DoJ at §107.
Previously, only a federal court in the district in which the e-mail was stored could issue the order. Under section 220, federal courts in the district where an offense under investigation occurred may issue orders applicable “without geographic limitation,” 18 U.S.C. 2703.14

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

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

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

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

April 15, 2002

Charles Doyle
Senior Specialist
American Law Division
Summary

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

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

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

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

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

Congress passed the USA PATRIOT Act (the Act) in response to the terrorists’ attacks of September 11, 2001.1 The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to further close our borders to foreign terrorists and to detain and remove those within our borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it is not without safeguards, critics contend some of its provisions go too far. Although it grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough.


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

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

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

Criminal Investigations: Tracking and Gathering Communications

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

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

Congress responded to *Berger* and *Katz*, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications, 18 U.S.C. 2511. At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious criminal investigations. Tracking and Gathering Communications A portion of the Act addresses issues suggested originally in a Department of Justice proposal circulated in mid-September. The first of its suggestions called for amendments to federal surveillance laws, laws which govern the capture and tracking of suspected terrorists’ communications within the United States. Federal law features a three tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications.

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

7 Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
criminal cases. When approved by senior Justice Department officials, law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.9

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

9 The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery of public officials and witnesses), 224 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement), 1751 (presidential and presidential staff assassination, kidnapping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnaping, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or naturalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations, 18 U.S.C. 2518. The court notifies the parties to any conversations seized under the order after the order expires, 18 U.S.C. 2518(8).

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

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

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

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10 Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
• permits pen register and trap and trace orders for electronic communications (e.g., e-mail)

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

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

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

• adds terrorist and computer crimes to Title III’s predicate offense list

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

• encourages cooperation between law enforcement and foreign intelligence investigators

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

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

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

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

“(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof),” section 216(b)(1).
The use of pen registers or trap and trace devices was limited at one time to the judicial district in which the order was issued, 18 U.S.C. 3123 (2000 ed.). Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States, 18 U.S.C. 3123(b)(1)(C), 3127(2).

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

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

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

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

13 Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user's true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” DoJ at §107.
Previously, only a federal court in the district in which the e-mail was stored could issue the order. Under section 220, federal courts in the district where an offense under investigation occurred may issue orders applicable “without geographic limitation.” 18 U.S.C. 2703.\(^\text{14}\)

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

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

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

\(^{15}\) See e.g., \emph{DoJ} at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement’s access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

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

**Criminal Investigators’ Access to Foreign Intelligence Information.**

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

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

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

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

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“Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” DoJ at §153.
demanding standard than the “a purpose” threshold proposed by the Justice Department, but a clear departure from the original “the purpose” entry point. FISA once described a singular foreign intelligence focus prerequisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k), 1825(k).21

**Protective Measures.** The Act reenforces two kinds of safeguards, one set designed to prevent abuse and the other to protect those who assist the government. The sunset clause is perhaps the best known of the Act’s safeguards. Under the direction of section 224, many of the law enforcement and foreign intelligence authorities granted by the Act expire as of December 31, 2005.22 The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter

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

22 “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210[subpoenas for communications provider customer records], 211[access to cable company communication service records], 213[sneak and peek], 216[pen register and trap and trace device amendments], 221[trade sanctions], and 222[assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005. “(b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers' communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices).\textsuperscript{23} Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees,\textsuperscript{24} but could not recover against the United States.\textsuperscript{25} Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

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

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

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

\begin{itemize}
  \item \textsuperscript{23}18 U.S.C. 2511, 2701, and 3121 (2000 ed.), respectively.
  \item \textsuperscript{24}18 U.S.C. 2520 and 2707 (2000 ed.).
  \item \textsuperscript{26}Prior law already granted service providers immunity for disclosure of customer records in compliance with a court access order, 18 U.S.C. 2703(f).
  \item \textsuperscript{27}“Existing law contains no provision that allows providers of electronic communications service to disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies that threaten death or serious bodily injury. This section amends 18 U.S.C. §2702 to authorize such disclosures if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.

  “Current law also contains an odd disconnect: a provider may disclose the contents of the customer's communications in order to protect its rights or property but the current statute does not expressly permit a provider to voluntarily disclose non-content records (such as a subscriber's login records). 18 U.S.C. 2702(b)(5). This problem substantially hinders the ability of providers to protect themselves from cyber-terrorists and criminals. Yet the right to disclose the contents of communications necessarily implies the less intrusive ability to disclose non-content records. In order to promote the protection of our nation's critical infrastructures, this section's amendments allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems,” DoJ at
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

**Foreign Intelligence Investigations**

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

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

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

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

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

31 50 U.S.C. 1801 *et seq.*
lockers, 50 U.S.C. 1861-1863 (2000 ed.). Intelligence authorities gained narrow passages through other privacy barriers as well.\textsuperscript{32}

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


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

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

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

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

“(e) ‘Foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans (“United States persons,” i.e., citizens or permanent resident aliens). The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

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

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

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

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

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

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

• carries a sunset provision

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

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

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

34 Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
**FISA.** FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases.\(^35\) It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

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

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


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

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

\(^{37}\) See e.g., S.Rep.No. 106-352, at 3, 6, 7 (2000)(“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application
process, as interpreted by the OIPR is administratively burdensome and, at times, extremely slow. Many applications undergo months of scrutiny before submission to the court because the OIPR prescribes standards and restrictions not imposed by the statute. . . . In particular, the OIPR has been criticized for an overly restrictive interpretation of the FISA ‘currency’ requirement. This is the issue of how recent a subject’s activities must be to support a finding of probable cause that the subject is engaged in clandestine intelligence gathering activities. . . . While existing law does not specifically address “past activities,” it does not preclude, and legislative history supports, the conclusion that past activities may be part of the totality of circumstances considered by the FISC in making a probable cause determination. . . . By definition, information collected pursuant to a court order issued under the Foreign Intelligence Surveillance Act is foreign intelligence not law enforcement information. Accordingly, the Committee wants to clarify that the FISA ‘take’ can and must be shared by the Federal Bureau of Investigation with appropriate intelligence agencies. For the intelligence mission of the United States to be successful, there must be a cooperative and concerted effort among intelligence agencies. Any information collected by one agency under foreign intelligence authorities that could assist another agency in executing its lawful mission should be shared fully and promptly. Only then can the United States Government pursue aggressively important national security targets including, for example, counterterrorist and counternarcotics targets”); see also, 147 Cong.Rec. S799-803 (daily ed. Feb. 24, 2000)(remarks of Sens. Specter, Torricelli and Biden).

38 “When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevance, an additional factual showing that the communications device has been used to contact an ‘agent of a foreign power’ engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the ‘agent of a foreign power’ prong from the predication, and thus makes the FISA authority more closely track the criminal authority,” DoJ at §155.
Section 214 adjusts the language of the FISA pen register-trap and trace authority to permit its use to capture source and destination information relating to electronic communications (e.g., e-mail) as well as telephone communications, 50 U.S.C. 1842(d). The section makes it clear that requests for a FISA pen register-trap and trace order, like requests for other FISA orders, directed against Americans (U.S. persons) may not be based solely on activities protected by the First Amendment, 50 U.S.C. 1842, 1843.

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

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

40 When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court's order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.’ This would enhance the FBI's ability to monitor international terrorists and intelligence officers who are
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian. The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities, in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.


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

42 Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.43

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

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

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

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

44 See also, DoJ at §103, “This section facilities the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, Draft at §354.45

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

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion.47 It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions.”

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

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

47 Blair v. United States, 250 U.S. 273, 281 (1919)(the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

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

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

49 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25 HARVARD JOURNAL OF LAW & PUBLIC POLICY 699, 719-20 (2002)(“There is a significant danger that the rule permitting disclosure will be treated as the de facto authorization of an expansion of the grand jury’s investigative role to encompass seeking material relevant only to matters of national security, national defense, immigration, and so forth. The grand jury’s awesome powers should not be unwittingly extended to a much wider range of issues. . . Since the grand jury operates in secret, there are no public checks on the scope of its investigations, and witnesses are not permitted to challenge its jurisdiction. Only the supervising court is in a position to keep the grand jury’s investigation within proper bounds. Requiring judicial approval of foreign intelligence and counterintelligence information disclosures would provide a natural check against the temptation to manipulate the grand jury to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6 (Nov. 2001)(“The grand jury secrecy rule is a rule of policy which has always had exceptions, and it has been frequently modified. The secrecy rule has no credible claim to constitutional stature”).
court approval, H.R.Rep.No. 107- 236, at 73 (2001). The Act, in section 203(a), instead calls for confidential notification of the court that a disclosure has occurred and the entity to whom it was made, F.R.Crim.P. 6(e)(3)(C)(iii). It also insists that the Attorney General establish implementing procedures for instances when the disclosure “identifies” Americans (U.S. persons), section 203(c).

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

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

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

51 “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person’s official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification.\textsuperscript{52} By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.\textsuperscript{53}

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

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

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

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

\textsuperscript{53} Draft at §154, “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”
computerized translation capability to be used in foreign intelligence gathering.\footnote{54} Section 907 instructs the Director of the Central Intelligence, in consultation with the Director of the FBI, to report on the creation of a National Virtual Translation Center. The report is to include information concerning staffing, allocation of resources, compatibility with comparable systems to be used for law enforcement purposes, and features which permit its efficient and secure use by all of the intelligence agencies.

**Money Laundering**

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

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

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

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


\footnote{56} See *e.g.*, 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
**Records and Reports.** For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler’s checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

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

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

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

“While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement
reflected in section 357 which asks the Secretary of the Treasury to report on the Internal Revenue Service’s role in the administration of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311 et seq.), and what transfers of authority, if any, are appropriate.

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

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

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

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

“Subsection [351](b) amends section 5318(g)(2) of title 31--which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed--to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee's official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
employment references to other insured depository financial institutions provided disclosure is not done with malicious intent.\textsuperscript{60}

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

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

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

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

- evidence of organized crime or terrorist transactions there;
- the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use;
- the extent and effectiveness of the jurisdiction’s banking regulation;
- the volume of financial transactions in relation to the size of the jurisdiction’s economy;
- whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven;
- the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and
- the extent of official corruption within the jurisdiction.

The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

“For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
**General Regulatory Matters.** The Act establishes several other regulatory mechanisms directed at the activities involving U.S. financial institutions and foreign individuals or institutions. Section 313, for instance, in another restriction on correspondent accounts for foreign financial institutions, prohibits U.S. financial institutions from maintaining correspondent accounts either directly or indirectly for foreign shell banks (banks with no physical place of business) which have no affiliation with any financial institution through which their banking activities are subject to regulatory supervision.

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

The Secretary of the Treasury is instructed in section 326 to issue regulations for financial institutions’ minimum new customer identification standards and record-
keeping and to recommend a means to effectively verify the identification of foreign customers.\textsuperscript{67}

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

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

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

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

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

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

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

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

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

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

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

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

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

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

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

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

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

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

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

“The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addresssee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime”).
**Crimes.** Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

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

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

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

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

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

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

April 15, 2002

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The USA PATRIOT Act: A Legal Analysis

Summary

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

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

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

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

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

Introduction

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


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

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

3 H.R. 3004 was introduced by Representative Oxley for himself and Representatives LaFalce, Leach, Maloney, Roukema, Bentsen, Hooley, Bereuter, Baker, Bachus, King, Kelly, Gillmore, Cantor, Riley, Latourette, Green (of Wisconsin), and Grucci; and reported out of the House Financial Services Committee with amendments on October 15, 2001, H.R.Rep.No. 107-250. H.R. 3004, as reported out, included Internet gambling amendments that were not included in H.R. 2975/H.R.3108.
The Department’s proposal, dated September 20, 2001, came with a brief section by section analysis. Both the proposal (Draft) and analysis (DoJ) were printed as an appendix in Administration’s Draft Anti-Terrorism Act of 2001, Hearing Before the House Comm. on the Judiciary, 107th Cong., 1st Sess. 54 (2001).

**Criminal Investigations: Tracking and Gathering Communications**

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

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

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

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


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

7 Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
criminal cases. When approved by senior Justice Department officials, law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.

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

9 The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 91 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement), 1751 (presidential and presidential staff assassination, kidnapping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnapping, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or nationalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations, 18 U.S.C. 2518. The court notifies the parties to any conversations seized under the order after the order expires, 18 U.S.C. 2518(8).

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

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

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

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10 Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
• permits pen register and trap and trace orders for electronic communications (e.g., e-mail)

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

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

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

• adds terrorist and computer crimes to Title III’s predicate offense list

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

• encourages cooperation between law enforcement and foreign intelligence investigators

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

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

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

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

“(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof),” section 216(b)(1).
The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” DoJ at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

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

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

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

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13 Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user’s true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” DoJ at §107.
Previously, only a federal court in the district in which the e-mail was stored could issue the order. Under section 220, federal courts in the district where an offense under investigation occurred may issue orders applicable “without geographic limitation,” 18 U.S.C. 2703.14

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

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

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

15 See e.g., DoJ at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement’s access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

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

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

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

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

Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment's warrant clause. It is here that the “primary purpose” notion originated. In *United States v. Truong Dinh Hung*, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, “as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.”

Subsequent case law, however, is not as clear as it might be: see e.g., *United States v. Duggan*, 743 F.2d 59, 77 (2d Cir. 1984)(“FISA permits federal officials to obtain orders authorizing electronic surveillance ‘for the purpose of obtaining foreign intelligence information.’ The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying officials’ belief that the information sought is the type of foreign intelligence information described”); *United States v. Pelton*, 835 F.2d 1067, 1075-76 (4th Cir. 1987)(“We also reject Pelton’s claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial”); *United States v. Sarkissian*, 841 F.2d 959, 907-8 (9th Cir. 1988)(“Defendants rely on the primary purpose test articulated in *United States v. Truong Dinh Hung*. . . . One other court has applied the primary purpose test. Another court has rejected it . . . distinguishing *Truong*. A third court has declined to decide the issue. We also decline to decide the issue”); *United States v. Johnson*, 952 F.2d 565, 572 (1st Cir. 1991)(“Appellants attack the government's surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance”).

Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” DoJ at §153.
demanding standard than the “a purpose” threshold proposed by the Justice Department, but a clear departure from the original “the purpose” entry point. FISA once described a singular foreign intelligence focus requisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k), 1825(k).

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

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

22 “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210[subpoenas for communications provider customer records], 211[access to cable company communication service records], 213[sneak and peek], 216[pen register and trap and trace device amendments], 221[trade sanctions], and 222[assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005. “(b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers' communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices).\textsuperscript{23} Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys’ fees,\textsuperscript{24} but could not recover against the United States.\textsuperscript{25} Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

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

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

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government’s request until a court order authorizing access can be obtained.\textsuperscript{26} Another allows providers to disclose customer records to protect the provider’s rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others.\textsuperscript{27} A third section, 23 18 U.S.C. 2511, 2701, and 3121 (2000 ed.), respectively.


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

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

“Current law also contains an odd disconnect: a provider may disclose the contents of the customer’s communications in order to protect its rights or property but the current statute does not expressly permit a provider to voluntarily disclose non-content records (such as a subscriber's login records). 18 U.S.C. 2702(b)(5). This problem substantially hinders the ability of providers to protect themselves from cyber-terrorists and criminals. Yet the right to disclose the contents of communications necessarily implies the less intrusive ability to disclose non-content records. In order to promote the protection of our nation's critical infrastructures, this section's amendments allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems,” DoJ at
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

**Foreign Intelligence Investigations**

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

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

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

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

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

31 50 U.S.C. 1801 et seq.
In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs. There were and still are extra


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

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

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

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

‘(e) ‘Foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans (“United States persons,” i.e., citizens or permanent resident aliens). The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

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

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

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

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

• authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations

• sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses

• carries a sunset provision

• establishes a claim against the U.S. for certain communications privacy violations by government personnel

• expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to – (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States,” 50 U.S.C. 1801.

34 Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
**FISA.** FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases.\(^{35}\) It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

**Search and Surveillance for Intelligence Purposes.** Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, Draft at §151.\(^{36}\)

Section 901 of the Act address a concern raised during the 106th Congress relating to the availability of the FISA orders and the effective use of information gleaned from the execution of a FISA order.\(^{37}\) It vests the Director of Central

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\(^{36}\) See also, DoJ at §151, “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order’s minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed (50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

\(^{37}\) See *e.g.*, S.Rep.No. 106-352, at 3, 6, 7 (2000) (“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application
process, as interpreted by the OIPR is administratively burdensome and, at times, extremely slow. Many applications undergo months of scrutiny before submission to the court because the OIPR prescribes standards and restrictions not imposed by the statute. . . . In particular, the OIPR has been criticized for an overly restrictive interpretation of the FISA ‘currency’ requirement. This is the issue of how recent a subject’s activities must be to support a finding of probable cause that the subject is engaged in clandestine intelligence gathering activities. . . . While existing law does not specifically address “past activities,” it does not preclude, and legislative history supports, the conclusion that past activities may be part of the totality of circumstances considered by the FISC in making a probable cause determination. . . . By definition, information collected pursuant to a court order issued under the Foreign Intelligence Surveillance Act is foreign intelligence not law enforcement information. Accordingly, the Committee wants to clarify that the FISA ‘take’ can and must be shared by the Federal Bureau of Investigation with appropriate intelligence agencies. For the intelligence mission of the United States to be successful, there must be a cooperative and concerted effort among intelligence agencies. Any information collected by one agency under foreign intelligence authorities that could assist another agency in executing its lawful mission should be shared fully and promptly. Only then can the United States Government pursue aggressively important national security targets including, for example, counterterrorist and counternarcotics targets”); see also, 147 Cong.Rec. S799-803 (daily ed. Feb. 24, 2000)(remarks of Sens. Specter, Torricelli and Biden).

Pen Registers and Trap and Trace Devices for Intelligence Gathering. Section 214 grants the request of the Department of Justice by dropping requirements which limited FISA pen register and trap and trace device orders to facilities used by foreign agents or those engaged in international terrorist or clandestine intelligence activities, 50 U.S.C. 1842(c)(3)(2000 ed.). It is enough that the order is sought as part of an investigation to protect against international terrorism or clandestine intelligence activities and is not motivated solely by an American’s exercise of his or her First Amendment rights. Elsewhere (section 505), the Act drops a similar limitation for intelligence officials’ access to telephone records, 18 U.S.C.

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38 “When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevance, an additional factual showing that the communications device has been used to contact an ‘agent of a foreign power’ engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the ‘agent of a foreign power’ prong from the predication, and thus makes the FISA authority more closely track the criminal authority,” DoJ at §155.
Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise be entitled to confidentiality. Section 505, in response to the Justice Department’s suggestion, allows FBI field offices to make the requests, see DoJ at §157 (“At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and countterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports”).

When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court’s order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.’ This would enhance the FBI’s ability to monitor international terrorists and intelligence officers who are...
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian. The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities, in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B);
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a);
- the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a);
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v;

41 “The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigative contexts. The time and difficulty involved in getting such pleadings before the Court usually outweighs the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” DoJ at §156.

42 Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
Access to Law Enforcement Information. Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community's access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, Draft at §103.

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43 H.R.Rep.No. 107-205, at 60-1 (2001)(“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

“The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

“Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual’s credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding—without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information”).

44 See also, DoJ at §103, “This section facilities the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, Draft at §354.45

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, Draft at §154.46

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion.47 It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions.”

45 See also, DoJ at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.” Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officers

46 See also, DoJ at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”

47 Blair v. United States, 250 U.S. 273, 281 (1919)(the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
affairs are conducted in private and outside the presence of the court. Only the attorney for the government, witnesses under examination, and a court reporter may attend its proceedings, F.R.Crim.P. 6(d). Matters occurring before the grand jury are secret and may be disclosed by the attending attorney for the government and those assisting the grand jury only in the performance of their duties; in presentation to a successor grand jury; or under court order for judicial proceedings, for inquiry into misconduct before the grand jury, or for state criminal proceedings, F.R.Crim.P. 6(e).

The Act, in section 203(a), allows disclosure of matters occurring before the grand jury to “any federal law enforcement, intelligence, protective, immigration, national defense, or national security” officer to assist in the performance of his official duties, F.R.Crim.P. 6(e)(3)(C)(i)(V).

Critics may protest that the change could lead to the use of the grand jury for intelligence gathering purposes, or less euphemistically, to spy on Americans. The proposal was never among those scheduled to sunset, but earlier versions of the section followed the path used for most other disclosures of grand jury material: prior

48 These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

49 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25 Harvard Journal of Law & Public Policy 699, 719-20 (2002)(“There is a significant danger that the rule permitting disclosure will be treated as the de facto authorization of an expansion of the grand jury’s investigative role to encompass seeking material relevant only to matters of national security, national defense, immigration, and so forth. The grand jury’s awesome powers should not be unwittingly extended to a much wider range of issues... Since the grand jury operates in secret, there are no public checks on the scope of its investigations, and witnesses are not permitted to challenge its jurisdiction. Only the supervising court is in a position to keep the grand jury’s investigation within proper bounds. Requiring judicial approval of foreign intelligence and counterintelligence information disclosures would provide a natural check against the temptation to manipulate the grand jury to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6 (Nov. 2001)(“The grand jury secrecy rule is a rule of policy which has always had exceptions, and it has been frequently modified. The secrecy rule has no credible claim to constitutional stature”).
Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

Law enforcement officials may share Title III information with the intelligence community under the same conditions, section 203(b), although the grand jury and Title III sharing provisions differ in at least three important respects. The court need not be notified of Title III disclosures. On the other hand, the authority for sharing Title III information expires on December 31, 2005, section 224, and agencies and their personnel guilty of intentional improper disclosures may be subject to a claim for damages and disciplinary action, 18 U.S.C. 2520.

The third subsection of section 203 remains something of an enigma. It speaks in much the same language as its counterparts. It allows law enforcement officials to share information with the intelligence community, “notwithstanding any other provisions of law,” section 203(d). It either swallows the other subsections, or supplements them. Several factors argue for its classification as a supplement. Congress is unlikely to have crafted subsections (a), (b) and (c) only to completely

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50 Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

51 “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person’s official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification. By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

Increasing Institutional Capacity. As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a

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52 Duncan v. Walker, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted) (“It is our duty to give effect, if possible, to every clause and word of a statute. United States v. Menasche, 348 U.S. 528, 538-539 (1955) (quoting Montclair v. Ramsdell, 107 U.S. 147, 152 (1883)); see also Williams v. Taylor, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); Market Co. v. Hoffman, 101 U.S. 112, 115 (1879)(As early as in Bacon's Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

53 Draft at §154, “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”
computerized translation capability to be used in foreign intelligence gathering.\textsuperscript{54} Section 907 instructs the Director of the Central Intelligence, in consultation with the Director of the FBI, to report on the creation of a National Virtual Translation Center. The report is to include information concerning staffing, allocation of resources, compatibility with comparable systems to be used for law enforcement purposes, and features which permit its efficient and secure use by all of the intelligence agencies.

**Money Laundering**

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture.\textsuperscript{55} The Act bolsters federal efforts in each area.

**Regulation.** Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.\textsuperscript{56}

\begin{itemize}
\item \textsuperscript{54} “The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

“‘The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so,” S.Rep.No. 107-63, at 11 (2001).

\item \textsuperscript{55} For a brief overview, see, Murphy, *Money Laundering: Current Law and Proposals*, CRS Rep.NO. RS21032 (Dec. 21, 2001).

\item \textsuperscript{56} See e.g., 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
\end{itemize}
**Records and Reports.** For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler’s checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to files SARs as well, reflecting Congress’ view that the information provided the IRS may be valuable for other law enforcement purposes. This concern is likewise

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H.R.Rep.No. 107-250, at 38-9 (2001) (“Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

“Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a ‘Safeguard Procedures Report’ which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

“While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement
reflected in section 357 which asks the Secretary of the Treasury to report on the Internal Revenue Service’s role in the administration of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311 et seq.), and what transfers of authority, if any, are appropriate.

Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action. Section 355 expands the immunity to cover disclosures in

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authorities as the various reports mandated by the Bank Secrecy Act, which can typically be retrieved electronically from a database maintained by the Treasury Department. The differential access to the two kinds of reports is made anomalous by the fact that Form 8300 elicits much the same information that is required to be disclosed by the Bank Secrecy Act. For example, just as Form 8300 seeks the name, address, and social security number of a customer who engages in a cash transaction exceeding $10,000 with a trade or business, Currency Transaction Reports (CTRs) mandated by the Bank Secrecy Act require the same information to be reported on a cash transaction exceeding $10,000 between a financial institution and its customer.”

59 “Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

“First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor from civil liability applies in arbitration, as well as judicial, proceedings. Second, it amends section 5318(g)(3) to clarify the safe harbor’s coverage of voluntary disclosures (that is, those not covered by the SAR regulatory reporting requirement). The language in section 5318(g)(3)(A) providing that ‘any financial institution that *** makes a disclosure pursuant to *** any other authority *** shall not be liable to any person’ is not intended to avoid the application of the reporting and disclosure provisions of the Federal securities laws to any person, or to insulate any issuers from private rights of actions for disclosures made under the Federal securities laws.

“Subsection [351](b) amends section 5318(g)(2) of title 31—which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed—to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee’s official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
employment references to other insured depository financial institutions provided disclosure is not done with malicious intent.\textsuperscript{60}

The Financial Crimes Enforcement Network (FinCEN), a component within the Treasury Department long responsible for these anti-money laundering reporting and record-keeping requirements, 31 C.F.R. pt. 103, was administratively created in 1990 to provide other government agencies with an “intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes,” 55 Fed.Reg. 18433 (May 2, 1990).

The Act, in section 361, makes FinCEN a creature of statute, a bureau within the Treasury Department, 31 U.S.C. 310. Section 362 charges it with the responsibility of establishing a highly secure network to allow financial institutions to file required reports electronically and to permit FinCEN to provide those institutions with alerts and other information concerning money laundering protective measures, 31 U.S.C. 310 note.

**Special Measures.** In extraordinary circumstances involving international financial matters, the Act grants the Secretary of the Treasury, in consultation with other appropriate regulatory authorities, the power to issue regulations and orders involving additional required “special measures” and additional “due diligence” requirements to combat money laundering. The special measure authority, available under section 311, comes to life with the determination that particular institutions, jurisdictions, types of accounts, or types of transactions pose a primary money

\textsuperscript{60} 31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 66 (2001).
laundering concern. These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

31 U.S.C. 5318A. The circumstances considered in the case of a suspect jurisdiction are: evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction’s banking regulation; the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

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The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’ including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate
business transactions.

“Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

“Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

“The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

“The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

“The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

“The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent’ account for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information that it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

“The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

“The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed
**Due Diligence.** Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.63

63 See generally, H.R.Rep. No. 107-250, at 71-2 ("Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

"The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

"The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

"For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
detect and report transactions that may involve the proceeds of foreign corruption. A private bank account is defined as an account (or any combination of accounts) that requires a minimum aggregate deposit of funds or other assets of not less than $1 million; is established on behalf of one or more individuals who have a direct or beneficial ownership in the account; and is assigned to, or administered or managed by, an officer, employee or agent of a financial institution acting as a liaison between the institution and the direct or beneficial owner of the account.

“This section directs the Secretary of the Treasury, within 6 months of enactment of this bill and in consultation with appropriate Federal functional regulators, to further define and clarify, by regulation, the requirements imposed by this section”).

64 Or more exactly, a bank which has no physical presence in any country; a “physical presence” for a foreign bank is defined as “a place of business that – (i) is maintained by a foreign bank; (ii) is located at a fixed address (other than solely an electronic address) in a country in which the foreign bank is authorized to conduct banking activities, at which location the foreign bank – (I) employs 1 or more individuals on a full-time basis; and (II) maintains operating records relating to its banking activities; and (iii) is subject to inspection by the banking authority which licensed the foreign bank to conduct banking activities,” 31 U.S.C. 5318(j)(4).


66 The Act does not define “concentration accounts,” although the House Financial Services Committee report provides some incite into the section’s intent, H.R.Rep.No. 107-250, at 72-3 (2001) (“This section gives the Secretary of the Treasury discretionary authority to prescribe regulations governing the maintenance of concentration accounts by financial institutions, to ensure that these accounts are not used to prevent association of the identity of an individual customer with the movement of funds of which the customer is the direct or beneficial owner. If promulgated, the regulations are required to prohibit financial institutions from allowing clients to direct transactions into, out of, or through the concentration accounts of the institution; prohibit financial institutions and their employees from informing customers of the existence of, or means of identifying, the concentration accounts of the institution; and to establish written procedures governing the documentation of all transactions involving a concentration account.”)
keeping and to recommend a means to effectively verify the identification of foreign customers. 67

67 31 U.S.C. 5318(l); H.R.Rep.No. 107-250, at 62-3 (2001)(“Section [326](a) amends 31 U.S.C. 5318 by adding a new subsection governing the identification of account holders. Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a ’street name’ or omnibus account in the broker-dealer's name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to ’look through‘ the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund's customers. Thus, the fund would not be required to ‘look through’ the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature.68

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

Reports to Congress. Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.  

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

**International Cooperation.** Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (*i.e.*, the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.

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70 H.R.Rep.No. 107-250, at 67 (2001)("This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury's progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

"The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime").
Crimes. Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, smuggling, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
expands 18 U.S.C. 1956 to cover financial transactions conducted in foreign financial institutions.71

Section 329 makes it a federal crime to corruptly administer the money laundering regulatory scheme. Offenders are punishable by imprisonment for not more than 15 years and a fine of not more than three times the amount of the bribe.

Section 5326 of title 31 authorizes the Secretary of the Treasury to impose temporary, enhanced reporting requirements upon financial institutions in areas victimized by substantial money laundering activity (geographic targeting regulations and orders). Section 353 makes it clear that the civil sanctions, criminal penalties, and prohibitions on smurfing (structuring transactions to evade reporting requirements) apply to violations of the regulations and orders issued under 31 U.S.C. 5326.72 It also extends the permissible length of the temporary geographical orders from 60 to 180 days.

Violations of the special measures and special due diligence requirements of sections 311 and 312 are subject to both civil and criminal penalties by virtue of section 363's amendments to 31 U.S.C. 5321(a) and 5322. The amendments authorize civil penalties and criminal fines of twice the amount of the transaction but not more than $1 million. Criminal offenders would be subject to a fine in the same amount.

71 “[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

“The definition of ‘financial institution’ in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of ‘commercial bank’ or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad--say to a Mexican bank--and launders them through a series of financial transactions, the government conceivably could not rely on the definition of a ‘financial institution’ in 1956(c)(6) to establish that the transaction was a ‘financial transaction’ within the meaning of 1956(c)(4)(B) (defining a ‘financial transaction’ as a transaction involving the use of a ‘financial institution’), or that it was a ‘monetary transaction’ within the meaning of 1957(f) (defining ‘monetary transaction’ as, inter alia, a transaction that would be a ‘financial transaction’ under 1956(c)(4)(B)).

“Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launders the proceeds of one of the crimes set forth on a list of ‘specified unlawful activities.’ 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),” H.R.Rep.No. 107-250, at 38 (2000).

Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.73

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents.74 They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

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73 “The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business.

“Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.

“Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive,” H.R.Rep.No. 107-250, at 54 (2001).

74 “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual, 31 U.S.C. 5332(a)(2).

- 18 U.S.C. 476 (taking impressions of tools used for obligations and securities) from 10 to 25 years;
- 18 U.S.C. 477 (possessing or selling impressions of tools used for obligations or securities) from 10 to 25 years;
- 18 U.S.C. 484 (connecting parts of different notes) from 5 to 10 years;
- 18 U.S.C. 493 (bonds and obligations of certain lending agencies) from 5 to 10 years;
- 18 U.S.C. 478 (foreign obligations or securities) from 5 to 20 years;
- 18 U.S.C. 479 (uttering counterfeit foreign obligations or securities) from 3 to 20 years;
- 18 U.S.C. 480 (possessing counterfeit foreign obligations or securities) from 1 to 20 years;
- 18 U.S.C. 481 (plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities) from 5 to 25 years;
- 18 U.S.C. 482 (foreign bank notes) from 2 to 20 years; and
- 18 U.S.C. 483 (uttering counterfeit foreign bank notes) from 1 to 20 years.

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

**Bulk Cash.** Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act’s bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting.  

The section appears to be the product of reactions to the Supreme Court’s decision in *United States v. Bajakian*, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court’s

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As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency – representing the proceeds of drug trafficking and other criminal offenses – is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad. . . .

Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United State without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

Extraterritorial Jurisdiction. The Act makes 18 U.S.C. 1029, the federal statute condemning various crimes involving credit cards, PIN numbers and other access devices, applicable overseas if the card or device is issued by or controlled by an American bank or other entity and some article is held in or transported to or through the United States during the course of the offense, section 377. The change was part of the original Justice Department proposals. Justice explained that, “[financial crime[] admits of no border, utilizing the integrated global financial network for ill purposes. This provision would apply the financial crimes prohibitions to conduct committed abroad, so long as the tools or proceeds of the crimes pass through or are in the United States,” DoJ at §408. The section, however, appears to limit the otherwise applicable extraterritorial jurisdiction implicit in section 1029, since federal courts would likely recognize extraterritorial jurisdiction over a violation examination of forfeiture in false reporting cases under the Constitution’s Excessive Fines Clause.76

Section 5317 of title 31 once called for civil forfeiture of property traceable to a violation of 31 U.S.C. 5316 (reports on exporting or importing money instruments worth $10,000 or more). Section 372 of the Act recasts section 5317 to provide for civil and criminal forfeitures for violations of 31 U.S.C. 5316, of 31 U.S.C. 5313 (reports on domestic coins and currency transactions involving $10,000 or more) and of 31 U.S.C. 5324 (structuring transactions to evade reporting requirements (smurfing)).

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“Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute,” H.R.Rep.No. 107-250 at 36-7 (2001).
under either circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.  

**Venue.** Section 1004 relies on dicta in *United States v. Cabrales*, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering, in the state and district in which the monetary transaction takes place. The Supreme Court in *Cabrales* held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in dicta, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.  

**Forfeiture.** Forfeiture is the government confiscation of property as a consequence of crime. The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 et seq. (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

**Constitutional Considerations.** The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 et seq., which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the

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78 “The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed,” U.S.Const. Art.III, §2, cl.3.

“[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,” U.S.Const. Amend. VI.

79 See also, *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnapping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.

jurisdiction of the United States, belonging to any foreign individual, foreign entity, or foreign country whom they determine to have planned, authorized, aided or engaged in an attack on the United States by a foreign country or foreign nationals. The section also permits the government to present secretly (ex parte and in camera) any classified information upon which the forfeiture was based should the decision be subject to judicial review. The Justice Department requested the section as a revival of the President's powers in times of unconventional wars. By virtue of section 316, property owners may initiate a challenge to a confiscation by filing a claim under the rules applicable in maritime confiscations. The section permits two defenses to forfeiture – that the property is not subject to confiscation under section 106 or that the claimant is entitled to the innocent owner defense of 18 U.S.C. 983(d). The characterization of the defenses as “affirmative defense” indicates that the claimant bears the burden of proof. The innocent owner defenses of 18 U.S.C. 983(d) are probably not available in cases under section 106, since that section is explicitly

81 This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App.U.S.C. §5(b).

“This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress's war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

“The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2),” DoJ at §159.

82 “An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
excepted from the coverage of 18 U.S.C. 983. The challenge proceedings permit the court to admit evidence, such as hearsay evidence, that would not otherwise be admissible under the Federal Rules of Evidence if the evidence is reliable and if national security might be imperiled should dictates of the Federal Rules be followed, §316(b). The section recognizes the rights of claimants to proceed alternatively under the Constitution or the Administrative Procedure Act.

The Justice Department also recommended enactment of an overlapping provision which ultimately passed as section 806 of the Act without any real discussion of the relationship of the two sections. Section 806 authorizes confiscation of all property, regardless of where it is found, of any individual, entity, or organization engaged in domestic or international terrorism (as defined in 18 U.S.C. 2331), against the United States, Americans or their property, 18 U.S.C.

83 18 U.S.C. 983(i)(2)(D).

84 “The exclusion of certain provisions of Federal law from the definition of the term ‘civil forfeiture statute’ in section 983(i) of title 18, United States Code, shall not be construed to deny an owner of property the right to contest the confiscation of assets of suspected international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C) subchapter II of chapter 5 of title 5, United States Code (commonly known as the ‘Administrative Procedure Act’).” Sec. 316(c)(1).

85 “Current law does not contain any authority tailored specifically to the confiscation of terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available current forfeiture laws require detailed tracing that is quite difficult for accounts coming through the banks of countries used by many terrorists.

‘This section increases the government’s ability to strike at terrorist organizations’ economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001,” DoJ, at §403. The House Report on H.R. 2975 which contained versions of both sections is no more explicit on the relation of the two sections.

86 “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5)(as amended by section 802 of the Act).

981(a)(1)(G). Section 806 as discussed below also calls for the more common confiscation of property derived from and or facilitating acts of domestic or international terrorism against the United States or its citizens. Confiscations under 806 may be challenged under the procedures of 18 U.S.C. 983, since they are not exempted there. To the extent that forfeiture under section 806 is based on international rather than domestic terrorism, claimants may also use the procedures of section 316.

Confiscation based solely on the fact that the property is owned by a criminal offender, rather than that it is derived from or facilitates some crime is fairly uncommon. It is the mark of common law forfeiture of estate. At common law, a felon forfeited all of his property. Most contemporary forfeiture statutes employ statutory forfeiture, a more familiar presence in American law,\(^7\) which consists of the confiscation of things whose possession is criminal, of the fruits of crime, and of the means of crime – untaxed whiskey, the drug dealer’s profits, and the rum runner’s ship.

Three characteristics set forfeiture of estate apart. The property is lost solely by reason of its ownership by a felon. All of a felon’s property is confiscated, not merely that which is related to the crime for which he is convicted. Finally, it occasions attainder which negates the felon’s right to hold property or for title to property to pass through him to his heirs. It was with this in mind, that the Framers declared that “no attainder of treason shall work corruption of blood or forfeiture exception during the life of the person attainted.”\(^8\) And for this reason, President Lincoln insisted that the confiscated real estate of Confederate supporters should revert their heirs at death.\(^9\)

\(^7\) Austin v. United States, 509 U.S. 602, 611-12 (1993)(“Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture . . . . Of England’s three kinds of forfeiture, only the third took hold in the United States”).

\(^8\) U.S.Const. Art.III, §3, cl.2.

\(^9\) 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal in personam proceedings following criminal conviction as a means of accomplishing confiscation.
Neither section 106 nor 806 require conviction of the terrorist property owner.\(^90\) Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers.\(^91\) The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners.\(^92\) Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them.\(^93\) The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate

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\(^90\) Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c)(“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act”).

\(^91\) *Silesian American Corp.* v. *Clark*, 332 U.S. 469 (1947); cf., *Societe Internationale v. Rogers*, 357 U.S. 197, 211 (1958)(“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).

\(^92\) *Zittman v. McGrath*, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’”).

any presumption of remedial purposes. The same has been said of the applicability of the ex post facto clause.

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO. If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

**Other Forfeiture Amendments.** In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.

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95 See e.g., United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.), 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994).

96 DoJ, at §403.

97 18 U.S.C. 1956(b). Cf., H.R.Rep.No. 107-250, at 54-5 (2001)(“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas. 98 Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted

98 18 U.S.C. 981(k). H.R.Rep.No. 107-250, at 57-8 (2001)(“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank's customers.

“Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank's correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

“The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”).
defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation.\textsuperscript{99}

Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here.\textsuperscript{100} Section 320 enlarges this provisions to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements.\textsuperscript{101} This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.\textsuperscript{102}

\textsuperscript{99} Cf., H.R.Rep.No. 107-250, at 58-9 (2001) (“Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of ‘substitute assets’ when the defendant has placed the property otherwise subject to forfeiture ‘beyond the jurisdiction of the court.’ Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

“This section amends 21 U.S.C. 853 to make clear that a court in a criminal case may issue a repatriation order—either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. 853(e) to restrain property—so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both”).

\textsuperscript{100} 18 U.S.C. 981(a)(1)(B).

\textsuperscript{101} H.R.Rep.No. 107-250, at 56 (2001)(“This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act”).

\textsuperscript{102} H.R.Rep.No. 107-250, at 59-60 (2001)(“Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country.

“Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
A fugitive may not challenge a federal forfeiture. Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in “order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.”

to contest the restraining order could do so on the ground that 28 U.S.C. 2467 was not properly applied to the particular case, but could not oppose the restraining order on any ground that could also be raised in the proceedings pending in a foreign court. This provision prevents a litigant from taking ‘two bites at the apple’ by raising objections to the basis for the forfeiture in the Federal court that he also raised, or is entitled to raise, in the foreign court where the forfeiture action is pending. It complements the existing provision in section 2467(e) providing that the Federal court is bound by the findings of fact of the foreign court, and may not look behind such findings in determining whether to enter an order enforcing a foreign forfeiture judgment.

“This section also amends 28 U.S.C. 2467 to make clear that it is not necessary to prove that the person asserting an interest in the property received actual notice of the forfeiture proceedings. As is the case with respect to forfeitures under U.S. law, it is sufficient if the foreign nation takes steps to provide notice, in accordance with the principles of due process. See Gonzalez v. United States, 1997 WL 278123 (S.D.N.Y. 1997) (‘the [G]overnment is not required to ensure actual receipt of notice that is properly mailed’); Albajon v. Gugliotta , 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant’s identifications, and mailed after claimant released from jail, is sufficient to satisfy due process, even if claimant never received notice); United States v. Schiavo , 897 F. Supp. 644, 648 49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; due process satisfied even if he did not receive the notice).

“Finally, 28 U.S.C. 2467 is amended to authorize the enforcement of a forfeiture judgment based on any foreign offense that would constitute an offense giving rise to a civil or criminal forfeiture of the same property if the offense had been committed in the United States. This is one of two safeguards that the statute contains against the enforcement of judgments that the United States does not consider appropriate for enforcement: if the judgment is based on an act that would not constitute a crime in the United States, such as removing assets from the reach of a repressive regime, it could not be enforced. In addition, section 2467 already provides that a foreign judgment may only be enforced by a Federal court at the request of the United States, and only after the Attorney General has certified that the judgment was obtained in accordance with the principles of due process. Thus, neither a foreign Government nor a foreign private party could enforce a foreign judgment on its own under this provision.”). Note that the safeguard to which the report refers is the range of foreign offenses that will support an enforceable confiscation order, i.e., drug offenses and crimes on the money laundering predicate offense list, and that the amendment narrows that safeguard by adding additional foreign offenses, i.e., any foreign equivalent of a federal crime which would support a confiscation order.

Alien Terrorists and Victims

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

Border Protection. The border protection provisions:

- authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401

- authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402

- remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404

- authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405

- authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.

- instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007

- direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418

- express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414

- add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415

- call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416

- limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
• instruct the Attorney General to report on the feasibility of using biometric scanners to help prevent terrorists and other foreign criminals from entering the country, section 1008

• authorize appropriations of $250,000 for the FBI to determine the feasibility of providing airlines with computer access to the names of suspected terrorists, section 1009

• authorize reciprocal sharing of the State Department’s visa lookout data and related information with other nations in order to prevent terrorism, drug trafficking, slave marketing, and gun running, section 413

**Detention and Removal.** Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity, 8 U.S.C. 1227 (a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(iv). Aliens may be inadmissible for any number of terrorism-related reasons, 8 U.S.C. 1182 (a)(3)(B). Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported.


Section 411 defines “terrorist organization” to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the Federal Register as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C.

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104 As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).
1182(a)(3)(B)(iv). Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).


An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in “premeditated, politically motivated violence perpetrated against noncombatant targets,” or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien’s release would threaten national security or endanger some individual or the general public. The Attorney General’s determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

Victims. The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

- permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421
- extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422

105 “The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

106 “The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks. The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application.

“Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

“Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 31.

“Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.


107 “Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigran t status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

“The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

“The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death),” H.R.Rep.No. 107-236, at 68 (2001).

108 “Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien’s 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien’s 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
• a denial of benefits of the Act to terrorists and their families, section 427

• authority for the Attorney General to establish evidentiary standards to implement the alien victim provisions of the Act, section 426.

**Other Crimes, Penalties, & Procedures**

**New Crimes.** The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department, the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offenses for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents, 18 U.S.C. 175b. Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.

109 “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g), . . .” DoJ at §305.

110 The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

111 “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2)(“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.\(^\text{112}\)

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D). The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

\(^{112}\) U.S. Const. Art.III, §2, cl.3 (“The trial of all crimes... shall be held in the state where the said crimes shall have been committed...”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed...”); United States v. Cabrales, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from Cabrales when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnapping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999)(“By way of comparison, last Term in [Cabrales] we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).
• chemical weapons offenses, 18 U.S.C. 229;
• terrorist attacks on mass transportation, 18 U.S.C. 1993;
• sabotage of a nuclear facility, 42 U.S.C. 2284; and
• sabotage of interstate pipelines, 49 U.S.C. 60123(b).

And it adds expert advice or assistance to the types of assistance that may not be provided under section 2339A. This last addition may encounter the same First Amendment vagueness problems some courts have found in assistance which takes the form of “training” and “personnel,” Humanitarian Law Project v. Reno, 205 F.3d 1130, 1137-136 (9th Cir. 2000). Finally, the section announces that a prosecution for violation of section 2339A (support of terrorists) may be brought where the support is provided or where the predicate act of terrorism occurs. There may be some question whether the Constitution permits prosecution where the predicate act occurs.

Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.


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113 The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of ‘material support or resources’ is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’),” DoJ at 306.


115 “The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill (‘Federal terrorism offenses’) is used in identifying the relevant crimes,” DoJ, at §304.

**New Penalties.** The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. 3571(b), (c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense.\(^\text{117}\)

The proposal, however, failed to identify the critical elements that would trigger the alternative.\(^\text{118}\) Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

- for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

- for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

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\(^{117}\) “Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersede lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,”*DoJ*, at §302.

\(^{118}\) “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense,”*Draft* at §302.
• for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;

• for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;

• for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;

• for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and

• for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism.\(^{119}\) Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:

• arson committed within a federal enclave, 18 U.S.C. 81;
• killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);
• destruction of communications facilities, 18 U.S.C. 1362;
• destruction of property within a federal enclave, 18 U.S.C. 1363;
• causing a train wreck, 18 U.S.C. 1922;
• providing material support to a terrorist, 18 U.S.C. 2339A;
• torture committed overseas under color of law, 18 U.S.C. 2340A;
• sabotage of a nuclear facility, 42 U.S.C. 2284;

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\(^{119}\) “The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §§846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

“This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.
• interfering with a flight crew within U.S. special aircraft jurisdiction, 49 U.S.C. 46504;
• carrying a weapon or explosive abroad an aircraft within U.S. special aircraft jurisdiction, 49 U.S.C. 46505; and
• sabotage of interstate gas pipeline facilities, 49 U.S.C. 60123.

When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years). The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission), a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

120 Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

121 “Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses. “This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders).\textsuperscript{122}

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

**Other Procedural Adjustments.** In other procedural adjustments designed to facilitate criminal investigations, the Act:

- increases the rewards for information in terrorism cases
- expands the Posse Comitatus Act exceptions
- authorizes “sneak and peek” search warrants
- permits nationwide and perhaps worldwide execution of warrants in terrorism cases
- eases government access to confidential information
- allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
- lengthens the statute of limitations applicable to crimes of terrorism
- clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
- adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B.\textsuperscript{123}

\textsuperscript{122} It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, e.g., damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

\textsuperscript{123} When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001)(remarks of Rep. Sensenbrenner); for general background, see, Doyle, *McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys*, CRS REP.NO. RL30060 (Dec. 14, 2001).
Rewards. The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L.105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism.\textsuperscript{124}

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

Posse Comitatus. The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.\textsuperscript{125}

Delayed notification of a search (sneak and peek). Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take

\textsuperscript{124} The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct threat assessments for federal agencies, and to reimburse federal agencies for the costs of detaining terrorist suspects overseas.

\textsuperscript{125} For a general discussion of the Posse Comitatus Act, see, Doyle, The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law, CRS Rep.No. 95-964 (June 1, 2000).
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, Richards v. Wisconsin, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, Wilson v. Arkansas, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, Dalia v. United States, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, cf., United States v. Miller, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, United States v. Freitas, 800 F.2d 1451, 1453 (9th Cir. 1986).126

126 The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in United States v. New York Telephone Co., 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth
Amendment, demands that surreptitious entries be closely circumscribed,” United States v. Freitas (Freitas I), 800 F.2d 1451, 1455-1456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, United States v. Freitas (Freitas II), 856 F.2d 1425 (9th Cir. 1988).

“No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in Dalia v. United States, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in Dalia, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property. . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. See United States v. New York Telephone Co., 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . . Although the Freitas I court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in United States v. Villegas, 899 F.2d 1324 (1999). Although the Freitas I court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in Villegas. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the Freitas I court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” United States v. Pangburn, 983 F.2d 449, 453-55 (2d Cir. 1993).

In Simons, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
Fourth Amendment does not mention notice, and the Supreme Court has stated that the constitution does not categorically proscribe covert entries, which necessarily involve a delay in notice. And insofar as the August search satisfied the requirements of the Fourth Amendment, i.e., it was conducted pursuant to a warrant based on probable cause issued by a neutral and detached magistrate, we perceive no basis for concluding that the 45-day delay in notice rendered the search unconstitutional. Having concluded that the Rule 41(d) violation at issue here did not infringe on Simons' constitutional rights, we must now evaluate his argument that the violation was deliberate. . . . The district court did not address the intent issue when it ruled on Simons' motion to suppress. . . . We therefore remand for the district court to consider whether the Government intentionally and deliberately disregarded the notice provision of Rule 41(d) when it carried out the August 6, 1998 search,” 206 F.3d at 403.

129 The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (e.g., risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (e.g., jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, i.e., in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation. 130 The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

129 “The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities,” DoJ at §353.

130 Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department's initial proposal, the Department's justification does not address the question.
constitutionally “reasonable,” that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

**Nationwide terrorism search warrants.** The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either “within or outside the district,” (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases. The provision may anticipate execution both in this country and overseas. The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage. Neither Rule 41 nor any other provision of federal

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131 The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

132 The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

133 *United States v. Barona*, 56 F.3d 1087, 1092 (9th Cir. 1995) (“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994) (“if American law enforcement officials substantially participated in the search or if the

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” F.R.Crim.P. 41, *Advisory Committee Notes: 1990 Amendment*. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

**Terrorists’ DNA.** The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards *per se*.  

Existing federal law allowed the Attorney General to collect samples from foreign officials conducting the search were actually acting as agents for their American counterparts); *United States v. Maturo*, 982 F.2d 57, 61 (2d Cir. 1992)(“where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials” or “where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials”); *United States v. Mitro*, 880 F.2d 1480, 1482 (1st Cir. 1989)(“where American agents participated in the foreign search or the foreign officers acted as agents for their American counterparts”); *United States v. Mount*, 757 F.2d 1315, 1318 (D.C.Cir. 1985)(“if American officials or officers participated in some significant way”); *United States v. Marzano*, 537 F.2d 257, 270 (7th Cir. 1976)(declining to adopt the “joint venture” standards, but finding level of American participation in the case before it insignificant); *United States v. Morrow*, 537 F.2d 120, 139 (5th Cir. 1976)(“if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts”); each of the decisions also suggests that evidence secured in a manner which shocked the conscience of the court would be excluded.

134 The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, see, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), reprinted, 78 Cong.Rec. 4982-983 (1934)(“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.)(conferring judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

federal prisoners convicted of a variety of violent crimes, 42 U.S.C. 14135a. The Act enlarges the predicate offense list to include any crime of violence or any terrorism offence, section 503.136

**Access to Educational Records.** Finally, the Act calls for an ex parte court order procedure under which senior Justice Department officials may seek authorization to collect educational records relevant to an investigation or prosecution of a crime of terrorism, section 507 (as an exception to the confidentiality requirements of the General Education Provisions Act, 20 U.S.C. 1232g), section 508 (as an exception to the confidentiality requirements of the National Education Statistics Act, 20 U.S.C. 9007).

**Statute of Limitations.** Prosecution for murder in violation of federal law may be initiated at any time, 18 U.S.C. 3281. A five year statute of limitations applied for most other federal crimes before passage of the Act, with a few exceptions. Among the relevant exceptions were an eight year statute of limitations for several terrorist offenses, 18 U.S.C. 3286,137 and a ten year statute of limitations for a few arson and explosives offenses, 18 U.S.C. 3295. The Justice Department recommended the elimination of a statute of limitations in terrorism cases.138

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136 Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples form convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes.” DoJ at §353.

For a general discussion, see, Fischer, DNA Identification: Applications and Issues, CRS REP.NO. RL30717 (Jan. 12, 2001).

137 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

138 “This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

“This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in
connection with the September 11, 2001 terrorist attacks. The constitutionality of such retrospective applications of changes in statutes of limitations is well-settled, See, e.g., United States v. Grimes, 142 F.3d 1342, 1350-51 (11th Cir. 1998); People v. Frazer, 982 P.2d 180 (Cal. 1999).

"Existing federal law (18 U.S.C. §3282) bars prosecuting most offenses after five years. 18 U.S.C. §3286, as currently formulated, extends the limitation period for prosecution for certain offenses that may be committed by terrorists – but only to eight years. While this is a limited improvement over the five-year limitation period for most federal offenses, it is patently inadequate in relation to the catastrophic human and social costs that frequently follow from such crimes as destruction of aircraft (18 U.S.C. §32), aircraft hijackings ([49] U.S.C. §§46502, 46504-06, attempted political assassinations (18 U.S.C. §§351, 1116, 1751), or hostage taking (18 U.S.C. §1203). These are not minor acts of misconduct which can properly be forgiven or forgotten merely because the perpetrator has avoided apprehension for some period of time. Anomalously, existing law provides longer limitation periods for such offenses as bank frauds and certain artwork thefts (18 U.S.C.§§3293-94) than it does for crimes characteristically committed by terrorists.

"In many American jurisdictions, the limitation periods for prosecution for serious offenses are more permissible than those found in federal law, including a number of states which have no limitation period for the prosecution of felonies generally. While this section does not go so far, it does eliminate the limitation period for prosecution of the major crimes that are most likely to be committed by terrorists (‘Federal terrorism offenses’), as specified in section 309 of this bill,” DoJ at 301.

As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 ( sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

Moreover, a judicial difference of opinion has appeared in those cases...
when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period.\footnote{United States v. De La Matta, 266 F.3d 1275, 1286 (11th Cir. 2001); United States v. Grimes, 142 F.3d 1342, 1351 (11th Cir. 1998); United States v. Morrow, 177 F.3d 272, 294 (5th Cir. 1999); Falter v. United States, 23 F.2d 420, 425-26 (2d Cir. 1928).} Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.\footnote{People v. Frazer, 24 Cal.4th 737, 759, 982 P.2d 180, 1294, 88 Cal.Rptr.2d 312, 327 (1999).}

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (Grimes, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (Frazer, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

**Extraterritoriality.** Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States or elsewhere. . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.\footnote{United States v. Layton, 855 F.2d 1388 (9th Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); United States v. Benítez, 741 F.2d 1312 (11th Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).}

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnapping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.\footnote{Compare, United States v. Gatlin, 216 F.3d 207 (2d Cir. 2000); United States v. Laden, 92 F.Supp.2d 189 (S.D.N.Y. 2000); with, United States v. Corey, 232 F.3d 1166 (9th Cir. 2000); United States v. Erdos, 474 F.2d 157 (4th Cir. 1973).}

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

**Victims.** Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11th Victim Compensation Fund legislation before it passed the Act. Consequently, the Act’s victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 \textit{et seq.}, and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 \textit{et seq.}

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:
• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year) (42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d) (5)), section 621(d)

• waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

• eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
• makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

• prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

• allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

• reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

• makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

• allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

• establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

Increasing Institutional Capacity. A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

• $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)

• necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)

• $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)

• $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816

• $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701

• $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)

• $5 million for DEA police training in South and Central Asia, section 1007.

Miscellaneous. Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might to used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act, or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b), 807.146

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145 I.e., Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).

expands 18 U.S.C. 1956 to cover financial transactions conducted in foreign financial institutions.\footnote{71}

Section 329 makes it a federal crime to corruptly administer the money laundering regulatory scheme. Offenders are punishable by imprisonment for not more than 15 years and a fine of not more than three times the amount of the bribe.

Section 5326 of title 31 authorizes the Secretary of the Treasury to impose temporary, enhanced reporting requirements upon financial institutions in areas victimized by substantial money laundering activity (geographic targeting regulations and orders). Section 353 makes it clear that the civil sanctions, criminal penalties, and prohibitions on smurfing (structuring transactions to evade reporting requirements) apply to violations of the regulations and orders issued under 31 U.S.C. 5326.\footnote{72} It also extends the permissible length of the temporary geographical orders from 60 to 180 days.

Violations of the special measures and special due diligence requirements of sections 311 and 312 are subject to both civil and criminal penalties by virtue of section 363's amendments to 31 U.S.C. 5321(a) and 5322. The amendments authorize civil penalties and criminal fines of twice the amount of the transaction but not more than $1 million. Criminal offenders would be subject to a fine in the same amount.

\footnote{71}{“[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f). “The definition of ‘financial institution’ in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of ‘commercial bank’ or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad--say to a Mexican bank--and launders them through a series of financial transactions, the government conceivably could not rely on the definition of a ‘financial institution’ in 1956(c)(6) to establish that the transaction was a ‘financial transaction’ within the meaning of 1956(c)(4)(B) (defining a ‘financial transaction’ as a transaction involving the use of a ‘financial institution’), or that it was a ‘monetary transaction’ within the meaning of 1957(f) (defining ‘monetary transaction’ as, inter alia, a transaction that would be a ‘financial transaction’ under 1956(c)(4)(B)). “Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launders the proceeds of one of the crimes set forth on a list of ‘specified unlawful activities.’ 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),” H.R.Rep.No. 107-250, at 38 (2000).

\footnote{72}{\textit{Cf.}, H.R.Rep.No. 107-250, at 57.}
Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960. 73

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents. 74 They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

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73 “The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business. “Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.

“Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive,” H.R.Rep.No. 107-250, at 54 (2001).

74 “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
• 18 U.S.C. 476 (taking impressions of tools used for obligations and securities) from 10 to 25 years;
• 18 U.S.C. 477 (possessing or selling impressions of tools used for obligations or securities) from 10 to 25 years;
• 18 U.S.C. 484 (connecting parts of different notes) from 5 to 10 years;
• 18 U.S.C. 493 (bonds and obligations of certain lending agencies) from 5 to 10 years;
• 18 U.S.C. 478 (foreign obligations or securities) from 5 to 20 years;
• 18 U.S.C. 479 (uttering counterfeit foreign obligations or securities) from 3 to 20 years;
• 18 U.S.C. 480 (possessing counterfeit foreign obligations or securities) from 1 to 20 years;
• 18 U.S.C. 481 (plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities) from 5 to 25 years;
• 18 U.S.C. 482 (foreign bank notes) from 2 to 20 years; and
• 18 U.S.C. 483 (uttering counterfeit foreign bank notes) from 1 to 20 years.

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

**Bulk Cash.** Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act’s bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting.\(^{75}\)

The section appears to be the product of reactions to the Supreme Court’s decision in *United States v. Bajakian*, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court’s

\(^{75}\) “For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).
As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency – representing the proceeds of drug trafficking and other criminal offenses – is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad.

Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United States without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute,” H.R.Rep.No. 107-250 at 36-7 (2001).

Section 5317 of title 31 once called for civil forfeiture of property traceable to a violation of 31 U.S.C. 5316 (reports on exporting or importing money instruments worth $10,000 or more). Section 372 of the Act recasts section 5317 to provide for civil and criminal forfeitures for violations of 31 U.S.C. 5316, of 31 U.S.C. 5313 (reports on domestic coins and currency transactions involving $10,000 or more) and of 31 U.S.C. 5324 (structuring transactions to evade reporting requirements (smurfing)).

Extraterritorial Jurisdiction. The Act makes 18 U.S.C. 1029, the federal statute condemning various crimes involving credit cards, PIN numbers and other access devices, applicable overseas if the card or device is issued by or controlled by an American bank or other entity and some article is held in or transported to or through the United States during the course of the offense, section 377. The change was part of the original Justice Department proposals. Justice explained that, “[financial crime] admits of no border, utilizing the integrated global financial network for ill purposes. This provision would apply the financial crimes prohibitions to conduct committed abroad, so long as the tools or proceeds of the crimes pass through or are in the United States,” DoJ at §408. The section, however, appears to limit the otherwise applicable extraterritorial jurisdiction implicit in section 1029, since federal courts would likely recognize extraterritorial jurisdiction over a violation of 31 U.S.C. 1029.
under either circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.  

**Venue.** Section 1004 relies on dicta in United States v. Cabrales, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering, in the state and district in which the monetary transaction takes place. The Supreme Court in Cabrales held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in dicta, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.

**Forfeiture.** Forfeiture is the government confiscation of property as a consequence of crime. The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 et seq. (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

**Constitutional Considerations.** The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 et seq., which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the

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78 “The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.” U.S.Const. Art.III, §2, cl.3.

“[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,” U.S.Const. Amend. VI.

79 See also, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnaping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.

80 For general background information, see, Doyle, Crime and Forfeiture, CRS REP.NO. 97-139A (Oct. 11, 2000).
jurisdiction of the United States, belonging to any foreign individual, foreign entity, or foreign country whom they determine to have planned, authorized, aided or engaged in an attack on the United States by a foreign country or foreign nationals. The section also permits the government to present secretly (ex parte and in camera) any classified information upon which the forfeiture was based should the decision be subject to judicial review. The Justice Department requested the section as a revival of the President’s powers in times of unconventional wars.81 By virtue of section 316, property owners may initiate a challenge to a confiscation by filing a claim under the rules applicable in maritime confiscations. The section permits two defenses to forfeiture – that the property is not subject to confiscation under section 106 or that the claimant is entitled to the innocent owner defense of 18 U.S.C. 983(d).82 The characterization of the defenses as “affirmative defense” indicates that the claimant bears the burden of proof. The innocent owner defenses of 18 U.S.C. 983(d) are probably not available in cases under section 106, since that section is explicitly

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81 “This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App.U.S.C. §5(b).

“This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress’s war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

“The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2),” DoJ at §159.

82 “An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
excepted from the coverage of 18 U.S.C. 983. The challenge proceedings permit the court to admit evidence, such as hearsay evidence, that would not otherwise be admissible under the Federal Rules of Evidence if the evidence is reliable and if national security might be imperiled should dictates of the Federal Rules be followed, §316(b). The section recognizes the rights of claimants to proceed alternatively under the Constitution or the Administrative Procedure Act.

The Justice Department also recommended enactment of an overlapping provision which ultimately passed as section 806 of the Act without any real discussion of the relationship of the two sections. Section 806 authorizes confiscation of all property, regardless of where it is found, of any individual, entity, or organization engaged in domestic or international terrorism (as defined in 18 U.S.C. 2331) against the United States, Americans or their property, 18 U.S.C.

83 18 U.S.C. 983(i)(2)(D).

84 “The exclusion of certain provisions of Federal law from the definition of the term ‘civil forfeiture statute’ in section 983(i) of title 18, United States Code, shall not be construed to deny an owner of property the right to contest the confiscation of assets of suspected international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C) subchapter II of chapter 5 of title 5, United States Code (commonly known as the ‘Administrative Procedure Act’).” Sec. 316(c)(1).

85 “Current law does not contain any authority tailored specifically to the confiscation of terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available current forfeiture laws require detailed tracing that is quite difficult for accounts coming through the banks of countries used by many terrorists.

“This section increases the government's ability to strike at terrorist organizations' economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001,” DoJ, at §403. The House Report on H.R. 2975 which contained versions of both sections is no more explicit on the relation of the two sections.

86 “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
981(a)(1)(G). Section 806 as discussed below also calls for the more common confiscation of property derived from and or facilitating acts of domestic or international terrorism against the United States or its citizens. Confiscations under 806 may be challenged under the procedures of 18 U.S.C. 983, since they are not exempted there. To the extent that forfeiture under section 806 is based on international rather than domestic terrorism, claimants may also use the procedures of section 316.

Confiscation based solely on the fact that the property is owned by a criminal offender, rather than that it is derived from or facilitates some crime is fairly uncommon. It is the mark of common law forfeiture of estate. At common law, a felon forfeited all of his property. Most contemporary forfeiture statutes employ statutory forfeiture, a more familiar presence in American law,\(^87\) which consists of the confiscation of things whose possession is criminal, of the fruits of crime, and of the means of crime – untaxed whiskey, the drug dealer’s profits, and the rum runner’s ship.

Three characteristics set forfeiture of estate apart. The property is lost solely by reason of its ownership by a felon. All of a felon’s property is confiscated, not merely that which is related to the crime for which he is convicted. Finally, it occasions attainder which negates the felon’s right to hold property or for title to property to pass through him to his heirs. It was with this in mind, that the Framers declared that “no attainder of treason shall work corruption of blood or forfeiture exception during the life of the person attainted.”\(^88\) And for this reason, President Lincoln insisted that the confiscated real estate of Confederate supporters should revert their heirs at death.\(^89\)

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\(^87\) *Austin v. United States*, 509 U.S. 602, 611-12 (1993) (“Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture . . . . Of England’s three kinds of forfeiture, only the third took hold in the United States”).

\(^88\) *U.S.Const.* Art.III, §3, cl.2.

\(^89\) 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal *in personam* proceedings following criminal conviction as a means of accomplishing confiscation.
Neither section 106 nor 806 require conviction of the terrorist property owner.\(^{90}\) Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers.\(^{91}\) The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners.\(^{92}\) Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them.\(^{93}\) The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate

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\(^{90}\) Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c)(“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act”).

\(^{91}\) Silesian American Corp. V. Clark, 332 U.S. 469 (1947); cf., Societe Internationale v. Rogers, 357 U.S. 197, 211 (1958)(“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).

\(^{92}\) Zittman v. McGrath, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’”).

any presumption of remedial purposes. The same has been said of the applicability of the ex post facto clause.

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO. If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

**Other Forfeiture Amendments.** In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.

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95 See *e.g.*, *United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.)*, 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, *Landgraf v. USI Film Products*, 511 U.S. 244, 265-66 (1994).

96 *DoJ*, at §403.

97 18 U.S.C. 1956(b). Cf., H.R.Rep.No. 107-250, at 54-5 (2001) (“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas. Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted American Bank, 191 F.3d 30 (1st Cir. 1999).

“The second provision, modeled on 18 U.S.C. 1345(b), gives the district court the power to restrain property, issue seizure warrants, or take other action necessary to ensure that a defendant in an action covered by the statute does not dissipate the assets that would be needed to satisfy a judgment.

“This section also authorizes a court, on the motion of the Government or a State or Federal regulator, to appoint a receiver to gather and protect assets needed to satisfy a judgment under sections 1956 and 1957, and the forfeiture provisions in sections 981 and 982. This authority is intended to apply in three circumstances: (1) when there is a judgment in a criminal case, including an order of restitution, following a conviction for a violation of section 1956 or 1957; (2) when there is a judgment in a civil case under section 1956(b) assessing a penalty for a violation of either section 1956 or 1957; and (3) when there is a civil forfeiture judgment under section 981 or a criminal forfeiture judgment, including a personal money judgment, under section 982.

“The amendment also makes section 1956(b) applicable to violations of section 1957. It applies to conduct occurring before the effective date of the Act”).

98 18 U.S.C. 981(k). H.R.Rep.No. 107-250, at 57-8 (2001)(“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank's customers.

“Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank's correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

“The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”).
defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation.\(^99\)

Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here.\(^100\) Section 320 enlarges this provisions to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements.\(^101\) This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.\(^102\)

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\(^99\) Cf., H.R.Rep.No. 107-250, at 58-9 (2001) (“Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of ‘substitute assets’ when the defendant has placed the property otherwise subject to forfeiture ‘beyond the jurisdiction of the court.’ Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

“This section amends 21 U.S.C. 853 to make clear that a court in a criminal case may issue a repatriation order—either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. 853(e) to restrain property—so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both”).

\(^100\) 18 U.S.C. 981(a)(1)(B).

\(^101\) H.R.Rep.No. 107-250, at 56 (2001)(“This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act”).

\(^102\) H.R.Rep.No. 107-250, at 59-60 (2001)(“Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country.

“Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
A fugitive may not challenge a federal forfeiture. Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in “order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.”

to contest the restraining order could do so on the ground that 28 U.S.C. 2467 was not properly applied to the particular case, but could not oppose the restraining order on any ground that could also be raised in the proceedings pending in a foreign court. This provision prevents a litigant from taking ‘two bites at the apple’ by raising objections to the basis for the forfeiture in the Federal court that he also raised, or is entitled to raise, in the foreign court where the forfeiture action is pending. It complements the existing provision in section 2467(e) providing that the Federal court is bound by the findings of fact of the foreign court, and may not look behind such findings in determining whether to enter an order enforcing a foreign forfeiture judgment.

“This section also amends 28 U.S.C. 2467 to make clear that it is not necessary to prove that the person asserting an interest in the property received actual notice of the forfeiture proceedings. As is the case with respect to forfeitures under U.S. law, it is sufficient if the foreign nation takes steps to provide notice, in accordance with the principles of due process. See Gonzalez v. United States, 1997 WL 278123 (S.D.N.Y. 1997) (‘the [G]overnment is not required to ensure actual receipt of notice that is properly mailed’); Albajon v. Gugliotta, 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant’s identifications, and mailed after claimant released from jail, is sufficient to satisfy due process, even if claimant never received notice); United States v. Schiavo, 897 F. Supp. 644, 648 49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; due process satisfied even if he did not receive the notice).

“Finally, 28 U.S.C. 2467 is amended to authorize the enforcement of a forfeiture judgment based on any foreign offense that would constitute an offense giving rise to a civil or criminal forfeiture of the same property if the offense had been committed in the United States. This is one of two safeguards that the statute contains against the enforcement of judgments that the United States does not consider appropriate for enforcement: if the judgment is based on an act that would not constitute a crime in the United States, such as removing assets from the reach of a repressive regime, it could not be enforced. In addition, section 2467 already provides that a foreign judgment may only be enforced by a Federal court at the request of the United States, and only after the Attorney General has certified that the judgment was obtained in accordance with the principles of due process. Thus, neither a foreign Government nor a foreign private party could enforce a foreign judgment on its own under this provision.’

Note that the safeguard to which the report refers is the range of foreign offenses that will support an enforceable confiscation order, i.e., drug offenses and crimes on the money laundering predicate offense list, and that the amendment narrows that safeguard by adding additional foreign offenses, i.e., any foreign equivalent of a federal crime which would support a confiscation order.

Alien Terrorists and Victims

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

Border Protection. The border protection provisions:

- authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401

- authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402

- remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404

- authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405

- authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.

- instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007

- direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418

- express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414

- add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415

- call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416

- limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
• instruct the Attorney General to report on the feasibility of using biometric scanners to help prevent terrorists and other foreign criminals from entering the country, section 1008

• authorize appropriations of $250,000 for the FBI to determine the feasibility of providing airlines with computer access to the names of suspected terrorists, section 1009

• authorize reciprocal sharing of the State Department’s visa lookout data and related information with other nations in order to prevent terrorism, drug trafficking, slave marketing, and gun running, section 413

**Detention and Removal.** Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity, 8 U.S.C. 1227 (a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(iv). Aliens may be inadmissible for any number of terrorism-related reasons, 8 U.S.C. 1182(a)(3)(B). Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported.


Section 411 defines “terrorist organization” to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the Federal Register as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C.

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104 As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).
Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).


An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in “premeditated, politically motivated violence perpetrated against noncombatant targets,” or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security or endanger some individual or the general public. The Attorney General's determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

Victims. The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

- permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421
- extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422

105 “The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

106 “The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks.

“Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

"Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 31.

"Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.


107 "Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

"The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

"The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death)," H.R.Rep.No. 107-236, at 68 (2001).

108 "Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien's 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien's 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
• a denial of benefits of the Act to terrorists and their families, section 427

• authority for the Attorney General to establish evidentiary standards to implement the alien victim provisions of the Act, section 426.

Other Crimes, Penalties, & Procedures

New Crimes. The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department, the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offenses for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents, 18 U.S.C. 175b. Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.

109 “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . . .” DoJ at §305.

110 The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

111 “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2) (“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.112

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D). The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

112 U.S. Const. Art.III, §2, cl.3 (“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . .”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . .”); United States v. Cabrales, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from Cabrales when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnaping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999)(“By way of comparison, last Term in [Cabrales] we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).
The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of ‘material support or resources’ is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’),” DoJ at §304.

And it adds expert advice or assistance to the types of assistance that may not be provided under section 2339A. This last addition may encounter the same First Amendment vagueness problems some courts have found in assistance which takes the form of “training” and “personnel,” Humanitarian Law Project v. Reno, 205 F.3d 1130, 1137-136 (9th Cir. 2000). Finally, the section announces that a prosecution for violation of section 2339A (support of terrorists) may be brought where the support is provided or where the predicate act of terrorism occurs. There may be some question whether the Constitution permits prosecution where the predicate act occurs.

Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961. Prior law, 18 U.S.C. 2325-2327, outlawed violation of Federal Trade Commission (FTC) telemarketing regulations promulgated under 15 U.S.C. 6101 et seq. Section 1011 of the Act brings fraudulent charitable solicitations within the FTC’s regulatory authority.

113 The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of ‘material support or resources’ is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’),” DoJ at 306.


115 “The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill (‘Federal terrorism offenses’) is used in identifying the relevant crimes,” DoJ, at §304.

New Penalties. The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. 3571(b),(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense.117

The proposal, however, failed to identify the critical elements that would trigger the alternative.118 Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

- for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

- for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

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117 “Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersede lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,”DoJ, at §302.

118 “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense,” Draft at §302.
• for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;  

• for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;  

• for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;  

• for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and  

• for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.  

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism. Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:  

• arson committed within a federal enclave, 18 U.S.C. 81;  

• killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);  

• destruction of communications facilities, 18 U.S.C. 1362;  

• destruction of property within a federal enclave, 18 U.S.C. 1363;  

• causing a train wreck, 18 U.S.C. 1922;  

• providing material support to a terrorist, 18 U.S.C. 2339A;  

• torture committed overseas under color of law, 18 U.S.C. 2340A;  

• sabotage of a nuclear facility, 42 U.S.C. 2284;  

119 “The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §§846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists. “This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.
• interfering with a flight crew within U.S. special aircraft jurisdiction, 49 U.S.C. 46504;
• carrying a weapon or explosive abroad an aircraft within U.S. special aircraft jurisdiction, 49 U.S.C. 46505; and
• sabotage of interstate gas pipeline facilities, 49 U.S.C. 60123.

When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years).120 The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission),121 a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

120 Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

121 “Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.

“This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders).122

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

**Other Procedural Adjustments.** In other procedural adjustments designed to facilitate criminal investigations, the Act:

- increases the rewards for information in terrorism cases
- expands the Posse Comitatus Act exceptions
- authorizes “sneak and peek” search warrants
- permits nationwide and perhaps worldwide execution of warrants in terrorism cases
- eases government access to confidential information
- allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
- lengthens the statute of limitations applicable to crimes of terrorism
- clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
- adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B.123

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122 It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, e.g., damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

123 When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001)(remarks of Rep. Sensenbrenner); for general background, see, Doyle, *McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys*, CRS REP.NO. RL30060 (Dec. 14, 2001).
Rewards. The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L.105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism.124

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

Posse Comitatus. The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.125

Delayed notification of a search (sneak and peek). Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take

124 The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct threat assessments for federal agencies, and to reimburse federal agencies for the costs of detaining terrorist suspects overseas.

125 For a general discussion of the Posse Comitatus Act, see, Doyle, The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law, CRS REP.NO. 95-964 (June 1, 2000).
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, Richards v. Wisconsin, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, Wilson v. Arkansas, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, Dalia v. United States, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, cf., United States v. Miller, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, United States v. Freitas, 800 F.2d 1451, 1453 (9th Cir. 1986). 126

126 The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in United States v. New York Telephone Co., 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41 . . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41 . . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth
Amendment, demands that surreptitious entries be closely circumscribed,” United States v. Freitas (Freitas I), 800 F.2d 1451, 1455-456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, United States v. Freitas (Freitas II), 856 F.2d 1425 (9th Cir. 1988).

“No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in Dalia v. United States, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in Dalia, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property. . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. See United States v. New York Telephone Co., 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . . Although the Freitas I court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in United States v. Villegas, 899 F.2d 1324 (1999). Although the Freitas I court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in Villegas. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the Freitas I court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” United States v. Pangburn, 983 F.2d 449, 453-55 (2d Cir. 1993).

127 In Simons, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[i]there are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
Fourth Amendment does not mention notice, and the Supreme Court has stated that the constitution does not categorically proscribe covert entries, which necessarily involve a delay in notice. And insofar as the August search satisfied the requirements of the Fourth Amendment, i.e., it was conducted pursuant to a warrant based on probable cause issued by a neutral and detached magistrate, we perceive no basis for concluding that the 45-day delay in notice rendered the search unconstitutional. Having concluded that the Rule 41(d) violation at issue here did not infringe on Simons' constitutional rights, we must now evaluate his argument that the violation was deliberate. . . . The district court did not address the intent issue when it ruled on Simons' motion to suppress. . . . We therefore remand for the district court to consider whether the Government intentionally and deliberately disregarded the notice provision of Rule 41(d) when it carried out the August 6, 1998 search,” 206 F.3d at 403.

129 “The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (e.g., risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (e.g., jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, i.e., in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation. 130 The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

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constitutionally “reasonable,” that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

**Nationwide terrorism search warrants.** The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either “within or outside the district,” (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases. The provision may anticipate execution both in this country and overseas. The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage.

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131 The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

132 The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

133 *United States v. Barona*, 56 F.3d 1087, 1092 (9th Cir. 1995)(“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994)(“if American law enforcement officials substantially participated in the search or if the

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” F.R.Crim.P. 41, *Advisory Committee Notes: 1990 Amendment*. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

**Terrorists' DNA.** The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards *per se*. Existing federal law allowed the Attorney General to collect samples from foreign officials conducting the search were actually acting as agents for their American counterparts’); *United States v. Maturo*, 982 F.2d 57, 61 (2d Cir. 1992) ("where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials" or "where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials"); *United States v. Mitro*, 880 F.2d 1480, 1482 (1st Cir. 1989) ("where American agents participated in the foreign search or the foreign officers acted as agents for their American counterparts"); *United States v. Mount*, 757 F.2d 1315, 1318 (D.C.Cir. 1985) ("if American officials or officers participated in some significant way"); *United States v. Marzano*, 537 F.2d 257, 270 (7th Cir. 1976) (declining to adopt the “joint venture” standards, but finding level of American participation in the case before it insignificant); *United States v. Morrow*, 537 F.2d 120, 139 (5th Cir. 1976) ("if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts"); each of the decisions also suggests that evidence secured in a manner which shocked the conscience of the court would be excluded.

134 The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, *see*, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), *reprinted*, 78 *Cong.Rec.* 4982-983 (1934) (“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.) (conferring judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

federal prisoners convicted of a variety of violent crimes, 42 U.S.C. 14135a. The Act enlarges the predicate offense list to include any crime of violence or any terrorism offense, section 503.136

**Access to Educational Records.** Finally, the Act calls for an ex parte court order procedure under which senior Justice Department officials may seek authorization to collect educational records relevant to an investigation or prosecution of a crime of terrorism, section 507 (as an exception to the confidentiality requirements of the General Education Provisions Act, 20 U.S.C. 1232g), section 508 (as an exception to the confidentiality requirements of the National Education Statistics Act, 20 U.S.C. 9007).

**Statute of Limitations.** Prosecution for murder in violation of federal law may be initiated at any time, 18 U.S.C. 3281. A five year statute of limitations applied for most other federal crimes before passage of the Act, with a few exceptions. Among the relevant exceptions were an eight year statute of limitations for several terrorist offenses, 18 U.S.C. 3286,137 and a ten year statute of limitations for a few arson and explosives offenses, 18 U.S.C. 3295. The Justice Department recommended the elimination of a statute of limitations in terrorism cases.138

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136 Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples form convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes,” DoJ at §353.


137 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

138 “This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

“This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in
The Act takes less dramatic action in section 809. It eliminates the statute of limitations for any crime of terrorism\(^{139}\) that risks or results in a death or serious bodily injury, 18 U.S.C. §3286. In the absence of such a risk or result, all other terrorism offenses become subject to the eight year statute of limitations unless already covered by the ten year statute for explosives and arson offenses, 18 U.S.C. §3286.

Application of the statute of limitations rarely provokes a constitutional inquiry. Nevertheless, due process precludes prosecution when it can be shown that pre-indictment delay “caused substantial prejudice to [a defendant’s] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.”\(^{140}\) Moreover, a judicial difference of opinion has appeared in those cases

connection with the September 11, 2001 terrorist attacks. The constitutionality of such retroactive applications of changes in statutes of limitations is well-settled, See, e.g., United States v. Grimes, 142 F.3d 1342, 1350-51 (11th Cir. 1998); People v. Frazer, 982 P.2d 180 (Cal. 1999).

“Existing federal law (18 U.S.C. §3282) bars prosecuting most offenses after five years. 18 U.S.C. §3286, as currently formulated, extends the limitation period for prosecution for certain offenses that may be committed by terrorists – but only to eight years. While this is a limited improvement over the five-year limitation period for most federal offenses, it is patently inadequate in relation to the catastrophic human and social costs that frequently follow from such crimes as destruction of aircraft (18 U.S.C. §32), aircraft hijackings ([49] U.S.C. §§46502, 46504-06, attempted political assassinations (18 U.S.C. §§351, 1116, 1751), or hostage taking (18 U.S.C. §1203). These are not minor acts of misconduct which can properly be forgiven or forgotten merely because the perpetrator has avoided apprehension for some period of time. Anomalously, existing law provides longer limitation periods for such offenses as bank frauds and certain artwork thefts (18 U.S.C.$$3293-94) than it does for crimes characteristically committed by terrorists.

“In many American jurisdictions, the limitation periods for prosecution for serious offenses are more permissible than those found in federal law, including a number of states which have no limitation period for the prosecution of felonies generally. While this section does not go so far, it does eliminate the limitation period for prosecution of the major crimes that are most likely to be committed by terrorists (‘Federal terrorism offenses’), as specified in section 309 of this bill,” DoJ at 301.

\(^{139}\) As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 (sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period.\footnote{United States v. De La Matta, 266 F.3d 1275, 1286 (11th Cir. 2001); United States v. Grimes, 142 F.3d 1342, 1351 (11th Cir. 1998); United States v. Morrow, 177 F.3d 272, 294 (5th Cir. 1999); Falter v. United States, 23 F.2d 420, 425-26 (2d Cir. 1928).} Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.\footnote{People v. Frazer, 24 Cal.4th 737, 759, 982 P.2d 180, 1294, 88 Cal.Rptr.2d 312, 327 (1999).}

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (\textit{Grimes}, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (\textit{Frazer}, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

\textbf{Extraterritoriality.} Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States . . . within the United States or elsewhere. . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.\footnote{United States v. Layton, 855 F.2d 1388 (9th Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); United States v. Benítez, 741 F.2d 1312 (11th Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).}

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnaping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.¹⁴⁴

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

Victims. Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11th Victim Compensation Fund legislation before it passed the Act. Consequently, the Act’s victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 et seq., and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 et seq.

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:

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• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year)(42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d)(5)), section 621(d)

• waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

• eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
• makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

• prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

• allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

• reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

• makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

• allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

• establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

**Increasing Institutional Capacity.** A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

- $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)

- necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)

- $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)

- $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816

- $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701

- $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)

- $5 million for DEA police training in South and Central Asia, section 1007.

**Miscellaneous.** Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might to used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act, or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b), 807.

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145 *I.e.*, Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).

ed. Oct. 24, 2001), and H.R. 3162 was sent to the President who signed it on October 26, 2001.

**Criminal Investigations: Tracking and Gathering Communications**

A portion of the Act addresses issues suggested originally in a Department of Justice proposal circulated in mid-September. The first of its suggestions called for amendments to federal surveillance laws, laws which govern the capture and tracking of suspected terrorists’ communications within the United States. Federal law features a three-tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications.

The tiers reflected the Supreme Court’s interpretation of the Fourth Amendment’s ban on unreasonable searches and seizures. The Amendment protects private conversations, *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967). It does not cloak information, even highly personal information, for which there is no individual justifiable expectation of privacy, such as telephone company records of calls made to and from an individual's home, *Smith v. Maryland*, 442 U.S. 735 (1979), or bank records of an individual's financial dealings, *United States v. Miller*, 425 U.S. 435 (1976).

Congress responded to *Berger* and *Katz*, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications, 18 U.S.C. 2511. At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious

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6 “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,” *U.S. Const.* Amend. IV.

7 Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
criminal cases. When approved by senior Justice Department officials, law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.

8 “The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of” one or more predicate offense, 18 U.S.C. 2516.

9 The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement), 1751 (presidential and presidential staff assassination, kidnapping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnapping, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or naturalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations, 18 U.S.C. 2518. The court notifies the parties to any conversations seized under the order after the order expires, 18 U.S.C. 2518(8).

Below Title III, the next tier of privacy protection covers some of those matters which the Supreme Court has described as beyond the reach of the Fourth Amendment protection – telephone records, e-mail held in third party storage, and the like, 18 U.S.C. 2701-2709 (Chapter 121). Here, the law permits law enforcement access, ordinarily pursuant to a warrant or court order or under a subpoena in some cases, but in connection with any criminal investigation and without the extraordinary levels of approval or constraint that mark a Title III interception, 18 U.S.C. 2703.

Least demanding and perhaps least intrusive of all is the procedure that governs court orders approving the government’s use of trap and trace devices and pen registers, a kind of secret “caller id”, which identify the source and destination of calls made to and from a particular telephone, 18 U.S.C. 3121-3127 (Chapter 206). The orders are available based on the government's certification, rather than a finding of the court, that the use of the device is likely to produce information relevant to the investigation of a crime, any crime, 18 U.S.C. 3123. The devices record no more than the identity of the participants in a telephone conversation, but neither the orders nor the results they produce need ever be revealed to the participants.

The Act modifies the procedures at each of the three levels. It:

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offense involving counterfeiting punishable under 18 U.S.C. 471, 472, or 473; (e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States; (f) any offense including extortionate credit transactions under 18 U.S.C. 892, 893, or 894; (g) a violation of 31 U.S.C. 5322 (dealing with the reporting of currency transactions); (h) any felony violation of 18 U.S.C. 2511 and 2512 (interception and disclosure of certain communications and to certain intercepting devices); (i) any felony violation of 18 U.S.C. ch. 71 (obscenity); (j) 49 U.S.C. 60123(b) (destruction of a natural gas pipeline), 46502 (aircraft piracy); (k) 22 U.S.C. 2778 (Arms Export Control Act); (l) the location of any fugitive from justice from an offense described in this section; (m) a violation of 8 U.S.C. 1324, 1327, or 1328; (n) any felony violation of 18 U.S.C. 922, 924 (firearms); (o) any violation of 26 U.S.C. 5861 (firearms); (p) a felony violation of 18 U.S.C. 1028 (production of false identification documents), 1542 (false statements in passport applications), 1546 (fraud and misuse of visas, permits, and other documents) or a violation of 8 U.S.C. 1324, 1327, or 1328 (smuggling of aliens); (p) 229 (chemical weapons), 2332 (terrorist violence against Americans overseas), 2332a (weapons of mass destruction), 2332b (multinational terrorism), 2332d (financial transactions with countries supporting terrorism), 2339A (support of terrorist), 2332B (support of terrorist organizations); (r) any conspiracy to commit any of these, 18 U.S.C. 2516(1)(crimes added by the Act in italics). Other than telephone face to face conversations (i.e., electronic communications), the approval of senior Justice Department officials is not required and an order may be sought in any felony investigation, 18 U.S.C. 2516(3).

10 Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
• permits pen register and trap and trace orders for electronic communications (e.g., e-mail)

• authorizes nationwide execution of court orders for pen registers, trap and trace devices, and access to stored e-mail or communication records

• treats stored voice mail like stored e-mail (rather than like telephone conversations)

• permits authorities to intercept communications to and from a trespasser within a computer system (with the permission of the system’s owner)

• adds terrorist and computer crimes to Title III’s predicate offense list

• reinforces protection for those who help execute Title III, ch. 121, and ch. 206 orders

• encourages cooperation between law enforcement and foreign intelligence investigators

• establishes a claim against the U.S. for certain communications privacy violations by government personnel

• terminates the authority found in many of the these provisions and several of the foreign intelligence amendments with a sunset provision (Dec. 31, 2005).

Pen Registers and Trap and Trace Devices. In section 216, the Act allows court orders authorizing trap and trace devices and pen registers to be used to capture source and addressee information for computer conversations (e.g., e-mail) as well as telephone conversations, 18 U.S.C. 3121, 3123. In answer to objections that e-mail header information can be more revealing than a telephone number, it creates a detailed report to the court, 18 U.S.C. 3123(a)(3).11

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11 “Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public the agency shall ensure that a record will be maintained which will identify—(i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of the device.

“(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof),” section 216(b)(1).
The use of pen registers or trap and trace devices was limited at one time to the judicial district in which the order was issued, 18 U.S.C. 3123 (2000 ed.). Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States, 18 U.S.C. 3123(b)(1)(C), 3127(2).\(^\text{12}\)

**Communications Records and Stored E-Mail.** With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber, 18 U.S.C. 2703(a),(b). A warrant will also suffice to seize records describing telephone and other communications transactions without customer notice, 18 U.S.C. 2703(c). In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation, officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records, 18 U.S.C. 2703(b),(c). They can obtain a limited amount of record information (subscribers’ names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena, 18 U.S.C. 2703(c)(1)(C). There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial, 18 U.S.C. 2705.

In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider’s customer records, 18 U.S.C. 2703(c)(1)(C).\(^\text{13}\)

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.

\(^{12}\) The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” *DoJ* at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

\(^{13}\) Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user’s true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” *DoJ* at §107.
Previously, only a federal court in the district in which the e-mail was stored could issue the order. Under section 220, federal courts in the district where an offense under investigation occurred may issue orders applicable “without geographic limitation,” 18 U.S.C. 2703.14

The Act, in section 209, treats voice mail like e-mail, that is, subject to the warrant or court order procedure, rather than to the more demanding coverage of Title III once required, United States v. Smith, 155 F.3d 1050, 1055-56 (9th Cir. 1998).

Finally, the Act resolves a conflict between chapter 121 and the federal law governing cable companies. Government entities may have access to cable company customer records only under a court order following an adversary hearing if they can show that the records will evidence that the customer is or has engaged in criminal activity, 47 U.S.C. 511(h). When cable companies began offering telephone and other communications services the question arose whether the more demanding cable rules applied or whether law enforcement agencies were entitled to ex parte court orders under the no-notice procedures applicable to communications providers.15 The Act makes it clear that the cable rules apply when cable television viewing services are

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14 Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

15 See e.g., DoJ at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement’s access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

**Electronic Surveillance.** To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202. A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(i). Yet only the interloper's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.

**Criminal Investigators' Access to Foreign Intelligence Information.**
The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism. It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that “the purpose for the surveillance is to obtain foreign intelligence information,” 50 U.S.C. 1804(a)(7)(B)(2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps “the purpose” might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation

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16 18 U.S.C. 229 (chemical weapons), 2332 (terrorist acts of violence committed against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2332d (financial transactions with countries which support terrorists), 2339A (providing material support to terrorists), and 2339B (providing material support to terrorist organizations).

17 “Because service providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves as permitted under current law, they often have no way to exercise their rights to protect themselves from unauthorized attackers. Moreover, such attackers can target critical infrastructures and engage in cyberterrorism,” DoJ at §106. Elsewhere the Act defines “electronic surveillance” for purposes of the Foreign Intelligence Surveillance Act (FISA) to emphasize that the law enforcement authority for this intruder surveillance does not confer similar authority for purposes of foreign intelligence gathering, section 1003 (50 U.S.C. 1801(f)(2)).

Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment's warrant clause. It is here that the “primary purpose” notion originated. In United States v. Truong Dinh Hung, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, “as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.” Subsequent case law, however, is not as clear as it might be: see e.g., United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984)(“FISA permits federal officials to obtain orders authorizing electronic surveillance ‘for the purpose of obtaining foreign intelligence information.’ The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying officials’s belief that the information sought is the type of foreign intelligence information described”); United States v. Pelton, 835 F.2d 1067, 1075-76 (4th Cir. 1987)(“We also reject Pelton’s claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial”); United States v. Sarkissian, 841 F.2d 959, 907-8 (9th Cir. 1988)(“Defendants rely on the primary purpose test articulated in United States v. Truong Dinh Hung. . . . One other court has applied the primary purpose test. Another court has rejected it . . . distinguishing Truong. A third court has declined to decide the issue. We also decline to decide the issue”); United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1991)(“Appellants attack the government’s surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance”).

20 “Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” DoJ at §153.
demanding standard than the “a purpose” threshold proposed by the Justice Department, but a clear departure from the original “the purpose” entry point. FISA once described a singular foreign intelligence focus prerequisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k), 1825(k).21

**Protective Measures.** The Act reenforces two kinds of safeguards, one set designed to prevent abuse and the other to protect those who assist the government. The sunset clause is perhaps the best known of the Act’s safeguards. Under the direction of section 224, many of the law enforcement and foreign intelligence authorities granted by the Act expire as of December 31, 2005.22 The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter

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21 “(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. (2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, infra, quoting, 50 U.S.C. 1801.

22 “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210[ subpoenas for communications provider customer records], 211[access to cable company communication service records], 213 [sneak and peek], 216[pen register and trap and trace device amendments], 221[trade sanctions], and 222[assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005. “(b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers' communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices). Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees, but could not recover against the United States. Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice's Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government's request until a court order authorizing access can be obtained. Another allows providers to disclose customer records to protect the provider's rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others. A third section,

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26 Prior law already granted service providers immunity for disclosure of customer records in compliance with a court access order, 18 U.S.C. 2703(f).
27 “Existing law contains no provision that allows providers of electronic communications service to disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies that threaten death or serious bodily injury. This section amends 18 U.S.C. §2702 to authorize such disclosures if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.

“Current law also contains an odd disconnect: a provider may disclose the contents of the customer's communications in order to protect its rights or property but the current statute does not expressly permit a provider to voluntarily disclose non-content records (such as a subscriber's login records). 18 U.S.C. 2702(b)(5). This problem substantially hinders the ability of providers to protect themselves from cyber-terrorists and criminals. Yet the right to disclose the contents of communications necessarily implies the less intrusive ability to disclose non-content records. In order to promote the protection of our nation's critical infrastructures, this section's amendments allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems,” DoJ at
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

Foreign Intelligence Investigations

Although both criminal investigations and foreign intelligence investigations are conducted in the United States, criminal investigations seek information about unlawful activity; foreign intelligence investigations seek information about other countries and their citizens. Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough.

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA), something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President's authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, United States v. United States District Court, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage

§110.

28 Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

29 Thus in the name of assisting in the execution of Title III, chapter 121, or chapter 206 order, the courts may not cite the Act as the basis for an order compelling a service provider to make system modifications or provide any other technical assistance not already required under 18 U.S.C. 2518(4), 2706, or 3124(c), see, H.R.Rep.No. 107-236, at 62-3 (2001) (emphasis added) (“This Act is not intended to affect obligations under Communications Assistance for Law Enforcement Act [which addresses law enforcement-beneficial system modifications and the compensation to be paid for the changes], nor does the act impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance”).

30 E.g., As amended by section 902 of the Act, “foreign intelligence” means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2)(language added by the Act in italics).

31 50 U.S.C. 1801 et seq.
In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs. There were and still are extra


33 “As used in this subchapter: (a) ‘Foreign power’ means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

“(b) ‘Agent of a foreign power’ means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C).

“(c) ‘International terrorism’ means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnapping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

“(d) ‘Sabotage’ means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

“(e) ‘Foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans (“United States persons,” i.e., citizens or permanent resident aliens).\textsuperscript{34} The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

• permits “roving” surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)

• increases the number of judges on the FISA court from 7 to 11

• allows application for a FISA surveillance or search order when gathering foreign intelligence is \textit{a significant} reason for the application rather than \textit{the} reason

• authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations

• sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses

• carries a sunset provision

• establishes a claim against the U.S. for certain communications privacy violations by government personnel

• expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

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agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to – (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States,” 50 U.S.C. 1801.

\textsuperscript{34} Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
**FISA.** FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases. It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

**Search and Surveillance for Intelligence Purposes.** Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, Draft at §151.36

Section 901 of the Act address a concern raised during the 106th Congress relating to the availability of the FISA orders and the effective use of information gleaned from the execution of a FISA order.37 It vests the Director of Central


36 See also, DoJ at §151, “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order’s minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed (50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

37 See e.g., S.Rep.No. 106-352, at 3, 6, 7 (2000)(“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application
process, as interpreted by the OIPR is administratively burdensome and, at times, extremely slow. Many applications undergo months of scrutiny before submission to the court because the OIPR prescribes standards and restrictions not imposed by the statute. . . . In particular, the OIPR has been criticized for an overly restrictive interpretation of the FISA ‘currency’ requirement. This is the issue of how recent a subject’s activities must be to support a finding of probable cause that the subject is engaged in clandestine intelligence gathering activities. . . . While existing law does not specifically address past activities,‘ it does not preclude, and legislative history supports, the conclusion that past activities may be part of the totality of circumstances considered by the FISC in making a probable cause determination. . . . By definition, information collected pursuant to a court order issued under the Foreign Intelligence Surveillance Act is foreign intelligence not law enforcement information. Accordingly, the Committee wants to clarify that the FISA ‘take’ can and must be shared by the Federal Bureau of Investigation with appropriate intelligence agencies. For the intelligence mission of the United States to be successful, there must be a cooperative and concerted effort among intelligence agencies. Any information collected by one agency under foreign intelligence authorities that could assist another agency in executing its lawful mission should be shared fully and promptly. Only then can the United States Government pursue aggressively important national security targets including, for example, counterterrorist and counternarcotics targets”); see also, 147 Cong.Rec. S799-803 (daily ed. Feb. 24, 2000)(remarks of Sens. Specter, Torricelli and Biden).

38 “When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevance, an additional factual showing that the communications device has been used to contact an ‘agent of a foreign power’ engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the ‘agent of a foreign power’ prong from the predication, and thus makes the FISA authority more closely track the criminal authority,” DoJ at §155.
Section 214 adjusts the language of the FISA pen register-trap and trace authority to permit its use to capture source and destination information relating to electronic communications (e.g., e-mail) as well as telephone communications, 50 U.S.C. 1842(d). The section makes it clear that requests for a FISA pen register-trap and trace order, like requests for other FISA orders, directed against Americans (U.S. persons) may not be based solely on activities protected by the First Amendment, 50 U.S.C. 1842, 1843.

**Third Party Cooperation and Tangible Evidence.** As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target’s activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.40

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39 Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise to be entitled to confidentiality. Section 505, in response to the Justice Department's suggestion, allows FBI field offices to make the requests, see DoJ at §157 (“At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports”).

40 When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court’s order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.’ This would enhance the FBI’s ability to monitor international terrorists and intelligence officers who are
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian.41 The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities,42 in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B));
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a);
- the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a);
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v;

41 The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigative contexts. The time and difficulty involved in getting such pleadings before the Court usually outweighs the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” DoJ at §156.

42 Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.43

Access to Law Enforcement Information. Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community's access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, Draft at §103.44

43 H.R.Rep.No. 107-205, at 60-1 (2001)(“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

“The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

“Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual’s credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding--without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information”).

44 See also, DoJ at §103, “This section facilities the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, *Draft* at §354.45

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, *Draft* at §154.46

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion.47 It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions.”

45 See also, DoJ at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.” Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officers.

46 See also, DoJ at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”

47 Blair v. United States, 250 U.S. 273, 281 (1919) (the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

49 Beale & Felman, *The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy*, 25 HArvard Journal of Law & Public Policy 699, 719-20 (2002)(“There is a significant danger that the rule permitting disclosure will be treated as the de facto authorization of an expansion of the grand jury’s investigative role to encompass seeking material relevant only to matters of national security, national defense, immigration, and so forth. The grand jury’s awesome powers should not be unwittingly extended to a much wider range of issues. . . Since the grand jury operates in secret, there are no public checks on the scope of its investigations, and witnesses are not permitted to challenge its jurisdiction. Only the supervising court is in a position to keep the grand jury’s investigation within proper bounds. Requiring judicial approval of foreign intelligence and counterintelligence information disclosures would provide a natural check against the temptation to manipulate the grand jury to develop information for unauthorized purposes”); but see, Scheidegger et al., *Federalist Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6* (Nov. 2001)(“The grand jury secrecy rule is a rule of policy which has always had exceptions, and it has been frequently modified. The secrecy rule has no credible claim to constitutional stature”).

48 These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).
Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

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51 “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person’s official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification.\(^5\) By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.\(^5\)

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

**Increasing Institutional Capacity.** As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a

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\(^5\) *Duncan v. Walker*, 121 S.Ct. 2120, 2125 (2001) (internal quotation marks and parallel citations omitted) (“It is our duty to give effect, if possible, to every clause and word of a statute. *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)); see also *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879) (As early as in Bacon's Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage in any setting. *Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687, 698 (1995); see also *Ratzlaf v. United States*, 510 U.S. 135, 140 (1994)").

It is not possible to conclude that Congress intended the universal subsection (d) to apply until sunset and the grand jury and Title III subsections (a), (b), and (c) to operate thereafter, because the Title III subsection expires at the same time as the universal subsection.

\(^5\) *Draft* at §154, “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [*i.e. Title III*]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”
computerized translation capability to be used in foreign intelligence gathering.\textsuperscript{54} Section 907 instructs the Director of the Central Intelligence, in consultation with the Director of the FBI, to report on the creation of a National Virtual Translation Center. The report is to include information concerning staffing, allocation of resources, compatibility with comparable systems to be used for law enforcement purposes, and features which permit its efficient and secure use by all of the intelligence agencies.

**Money Laundering**

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture.\textsuperscript{55} The Act bolsters federal efforts in each area.

**Regulation.** Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.\textsuperscript{56}

\textsuperscript{54} “The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

“The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so,” S.Rep.No. 107-63, at 11 (2001).


\textsuperscript{56} See e.g., 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
Records and Reports. For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. § 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. § 103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department's Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. § 103.18. Money transmission businesses and those that deal in traveler's checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. § 103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to file SARs as well, reflecting Congress’ view that the information provided the IRS may be valuable for other law enforcement purposes. This concern is likewise


58 H.R.Rep.No. 107-250, at 38-9 (2001)."Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

"Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a 'Safeguard Procedures Report' which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

"While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement
reflected in section 357 which asks the Secretary of the Treasury to report on the Internal Revenue Service’s role in the administration of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311 et seq.), and what transfers of authority, if any, are appropriate.

Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action. Section 355 expands the immunity to cover disclosures in

59 “Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

“First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor from civil liability applies in arbitration, as well as judicial, proceedings. Second, it amends section 5318(g)(3) to clarify the safe harbor’s coverage of voluntary disclosures (that is, those not covered by the SAR regulatory reporting requirement). The language in section 5318(g)(3)(A) providing that ‘any financial institution that *** makes a disclosure pursuant to *** any other authority *** shall not be liable to any person’ is not intended to avoid the application of the reporting and disclosure provisions of the Federal securities laws to any person, or to insulate any issuers from private rights of actions for disclosures made under the Federal securities laws.

“Subsection [351](b) amends section 5318(g)(2) of title 31--which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed--to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee's official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
employment references to other insured depository financial institutions provided disclosure is not done with malicious intent.\footnote{31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 66 (2001).}

The Financial Crimes Enforcement Network (FinCEN), a component within the Treasury Department long responsible for these anti-money laundering reporting and record-keeping requirements, 31 C.F.R. pt. 103, was administratively created in 1990 to provide other government agencies with an “intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes,” 55 Fed.Reg. 18433 (May 2, 1990).

The Act, in section 361, makes FinCEN a creature of statute, a bureau within the Treasury Department, 31 U.S.C. 310. Section 362 charges it with the responsibility of establishing a highly secure network to allow financial institutions to file required reports electronically and to permit FinCEN to provide those institutions with alerts and other information concerning money laundering protective measures, 31 U.S.C. 310 note.

Special Measures. In extraordinary circumstances involving international financial matters, the Act grants the Secretary of the Treasury, in consultation with other appropriate regulatory authorities, the power to issue regulations and orders involving additional required “special measures” and additional “due diligence” requirements to combat money laundering. The special measure authority, available under section 311, comes to life with the determination that particular institutions, jurisdictions, types of accounts, or types of transactions pose a primary money
laundering concern. These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

31 U.S.C. 5318A. The circumstances considered in the case of a suspect jurisdiction are: evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction’s banking regulation; the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’ including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate
business transactions.

Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent’ account for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information that it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed
**Due Diligence.** Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.63

63 See generally, H.R.Rep. No. 107-250, at 71-2 (“Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

“The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

“The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

“For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
**General Regulatory Matters.** The Act establishes several other regulatory mechanisms directed at the activities involving U.S. financial institutions and foreign individuals or institutions. Section 313, for instance, in another restriction on correspondent accounts for foreign financial institutions, prohibits U.S. financial institutions from maintaining correspondent accounts either directly or indirectly for foreign shell banks (banks with no physical place of business\(^\text{64}\)) which have no affiliation with any financial institution through which their banking activities are subject to regulatory supervision.\(^\text{65}\)

The Act, in section 325, empowers the Secretary of the Treasury to promulgate regulations to prevent financial institutions from allowing their customers to conceal their financial activities by taking advantage of the institutions’ concentration account practices.\(^\text{66}\)

The Secretary of the Treasury is instructed in section 326 to issue regulations for financial institutions’ minimum new customer identification standards and record-
keeping and to recommend a means to effectively verify the identification of foreign customers.\footnote{31 U.S.C. 5318(l); H.R.Rep.No. 107-250, at 62-3 (2001)(“Section [326](a) amends 31 U.S.C. 5318 by adding a new subsection governing the identification of account holders. Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a ‘street name’ or omnibus account in the broker-dealer's name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to ‘look through’ the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund's customers. Thus, the fund would not be required to ‘look through’ the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).}
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature. 68

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

**Reports to Congress.** Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

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exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.\footnote{31 U.S.C. 5313 note; H.R.Rep.No. 107-205, at 65 (2001).}

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

**International Cooperation.** Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.\footnote{H.R.Rep.No. 107-250, at 67 (2001)("This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury's progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

“The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime").}
**Crimes.** Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, smuggling, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
expands 18 U.S.C. 1956 to cover financial transactions conducted in foreign financial institutions.\(^71\)

Section 329 makes it a federal crime to corruptly administer the money laundering regulatory scheme. Offenders are punishable by imprisonment for not more than 15 years and a fine of not more than three times the amount of the bribe.

Section 5326 of title 31 authorizes the Secretary of the Treasury to impose temporary, enhanced reporting requirements upon financial institutions in areas victimized by substantial money laundering activity (geographic targeting regulations and orders). Section 353 makes it clear that the civil sanctions, criminal penalties, and prohibitions on smurfing (structuring transactions to evade reporting requirements) apply to violations of the regulations and orders issued under 31 U.S.C. 5326.\(^72\) It also extends the permissible length of the temporary geographical orders from 60 to 180 days.

Violations of the special measures and special due diligence requirements of sections 311 and 312 are subject to both civil and criminal penalties by virtue of section 363's amendments to 31 U.S.C. 5321(a) and 5322. The amendments authorize civil penalties and criminal fines of twice the amount of the transaction but not more than $1 million. Criminal offenders would be subject to a fine in the same amount.

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\(^71\) “[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

“The definition of ‘financial institution’ in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of ‘commercial bank’ or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad--say to a Mexican bank--and launders them through a series of financial transactions, the government conceivably could not rely on the definition of a ‘financial institution’ in 1956(c)(6) to establish that the transaction was a ‘financial transaction’ within the meaning of 1956(c)(4)(B) (defining a ‘financial transaction’ as a transaction involving the use of a ‘financial institution’), or that it was a ‘monetary transaction’ within the meaning of 1957(f) (defining ‘monetary transaction’ as, inter alia, a transaction that would be a ‘financial transaction’ under 1956(c)(4)(B)).

“Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launders the proceeds of one of the crimes set forth on a list of ‘specified unlawful activities.’ 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),” H.R.Rep.No. 107-250, at 38 (2000).

Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960. 73

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents. 74 They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

73 “The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business.

“Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.

“Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive,” H.R.Rep.No. 107-250, at 54 (2001).

74 “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
• 18 U.S.C. 476 (taking impressions of tools used for obligations and securities) from 10 to 25 years;
• 18 U.S.C. 477 (possessing or selling impressions of tools used for obligations or securities) from 10 to 25 years;
• 18 U.S.C. 484 (connecting parts of different notes) from 5 to 10 years;
• 18 U.S.C. 493 (bonds and obligations of certain lending agencies) from 5 to 10 years;
• 18 U.S.C. 478 (foreign obligations or securities) from 5 to 20 years;
• 18 U.S.C. 479 (uttering counterfeit foreign obligations or securities) from 3 to 20 years;
• 18 U.S.C. 480 (possessing counterfeit foreign obligations or securities) from 1 to 20 years;
• 18 U.S.C. 481 (plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities) from 5 to 25 years;
• 18 U.S.C. 482 (foreign bank notes) from 2 to 20 years; and
• 18 U.S.C. 483 (uttering counterfeit foreign bank notes) from 1 to 20 years.

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

**Bulk Cash.** Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act’s bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting.75

The section appears to be the product of reactions to the Supreme Court’s decision in *United States v. Bajakian*, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court’s

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75 “For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).
As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency – representing the proceeds of drug trafficking and other criminal offenses – is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad...

Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United States without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute,” H.R. Rep. No. 107-250 at 36-7 (2001).

Extraterritorial Jurisdiction. The Act makes 18 U.S.C. 1029, the federal statute condemning various crimes involving credit cards, PIN numbers and other access devices, applicable overseas if the card or device is issued by or controlled by an American bank or other entity and some article is held in or transported to or through the United States during the course of the offense, section 377. The change was part of the original Justice Department proposals. Justice explained that, “[financial crime] admits of no border, utilizing the integrated global financial network for ill purposes. This provision would apply the financial crimes prohibitions to conduct committed abroad, so long as the tools or proceeds of the crimes pass through or are in the United States,” DoJ at §408. The section, however, appears to limit the otherwise applicable extraterritorial jurisdiction implicit in section 1029, since federal courts would likely recognize extraterritorial jurisdiction over a violation...

Section 5317 of title 31 once called for civil forfeiture of property traceable to a violation of 31 U.S.C. 5316 (reports on exporting or importing money instruments worth $10,000 or more). Section 372 of the Act recasts section 5317 to provide for civil and criminal forfeitures for violations of 31 U.S.C. 5316, of 31 U.S.C. 5313 (reports on domestic coins and currency transactions involving $10,000 or more) and of 31 U.S.C. 5324 (structuring transactions to evade reporting requirements (smurfing)).

Examination of forfeiture in false reporting cases under the Constitution’s Excessive Fines Clause.

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under either circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.77

**Venue.** Section 1004 relies on *dicta* in *United States v. Cabrales*, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering,78 in the state and district in which the monetary transaction takes place. The Supreme Court in *Cabrales* held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in *dicta*, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.79

**Forfeiture.** Forfeiture is the government confiscation of property as a consequence of crime.80 The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 et seq. (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

**Constitutional Considerations.** The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 et seq., which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the

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78 “The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed,” *U.S.Const.* Art.III, §2, cl.3.

79 “[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,” *U.S.Const.* Amend. VI.

80 For general background information, see, Doyle, *Crime and Forfeiture*, CRS REP.NO. 97-139A (Oct. 11, 2000).
jurisdiction of the United States, belonging to any foreign individual, foreign entity, or foreign country whom they determine to have planned, authorized, aided or engaged in an attack on the United States by a foreign country or foreign nationals. The section also permits the government to present secretly (ex parte and in camera) any classified information upon which the forfeiture was based should the decision be subject to judicial review. The Justice Department requested the section as a revival of the President’s powers in times of unconventional wars. By virtue of section 316, property owners may initiate a challenge to a confiscation by filing a claim under the rules applicable in maritime confiscations. The section permits two defenses to forfeiture – that the property is not subject to confiscation under section 106 or that the claimant is entitled to the innocent owner defense of 18 U.S.C. 983(d). The characterization of the defenses as “affirmative defense” indicates that the claimant bears the burden of proof. The innocent owner defenses of 18 U.S.C. 983(d) are probably not available in cases under section 106, since that section is explicitly

81 “This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App.U.S.C. §5(b).

“This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress's war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

“The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2),” DoJ at §159.

82 “An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
excepted from the coverage of 18 U.S.C. 983. The challenge proceedings permit the court to admit evidence, such as hearsay evidence, that would not otherwise be admissible under the Federal Rules of Evidence if the evidence is reliable and if national security might be imperiled should dictates of the Federal Rules be followed, §316(b). The section recognizes the rights of claimants to proceed alternatively under the Constitution or the Administrative Procedure Act.

The Justice Department also recommended enactment of an overlapping provision which ultimately passed as section 806 of the Act without any real discussion of the relationship of the two sections. Section 806 authorizes confiscation of all property, regardless of where it is found, of any individual, entity, or organization engaged in domestic or international terrorism (as defined in 18 U.S.C. 2331), against the United States, Americans or their property, 18 U.S.C.

83 18 U.S.C. 983(i)(2)(D).

84 “The exclusion of certain provisions of Federal law from the definition of the term ‘civil forfeiture statute’ in section 983(i) of title 18, United States Code, shall not be construed to deny an owner of property the right to contest the confiscation of assets of suspected international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C) subchapter II of chapter 5 of title 5, United States Code (commonly known as the ‘Administrative Procedure Act’).” Sec. 316(c)(1).

85 “Current law does not contain any authority tailored specifically to the confiscation of terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available current forfeiture laws require detailed tracing that is quite difficult for accounts coming through the banks of countries used by many terrorists.

‘This section increases the government’s ability to strike at terrorist organizations’ economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001,” DoJ, at §403. The House Report on H.R. 2975 which contained versions of both sections is no more explicit on the relation of the two sections.

86 “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
Section 806 as discussed below also calls for the more common confiscation of property derived from and or facilitating acts of domestic or international terrorism against the United States or its citizens. Confiscations under 806 may be challenged under the procedures of 18 U.S.C. 983, since they are not exempted there. To the extent that forfeiture under section 806 is based on international rather than domestic terrorism, claimants may also use the procedures of section 316.

Confiscation based solely on the fact that the property is owned by a criminal offender, rather than that it is derived from or facilitates some crime is fairly uncommon. It is the mark of common law forfeiture of estate. At common law, a felon forfeited all of his property. Most contemporary forfeiture statutes employ statutory forfeiture, a more familiar presence in American law, which consists of the confiscation of things whose possession is criminal, of the fruits of crime, and of the means of crime – untaxed whiskey, the drug dealer’s profits, and the rum runner’s ship.

Three characteristics set forfeiture of estate apart. The property is lost solely by reason of its ownership by a felon. All of a felon’s property is confiscated, not merely that which is related to the crime for which he is convicted. Finally, it occasions attainder which negates the felon’s right to hold property or for title to property to pass through him to his heirs. It was with this in mind, that the Framers declared that "no attainder of treason shall work corruption of blood or forfeiture exception during the life of the person attainted." And for this reason, President Lincoln insisted that the confiscated real estate of Confederate supporters should revert their heirs at death.

87 Austin v. United States, 509 U.S. 602, 611-12 (1993)(“Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture . . . . Of England’s three kinds of forfeiture, only the third took hold in the United States”).


89 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal in personam proceedings following criminal conviction as a means of accomplishing confiscation.
Neither section 106 nor 806 require conviction of the terrorist property owner.\textsuperscript{90} Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers.\textsuperscript{91} The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners.\textsuperscript{92} Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them.\textsuperscript{93} The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate

\textsuperscript{90} Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c)(“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act”).

\textsuperscript{91} Silesian American Corp. V. Clark, 332 U.S. 469 (1947); cf., Societe Internationale v. Rogers, 357 U.S. 197, 211 (1958)(“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).

\textsuperscript{92} Zittman v. McGrath, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’”).

any presumption of remedial purposes. The same has been said of the applicability of the ex post facto clause.

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO. If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

Other Forfeiture Amendments. In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.


95 See e.g., United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.), 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994).

96 DoJ, at §403.

97 18 U.S.C. 1956(b). Cf., H.R.Rep.No. 107-250, at 54-5 (2001)(“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas. Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted

American Bank, 191 F.3d 30 (1st Cir. 1999).

“The second provision, modeled on 18 U.S.C. 1345(b), gives the district court the power to restrain property, issue seizure warrants, or take other action necessary to ensure that a defendant in action covered by the statute does not dissipate the assets that would be needed to satisfy a judgment.

“This section also authorizes a court, on the motion of the Government or a State or Federal regulator, to appoint a receiver to gather and protect assets needed to satisfy a judgment under sections 1956 and 957, and the forfeiture provisions in sections 981 and 982. This authority is intended to apply in three circumstances: (1) when there is a judgment in a criminal case, including an order of restitution, following a conviction for a violation of section 1956 or 1957; (2) when there is a judgment in a civil case under section 1956(b) assessing a penalty for a violation of either section 1956 or 1957; and (3) when there is a civil forfeiture judgment under section 981 or a criminal forfeiture judgment, including a personal money judgment, under section 982.

“The amendment also makes section 1956(b) applicable to violations of section 1957. It applies to conduct occurring before the effective date of the Act”).

98 18 U.S.C. 981(k). H.R.Rep.No. 107-250, at 57-8 (2001)(“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank's customers.

“Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank's correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

“The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”).
Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here.\(^{100}\) Section 320 enlarges this provisions to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements.\(^{101}\) This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.\(^{102}\)

\(^{99}\) Cf., H.R.Rep.No. 107-250, at 58-9 (2001) (“Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of ‘substitute assets’ when the defendant has placed the property otherwise subject to forfeiture ‘beyond the jurisdiction of the court.’ Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

“This section amends 21 U.S.C. 853 to make clear that a court in a criminal case may issue a repatriation order—either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. 853(e) to restrain property—so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both”).

\(^{100}\) 18 U.S.C. 981(a)(1)(B).

\(^{101}\) H.R.Rep.No. 107-250, at 56 (2001) (“This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act”).

\(^{102}\) H.R.Rep.No. 107-250, at 59-60 (2001) (“Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country.

“Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
A fugitive may not challenge a federal forfeiture.\(^\text{103}\) Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in “order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.”

to contest the restraining order could do so on the ground that 28 U.S.C. 2467 was not properly applied to the particular case, but could not oppose the restraining order on any ground that could also be raised in the proceedings pending in a foreign court. This provision prevents a litigant from taking ‘two bites at the apple’ by raising objections to the basis for the forfeiture in the Federal court that he also raised, or is entitled to raise, in the foreign court where the forfeiture action is pending. It complements the existing provision in section 2467(e) providing that the Federal court is bound by the findings of fact of the foreign court, and may not look behind such findings in determining whether to enter an order enforcing a foreign forfeiture judgment.

“This section also amends 28 U.S.C. 2467 to make clear that it is not necessary to prove that the person asserting an interest in the property received actual notice of the forfeiture proceedings. As is the case with respect to forfeitures under U.S. law, it is sufficient if the foreign nation takes steps to provide notice, in accordance with the principles of due process. See Gonzalez v. United States, 1997 WL 278123 (S.D.N.Y. 1997) (‘[t]he [G]overnment is not required to ensure actual receipt of notice that is properly mailed’); Albajon v. Gugliotta, 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant’s identifications, and mailed after claimant released from jail, is sufficient to satisfy due process, even if claimant never received notice); United States v. Schiavo, 897 F. Supp. 644, 648 49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; due process satisfied even if he did not receive the notice).

“Finally, 28 U.S.C. 2467 is amended to authorize the enforcement of a forfeiture judgment based on any foreign offense that would constitute an offense giving rise to a civil or criminal forfeiture of the same property if the offense had been committed in the United States. This is one of two safeguards that the statute contains against the enforcement of judgments that the United States does not consider appropriate for enforcement: if the judgment is based on an act that would not constitute a crime in the United States, such as removing assets from the reach of a repressive regime, it could not be enforced. In addition, section 2467 already provides that a foreign judgment may only be enforced by a Federal court at the request of the United States, and only after the Attorney General has certified that the judgment was obtained in accordance with the principles of due process. Thus, neither a foreign Government nor a foreign private party could enforce a foreign judgment on its own under this provision.”\(^\text{103}\). Note that the safeguard to which the report refers is the range of foreign offenses that will support an enforceable confiscation order, \textit{i.e.}, drug offenses and crimes on the money laundering predicate offense list, and that the amendment narrows that safeguard by adding additional foreign offenses, \textit{i.e.}, any foreign equivalent of a federal crime which would support a confiscation order.

\(^{103}\) 28 U.S.C. 2466.
Alien Terrorists and Victims

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

Border Protection. The border protection provisions:

- authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401

- authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402

- remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404

- authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405

- authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.

- instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007

- direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418

- express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414

- add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415

- call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416

- limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).

Detention and Removal. Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity, 8 U.S.C. 1227 (a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(iv). Aliens may be inadmissible for any number of terrorism-related reasons, 8 U.S.C. 1182 (a)(3)(B). Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported.


Section 411 defines “terrorist organization” to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the Federal Register as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C.
Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).


An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in “premeditated, politically motivated violence perpetrated against noncombatant targets,” or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien’s release would threaten national security or endanger some individual or the general public. The Attorney General’s determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

Victims. The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

- permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421
- extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422

105 “The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

106 “The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks.

“The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application.

“Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

“Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 31.

“Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.


107 “Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

“The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

“The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death),” H.R.Rep.No. 107-236, at 68 (2001).

108 “Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien’s 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien’s 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
• a denial of benefits of the Act to terrorists and their families, section 427

• authority for the Attorney General to establish evidentiary standards to implement the alien victim provisions of the Act, section 426.

Other Crimes, Penalties, & Procedures

New Crimes. The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department, the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offenses for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents, 18 U.S.C. 175b. Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.

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109 “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . . .” DoJ at §305.

110 The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

111 “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2)(“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.\textsuperscript{112}

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D). The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

\textsuperscript{112} U.S. Const. Art.III, §2, cl.3 (“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . . .”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . . .”); United States v. Cabrales, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from Cabrales when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnaping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999)(“By way of comparison, last Term in [Cabrales] we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).
The Justice Department sought the expansion along with the enlargement of the predicate offense list, "18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of `material support or resources' is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill ('Federal terrorism offenses')," DoJ, at §304.

Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.115


113 The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of 'material support or resources' is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill ('Federal terrorism offenses'),” DoJ at 306.


115 "The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill ('Federal terrorism offenses') is used in identifying the relevant crimes,” DoJ, at §304.

New Penalties. The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. 3571(b),(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense.117

The proposal, however, failed to identify the critical elements that would trigger the alternative.118 Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

- for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

- for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

117 “Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersede lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,”DoJ, at §302.

118 “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense;” Draft at §302.
The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object of offense — see e.g., 21 U.S.C. §846 (drug crimes) — but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

This section accordingly adds a new §2332c to the terrorism chapter of the criminal code — parallel to the drug crime conspiracy provision in 21 U.S.C. §846 — which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.

• for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;

• for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;

• for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;

• for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and

• for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism. Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:

• arson committed within a federal enclave, 18 U.S.C. 81;
• killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);
• destruction of communications facilities, 18 U.S.C. 1362;
• destruction of property within a federal enclave, 18 U.S.C. 1363;
• causing a train wreck, 18 U.S.C. 1922;
• providing material support to a terrorist, 18 U.S.C. 2339A;
• torture committed overseas under color of law, 18 U.S.C. 2340A;
• sabotage of a nuclear facility, 42 U.S.C. 2284;

119 “The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §§846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

“This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.
• interfering with a flight crew within U.S. special aircraft jurisdiction, 49 U.S.C. 46504;
• carrying a weapon or explosive abroad an aircraft within U.S. special aircraft jurisdiction, 49 U.S.C. 46505; and
• sabotage of interstate gas pipeline facilities, 49 U.S.C. 60123.

When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years). The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission), a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

120 Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

121 “Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.

“This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders).122

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

**Other Procedural Adjustments.** In other procedural adjustments designed to facilitate criminal investigations, the Act:

- increases the rewards for information in terrorism cases
- expands the Posse Comitatus Act exceptions
- authorizes “sneak and peek” search warrants
- permits nationwide and perhaps worldwide execution of warrants in terrorism cases
- eases government access to confidential information
- allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
- lengthens the statute of limitations applicable to crimes of terrorism
- clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
- adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B.123

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122 It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, e.g., damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

**Rewards.** The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L.105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism.\(^{124}\)

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

**Posse Comitatus.** The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.\(^{125}\)

**Delayed notification of a search (sneak and peek).** Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take

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\(^{124}\) The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct threat assessments for federal agencies, and to reimburse federal agencies for the costs of detaining terrorist suspects overseas.

\(^{125}\) For a general discussion of the Posse Comitatus Act, see, Doyle, *The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law*, CRS REP.NO. 95-964 (June 1, 2000).
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, Richards v. Wisconsin, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, Wilson v. Arkansas, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, Dalia v. United States, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, cf., United States v. Miller, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, United States v. Freitas, 800 F.2d 1451, 1453 (9th Cir. 1986).126

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126 The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in United States v. New York Telephone Co., 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth
Amendment, demands that surreptitious entries be closely circumscribed,” United States v. Freitas (Freitas I), 800 F.2d 1451, 1455-456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, United States v. Freitas (Freitas II), 856 F.2d 1425 (9th Cir. 1988).

“[N]o provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in Dalia v. United States, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in Dalia, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property. . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. See United States v. New York Telephone Co., 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . . Although the Freitas I court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in United States v. Villegas, 899 F.2d 1324 (1999). Although the Freitas I court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in Villegas. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the Freitas I court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” United States v. Pangburn, 983 F.2d 449, 453-55 (2d Cir. 1993).

In Simons, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
The Justice Department urged that the conflict be resolved with a uniform rule which permitted sneak and peek warrants under the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage. 129

The Act, in section 213, stops short of the Justice Department proposal. Characterized as a codification of the Second Circuit decision, 147 Cong.Rec. H7197 (daily ed. Oct. 23, 2001), the Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C. 3103a. Its sneak and peek authorization reaches all federal search and seizure warrants where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (e.g., risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (e.g., jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, i.e., in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation. 130 The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

Fourth Amendment does not mention notice, and the Supreme Court has stated that the constitution does not categorically proscribe covert entries, which necessarily involve a delay in notice. And insofar as the August search satisfied the requirements of the Fourth Amendment, i.e., it was conducted pursuant to a warrant based on probable cause issued by a neutral and detached magistrate, we perceive no basis for concluding that the 45-day delay in notice rendered the search unconstitutional. Having concluded that the Rule 41(d) violation at issue here did not infringe on Simons' constitutional rights, we must now evaluate his argument that the violation was deliberate. . . . The district court did not address the intent issue when it ruled on Simons' motion to suppress. . . . We therefore remand for the district court to consider whether the Government intentionally and deliberately disregarded the notice provision of Rule 41(d) when it carried out the August 6, 1998 search,” 206 F.3d at 403.

129 “The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities,” DoJ at §353.

130 Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department’s initial proposal, the Department’s justification does not address the question.
constitutionally “reasonable,” that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

**Nationwide terrorism search warrants.** The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either “within or outside the district,” (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases. The provision may anticipate execution both in this country and overseas. The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage. Neither Rule 41 nor any other provision of federal

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131 The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum... (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

132 The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

133 *United States v. Barona*, 56 F.3d 1087, 1092 (9th Cir. 1995)(“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994)(“if American law enforcement officials substantially participated in the search or if the
law apparently contemplated extraterritorial execution, cf., F.R.Crim.P.41, Advisory Committee Notes: 1990 Amendment (discussing a proposal for extraterritorial execution that the Supreme Court rejected). 134

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person” within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” F.R.Crim.P. 41, Advisory Committee Notes: 1990 Amendment. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

**Terrorists’ DNA.** The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards *per se.* 135 Existing federal law allowed the Attorney General to collect samples from

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134 The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, see, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), reprinted, 78 Cong.Rec. 4982-983 (1934)(“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.)(conferring judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

135 Roe v. Marcotte, 193 F.3d 72 (2d Cir. 1999); Shaffer v. Saffle, 148 F.3d 1180 (10th Cir. 1998); Rise v. Oregon, 59 F.3d 1556 (9th Cir. 1995); Jones v. Murray, 962 F.2d 302 (4th Cir. 1992).
Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples form convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes,” DoJ at §353.

For a general discussion, see, Fischer, DNA Identification: Applications and Issues, CRS REP.NO. RL30717 (Jan. 12, 2001).

Access to Educational Records. Finally, the Act calls for an ex parte court order procedure under which senior Justice Department officials may seek authorization to collect educational records relevant to an investigation or prosecution of a crime of terrorism, section 507 (as an exception to the confidentiality requirements of the General Education Provisions Act, 20 U.S.C. 1232g), section 508 (as an exception to the confidentiality requirements of the National Education Statistics Act, 20 U.S.C. 9007).

Statute of Limitations. Prosecution for murder in violation of federal law may be initiated at any time, 18 U.S.C. 3281. A five year statute of limitations applied for most other federal crimes before passage of the Act, with a few exceptions. Among the relevant exceptions were an eight year statute of limitations for several terrorist offenses, 18 U.S.C. 3286, and a ten year statute of limitations for a few arson and explosives offenses, 18 U.S.C. 3295. The Justice Department recommended the elimination of a statute of limitations in terrorism cases.

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For a general discussion, see, Fischer, DNA Identification: Applications and Issues, CRS REP.NO. RL30717 (Jan. 12, 2001).

137 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

138 “This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

“This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in
The Act takes less dramatic action in section 809. It eliminates the statute of limitations for any crime of terrorism\(^\text{139}\) that risks or results in a death or serious bodily injury, 18 U.S.C. §3286. In the absence of such a risk or result, all other terrorism offenses become subject to the eight year statute of limitations unless already covered by the ten year statute for explosives and arson offenses, 18 U.S.C. §3286.

Application of the statute of limitations rarely provokes a constitutional inquiry. Nevertheless, due process precludes prosecution when it can be shown that pre-indictment delay “caused substantial prejudice to [a defendant’s] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.”\(^\text{140}\) Moreover, a judicial difference of opinion has appeared in those cases

connection with the September 11, 2001 terrorist attacks. The constitutionality of such retroactive applications of changes in statutes of limitations is well-settled. See, e.g., *United States v. Grimes*, 142 F.3d 1342, 1350-51 (11th Cir. 1998); *People v. Frazer*, 982 P.2d 180 (Cal. 1999).

“Existing federal law (18 U.S.C. §3282) bars prosecuting most offenses after five years. 18 U.S.C. §3286, as currently formulated, extends the limitation period for prosecution for certain offenses that may be committed by terrorists – but only to eight years. While this is a limited improvement over the five-year limitation period for most federal offenses, it is patently inadequate in relation to the catastrophic human and social costs that frequently follow from such crimes as destruction of aircraft (18 U.S.C. §32), aircraft hijackings (49 U.S.C. §§46502, 46504-06), attempted political assassinations (18 U.S.C. §§351, 1116, 1751), or hostage taking (18 U.S.C. §1203). These are not minor acts of misconduct which can properly be forgiven or forgotten merely because the perpetrator has avoided apprehension for some period of time. Anomalously, existing law provides longer limitation periods for such offenses as bank frauds and certain artwork thefts (18 U.S.C. §§3293-94) than it does for crimes characteristically committed by terrorists.

“In many American jurisdictions, the limitation periods for prosecution for serious offenses are more permissible than those found in federal law, including a number of states which have no limitation period for the prosecution of felonies generally. While this section does not go so far, it does eliminate the limitation period for prosecution of the major crimes that are most likely to be committed by terrorists (‘Federal terrorism offenses’), as specified in section 309 of this bill,” *DoJ* at 301.

\(^{139}\) As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 (sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period.\textsuperscript{141} Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.\textsuperscript{142}

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (Grimes, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (Frazer, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

**Extraterritoriality.** Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States or elsewhere. . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.\textsuperscript{143}

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnapping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.

\textsuperscript{141} United States v. De La Matta, 266 F.3d 1275, 1286 (11th Cir. 2001); United States v. Grimes, 142 F.3d 1342, 1351 (11th Cir. 1998); United States v. Morrow, 177 F.3d 272, 294 (5th Cir. 1999); Falter v. United States, 23 F.2d 420, 425-26 (2d Cir. 1928).

\textsuperscript{142} People v. Frazer, 24 Cal.4th 737, 759, 982 P.2d 180, 1294, 88 Cal.Rptr.2d 312, 327 (1999).

\textsuperscript{143} United States v. Layton, 855 F.2d 1388 (9th Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); United States v. Benítez, 741 F.2d 1312 (11th Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.\textsuperscript{144}

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

\textbf{Victims.} Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11\textsuperscript{th} Victim Compensation Fund legislation before it passed the Act. Consequently, the Act’s victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601\textit{ et seq.}, and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796\textit{ et seq.}

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:

\textsuperscript{144} Compare, United States v. Gatlin, 216 F.3d 207 (2d Cir. 2000); United States v. Laden, 92 F.Supp.2d 189 (S.D.N.Y. 2000); with, United States v. Corey, 232 F.3d 1166 (9th Cir. 2000); United States v. Erdos, 474 F.2d 157 (4th Cir. 1973).
• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year)(42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d)(5)), section 621(d)

• waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

• eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
• makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

• prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

• allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

• reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

• makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

• allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

• establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

Increasing Institutional Capacity. A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

- $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)

- necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)

- $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)

- $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816

- $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701

- $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)

- $5 million for DEA police training in South and Central Asia, section 1007.

**Miscellaneous.** Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might to used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act,\textsuperscript{145} or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b), 807.\textsuperscript{146}

\textsuperscript{145} \textit{i.e.}, Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).

\textsuperscript{146} For a general discussion of trade sanctions legislation, see, Jurenas, \textit{Exempting Food and Agriculture Products from U.S. Economic Sanctions: Status and Implementation}, CRS ISSUE BRIEF IB100061.
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

**Electronic Surveillance.** To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202. A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(i). Yet only the interloper's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.

**Criminal Investigators' Access to Foreign Intelligence Information.**

The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism. It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that “the purpose for the surveillance is to obtain foreign intelligence information,” 50 U.S.C. 1804(a)(7)(B)(2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps “the purpose” might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation

16 18 U.S.C. 229 (chemical weapons), 2332(terrorist acts of violence committed against Americans overseas), 2332a(use of weapons of mass destruction), 2332b(acts of terrorism transcending national boundaries), 2332d(financial transactions with countries which support terrorists), 2339A(providing material support to terrorists), and 2339B(providing material support to terrorist organizations).

17 “Because service providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves as permitted under current law, they often have no way to exercise their rights to protect themselves from unauthorized attackers. Moreover, such attackers can target critical infrastructures and engage in cyberterrorism,” DoJ at §106. Elsewhere the Act defines “electronic surveillance” for purposes of the Foreign Intelligence Surveillance Act (FISA) to emphasize that the law enforcement authority for this intruder surveillance does not confer similar authority for purposes of foreign intelligence gathering, section 1003 (50 U.S.C. 1801(f)(2)).

18 For a general discussion of federal intelligence and law enforcement cooperation, see, Best, Intelligence and Law Enforcement: Countering Transnational Threats to the U.S., CRS REP.NO. RL30252 (Dec. 3, 2001).
Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment's warrant clause. It is here that the “primary purpose” notion originated. In *United States v. Truong Dinh Hung*, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, “as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution."

Subsequent case law, however, is not as clear as it might be: see e.g., *United States v. Duggan*, 743 F.2d 59, 77 (2d Cir. 1984) (“FISA permits federal officials to obtain orders authorizing electronic surveillance ‘for the purpose of obtaining foreign intelligence information.’ The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying officials’ belief that the information sought is the type of foreign intelligence information described”); *United States v. Pelton*, 835 F.2d 1067, 1075-76 (4th Cir. 1987) (“We also reject Pelton’s claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial”); *United States v. Sarkissian*, 841 F.2d 959, 907-8 (9th Cir. 1988) (“Defendants rely on the primary purpose test articulated in *United States v. Truong Dinh Hung*. . . . One other court has applied the primary purpose test. Another court has rejected it . . . distinguishing Truong. A third court has declined to decide the issue. We also decline to decide the issue”); *United States v. Johnson*, 952 F.2d 565, 572 (1st Cir. 1991) (“Appellants attack the government's surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance”).

20 “Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” *DoJ* at §153.
“(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. (2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, infra, quoting, 50 U.S.C. 1801.

“(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a) [sharing grand jury information], 203(c) [procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210 [subpoenas for communications provider customer records], 211 [access to cable company communication service records], 213 [sneak and peek], 216 [pen register and trap and trace device amendments], 221 [trade sanctions], and 222 [assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005. 22 The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter

21 “(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. (2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, infra, quoting, 50 U.S.C. 1801.

22 “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a) [sharing grand jury information], 203(c) [procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210 [subpoenas for communications provider customer records], 211 [access to cable company communication service records], 213 [sneak and peek], 216 [pen register and trap and trace device amendments], 221 [trade sanctions], and 222 [assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005.

“(b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b) (sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers’ communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices). 23 Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees, 24 but could not recover against the United States. 25 Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice's Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government's request until a court order authorizing access can be obtained. 26 Another allows providers to disclose customer records to protect the provider's rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others. 27 A third section,


26 Prior law already granted service providers immunity for disclosure of customer records in compliance with a court access order, 18 U.S.C. 2703(f).

27 “Existing law contains no provision that allows providers of electronic communications service to disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies that threaten death or serious bodily injury. This section amends 18 U.S.C. §2702 to authorize such disclosures if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.

“Current law also contains an odd disconnect: a provider may disclose the contents of the customer's communications in order to protect its rights or property but the current statute does not expressly permit a provider to voluntarily disclose non-content records (such as a subscriber's login records). 18 U.S.C. 2702(b)(5). This problem substantially hinders the ability of providers to protect themselves from cyber-terrorists and criminals. Yet the right to disclose the contents of communications necessarily implies the less intrusive ability to disclose non-content records. In order to promote the protection of our nation's critical infrastructures, this section's amendments allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems,” DoJ at
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

**Foreign Intelligence Investigations**

Although both criminal investigations and foreign intelligence investigations are conducted in the United States, criminal investigations seek information about unlawful activity; foreign intelligence investigations seek information about other countries and their citizens. Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough.

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA), something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President’s authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, *United States v. United States District Court*, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage

§110.

28 Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

29 Thus in the name of assisting in the execution of Title III, chapter 121, or chapter 206 order, the courts may not cite the Act as the basis for an order compelling a service provider to make system modifications or provide any other technical assistance not already required under 18 U.S.C. 2518(4), 2706, or 3124(c), see, H.R.Rep.No. 107-236, at 62-3 (2001) (emphasis added) (“This Act is not intended to affect obligations under Communications Assistance for Law Enforcement Act [which addresses law enforcement-beneficial system modifications and the compensation to be paid for the changes], nor does the act impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance”).

30 *E.g.*, As amended by section 902 of the Act, “‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2)(language added by the Act in italics).

31 50 U.S.C. 1801 *et seq.*
lockers, 50 U.S.C. 1861-1863 (2000 ed.). Intelligence authorities gained narrow passages through other privacy barriers as well.32

In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs.33 There were and still are extra


33 “As used in this subchapter: (a) ‘Foreign power’ means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

(b) ‘Agent of a foreign power’ means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person’s presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of a foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C).

(c) ‘International terrorism’ means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnaping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

(d) ‘Sabotage’ means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

(e) ‘foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans ("United States persons," i.e., citizens or permanent resident aliens).\(^\text{34}\) The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

- permits “roving” surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)

- increases the number of judges on the FISA court from 7 to 11

- allows application for a FISA surveillance or search order when gathering foreign intelligence is a significant reason for the application rather than the reason

- authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations

- sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses

- carries a sunset provision

- establishes a claim against the U.S. for certain communications privacy violations by government personnel

- expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

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agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to – (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States,” 50 U.S.C. 1801.

\(^{34}\) Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
FISA. FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases. It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

Search and Surveillance for Intelligence Purposes. Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, Draft §151.6

Section 901 of the Act address a concern raised during the 106th Congress relating to the availability of the FISA orders and the effective use of information gleaned from the execution of a FISA order.7 It vests the Director of Central

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36 See also, DoJ at §151, “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order’s minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed (50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

37 See e.g., S.Rep.No. 106-352, at 3, 6, 7 (2000)(“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application
Intelligence with the responsibility to formulate requirements and priorities for the use of FISA to collect foreign intelligence information. He is also charged with the responsibility of assisting the Attorney General in the efficient and effective dissemination of FISA generated information (50 U.S.C. 403-3(c)).

**Pen Registers and Trap and Trace Devices for Intelligence Gathering.** Section 214 grants the request of the Department of Justice by dropping requirements which limited FISA pen register and trap and trace device orders to facilities used by foreign agents or those engaged in international terrorist or clandestine intelligence activities, 50 U.S.C. 1842(c)(3)(2000 ed.).\(^{38}\) It is enough that the order is sought as part of an investigation to protect against international terrorism or clandestine intelligence activities and is not motivated solely by an American’s exercise of his or her First Amendment rights. Elsewhere (section 505), the Act drops a similar limitation for intelligence officials’ access to telephone records, 18 U.S.C.

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\(^{38}\) “When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevance, an additional factual showing that the communications device has been used to contact an ‘agent of a foreign power’ engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the ‘agent of a foreign power’ prong from the predication, and thus makes the FISA authority more closely track the criminal authority,” *DoJ* at §155.
2709(b), and under the Right to Financial Privacy Act, 12 U.S.C. 3414(a)(5)(A), as well as the Fair Credit Reporting Act, 15 U.S.C. 1681u.\textsuperscript{39}

Section 214 adjusts the language of the FISA pen register-trap and trace authority to permit its use to capture source and destination information relating to electronic communications (e.g., e-mail) as well as telephone communications, 50 U.S.C. 1842(d). The section makes it clear that requests for a FISA pen register-trap and trace order, like requests for other FISA orders, directed against Americans (U.S. persons) may not be based solely on activities protected by the First Amendment, 50 U.S.C. 1842, 1843.

**Third Party Cooperation and Tangible Evidence.** As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target's activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.\textsuperscript{40}

\textsuperscript{39} Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise to be entitled to confidentiality. Section 505, in response to the Justice Department's suggestion, allows FBI field offices to make the requests, see DoJ at §157 ("At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power’. In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports").

\textsuperscript{40} When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court's order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.’ This would enhance the FBI's ability to monitor international terrorists and intelligence officers who are...
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian.\textsuperscript{41} The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities,\textsuperscript{42} in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B));
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a));
- the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a));
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v);

\textsuperscript{41} “The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigative contexts. The time and difficulty involved in getting such pleadings before the Court usually outweighs the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” \textit{DoJ} at §156.

\textsuperscript{42} Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.  

**Access to Law Enforcement Information.** Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community’s access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, Draft at §103.  

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43 H.R.Rep.No. 107-205, at 60-1 (2001)(“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

“The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

“Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual’s credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding--without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information”).

44 See also, DoJ at §103, “This section facilitates the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, Draft at §354.45

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, Draft at §154.46

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion.47 It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions.”

45 See also, DoJ at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.” Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officers.

46 See also, DoJ at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”

47 Blair v. United States, 250 U.S. 273, 281 (1919)(the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

Critics may protest that the change could lead to the use of the grand jury for intelligence gathering purposes, or less euphemistically, to spy on Americans. The proposal was never among those scheduled to sunset, but earlier versions of the section followed the path used for most other disclosures of grand jury material: prior

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48 These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

49 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25 HARVARD JOURNAL OF LAW & PUBLIC POLICY 699, 719-20 (2002)(“There is a significant danger that the rule permitting disclosure will be treated as the de facto authorization of an expansion of the grand jury’s investigatory role to encompass seeking material relevant only to matters of national security, national defense, immigration, and so forth. The grand jury’s awesome powers should not be unwittingly extended to a much wider range of issues. . . Since the grand jury operates in secret, there are no public checks on the scope of its investigations, and witnesses are not permitted to challenge its jurisdiction. Only the supervising court is in a position to keep the grand jury’s investigation within proper bounds. Requiring judicial approval of foreign intelligence and counterintelligence information disclosures would provide a natural check against the temptation to manipulate the grand jury to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6 (Nov. 2001)(“The grand jury secrecy rule is a rule of policy which has always had exceptions, and it has been frequently modified. The secrecy rule has no credible claim to constitutional stature”).
court approval, H.R.Rep.No. 107-236, at 73 (2001). The Act, in section 203(a), instead calls for confidential notification of the court that a disclosure has occurred and the entity to whom it was made, F.R.Crim.P. 6(e)(3)(C)(iii). It also insists that the Attorney General establish implementing procedures for instances when the disclosure “identifies” Americans (U.S. persons), section 203(c).

Law enforcement officials may share Title III information with the intelligence community under the same conditions, section 203(b), although the grand jury and Title III sharing provisions differ in at least three important respects. The court need not be notified of Title III disclosures. On the other hand, the authority for sharing Title III information expires on December 31, 2005, section 224, and agencies and their personnel guilty of intentional improper disclosures may be subject to a claim for damages and disciplinary action, 18 U.S.C. 2520.

The third subsection of section 203 remains something of an enigma. It speaks in much the same language as its counterparts. It allows law enforcement officials to share information with the intelligence community, “notwithstanding any other provisions of law,” section 203(d). It either swallows the other subsections, or supplements them. Several factors argue for its classification as a supplement. Congress is unlikely to have crafted subsections (a), (b) and (c) only to completely

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50 Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

51 “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person’s official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification.\textsuperscript{52} By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.\textsuperscript{53}

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

**Increasing Institutional Capacity.** As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a

\textsuperscript{52} *Duncan v. Walker*, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted) (“It is our duty to give effect, if possible, to every clause and word of a statute. *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)); see also *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879)(As early as in Bacon's Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage in any setting. *Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687, 698 (1995); see also *Ratzlaf v. United States*, 510 U.S. 135, 140 (1994)").

It is not possible to conclude that Congress intended the universal subsection (d) to apply until sunset and the grand jury and Title III subsections (a), (b), and (c) to operate thereafter, because the Title III subsection expires at the same time as the universal subsection.

\textsuperscript{53} Draft at §154, “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”
computerized translation capability to be used in foreign intelligence gathering. Section 907 instructs the Director of the Central Intelligence, in consultation with the Director of the FBI, to report on the creation of a National Virtual Translation Center. The report is to include information concerning staffing, allocation of resources, compatibility with comparable systems to be used for law enforcement purposes, and features which permit its efficient and secure use by all of the intelligence agencies.

**Money Laundering**

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture. The Act bolsters federal efforts in each area.

**Regulation.** Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.

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54 “The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘NationalVirtualTranslationCenter.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

“The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so,” S.Rep.No. 107-63, at 11 (2001).


56 See e.g., 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
Records and Reports. For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler’s checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to files SARs as well, reflecting Congress’ view that the information provided the IRS may be valuable for other law enforcement purposes. This concern is likewise

58 H.R.Rep.No. 107-250, at 38-9 (2001)(“Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

“Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a ‘Safeguard Procedures Report’ which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement
reflected in section 357 which asks the Secretary of the Treasury to report on the Internal Revenue Service’s role in the administration of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311 et seq.), and what transfers of authority, if any, are appropriate.

Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action. Section 355 expands the immunity to cover disclosures in

59 “Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

“First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor from civil liability applies in arbitration, as well as judicial, proceedings. Second, it amends section 5318(g)(3) to clarify the safe harbor’s coverage of voluntary disclosures (that is, those not covered by the SAR regulatory reporting requirement). The language in section 5318(g)(3)(A) providing that ‘any financial institution that *** makes a disclosure pursuant to *** any other authority *** shall not be liable to any person’ is not intended to avoid the application of the reporting and disclosure provisions of the Federal securities laws to any person, or to insulate any issuers from private rights of actions for disclosures made under the Federal securities laws.

“Subsection [351](b) amends section 5318(g)(2) of title 31—which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed—to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee’s official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
employment references to other insured depository financial institutions provided disclosure is not done with malicious intent.\footnote{31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 66 (2001).}

The Financial Crimes Enforcement Network (FinCEN), a component within the Treasury Department long responsible for these anti-money laundering reporting and record-keeping requirements, 31 C.F.R. pt. 103, was administratively created in 1990 to provide other government agencies with an “intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes,” 55 Fed.Reg. 18433 (May 2, 1990).

The Act, in section 361, makes FinCEN a creature of statute, a bureau within the Treasury Department, 31 U.S.C. 310. Section 362 charges it with the responsibility of establishing a highly secure network to allow financial institutions to file required reports electronically and to permit FinCEN to provide those institutions with alerts and other information concerning money laundering protective measures, 31 U.S.C. 310 note.

**Special Measures.** In extraordinary circumstances involving international financial matters, the Act grants the Secretary of the Treasury, in consultation with other appropriate regulatory authorities, the power to issue regulations and orders involving additional required “special measures” and additional “due diligence” requirements to combat money laundering. The special measure authority, available under section 311, comes to life with the determination that particular institutions, jurisdictions, types of accounts, or types of transactions pose a primary money
These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

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61 31 U.S.C. 5318A. The circumstances considered in the case of a suspect jurisdiction are: evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction’s banking regulation; the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

62 The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’ including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

“Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate
business transactions.

“Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

“Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

“The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

“The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

“The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

“The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent’ account for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information that it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

“The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

“The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed
**Due Diligence.** Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.  

63 See generally, H.R.Rep.No. 107-250, at 71-2 (“Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

“The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

“The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

“For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
detect and report transactions that may involve the proceeds of foreign corruption. A private
bank account is defined as an account (or any combination of accounts) that requires a
minimum aggregate deposit of funds or other assets of not less than $1 million; is established
on behalf of one or more individuals who have a direct or beneficial ownership in the account;
and is assigned to, or administered or managed by, an officer, employee or agent of a financial
institution acting as a liaison between the institution and the direct or beneficial owner of the
account.

"This section directs the Secretary of the Treasury, within 6 months of enactment of this
bill and in consultation with appropriate Federal functional regulators, to further define and
clarify, by regulation, the requirements imposed by this section").

64 Or more exactly, a bank which has no physical presence in any country; a “physical
presence” for a foreign bank is defined as “a place of business that – (i) is maintained by a
foreign bank; (ii) is located at a fixed address (other than solely an electronic address) in a
country in which the foreign bank is authorized to conduct banking activities, at which
location the foreign bank – (I) employs 1 or more individuals on a full-time basis; and (II)
maintains operating records relating to its banking activities; and (iii) is subject to inspection
by the banking authority which licensed the foreign bank to conduct banking activities,” 31


66 The Act does not define “concentration accounts,” although the House Financial Services
Committee report provides some incite into the section’s intent, H.R.Rep.No. 107-250, at 72-3
(2001) (“This section gives the Secretary of the Treasury discretionary authority to prescribe
regulations governing the maintenance of concentration accounts by financial institutions, to
ensure that these accounts are not used to prevent association of the identity of an individual
customer with the movement of funds of which the customer is the direct or beneficial owner.
If promulgated, the regulations are required to prohibit financial institutions from allowing
clients to direct transactions into, out of, or through the concentration accounts of the
institution; prohibit financial institutions and their employees from informing customers of the
existence of, or means of identifying, the concentration accounts of the institution; and to
establish written procedures governing the documentation of all transactions involving a
concentration account.")

General Regulatory Matters. The Act establishes several other regulatory
mechanisms directed at the activities involving U.S. financial institutions and foreign
individuals or institutions. Section 313, for instance, in another restriction on
 correspondent accounts for foreign financial institutions, prohibits U.S. financial
institutions from maintaining correspondent accounts either directly or indirectly for
foreign shell banks (banks with no physical place of business) which have no
affiliation with any financial institution through which their banking activities are
subject to regulatory supervision.

The Act, in section 325, empowers the Secretary of the Treasury to promulgate
regulations to prevent financial institutions from allowing their customers to conceal
their financial activities by taking advantage of the institutions’ concentration account
practices.

The Secretary of the Treasury is instructed in section 326 to issue regulations for
financial institutions’ minimum new customer identification standards and record-
keeping and to recommend a means to effectively verify the identification of foreign customers.\(^67\)

\(^67\) 31 U.S.C. 5318(l); H.R.Rep.No. 107-250, at 62-3 (2001) ("Section [326](a) amends 31 U.S.C. 5318 by adding a new subsection governing the identification of account holders. Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing 'customers' in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined 'customers' and 'customer relationship' for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a 'street name' or omnibus account in the broker-dealer's name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to 'look through' the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund's customers. Thus, the fund would not be required to 'look through' the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 325 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature. 68

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

**Reports to Congress.** Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

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exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.\textsuperscript{69}

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

**International Cooperation.** Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.\textsuperscript{70}

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (\textit{i.e.}, the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.


\textsuperscript{70} H.R.Rep.No. 107-250, at 67 (2001)(“This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury's progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

“The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime”).
Crimes. Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
expands 18 U.S.C. 1956 to cover financial transactions conducted in foreign financial institutions.\textsuperscript{71}

Section 329 makes it a federal crime to corruptly administer the money laundering regulatory scheme. Offenders are punishable by imprisonment for not more than 15 years and a fine of not more than three times the amount of the bribe.

Section 5326 of title 31 authorizes the Secretary of the Treasury to impose temporary, enhanced reporting requirements upon financial institutions in areas victimized by substantial money laundering activity (geographic targeting regulations and orders). Section 353 makes it clear that the civil sanctions, criminal penalties, and prohibitions on smurfing (structuring transactions to evade reporting requirements) apply to violations of the regulations and orders issued under 31 U.S.C. 5326.\textsuperscript{72} It also extends the permissible length of the temporary geographical orders from 60 to 180 days.

Violations of the special measures and special due diligence requirements of sections 311 and 312 are subject to both civil and criminal penalties by virtue of section 363's amendments to 31 U.S.C. 5321(a) and 5322. The amendments authorize civil penalties and criminal fines of twice the amount of the transaction but not more than $1 million. Criminal offenders would be subject to a fine in the same amount.

\textsuperscript{71} “[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

“The definition of ‘financial institution’ in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of ‘commercial bank’ or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad--say to a Mexican bank--and launders them through a series of financial transactions, the government conceivably could not rely on the definition of a ‘financial institution’ in 1956(c)(6) to establish that the transaction was a ‘financial transaction’ within the meaning of 1956(c)(4)(B) (defining a ‘financial transaction’ as a transaction involving the use of a ‘financial institution’), or that it was a ‘monetary transaction’ within the meaning of 1957(f) (defining ‘monetary transaction’ as, inter alia, a transaction that would be a ‘financial transaction’ under 1956(c)(4)(B)).

“Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launders the proceeds of one of the crimes set forth on a list of ‘specified unlawful activities.’ 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),” H.R.Rep.No. 107-250, at 38 (2000).

Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.73

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents.74 They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

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73 “The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business.

“Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.

“Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive,” H.R.Rep.No. 107-250, at 54 (2001).

74 “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual," 31 U.S.C. 5332(a)(2).

• 18 U.S.C. 476 (taking impressions of tools used for obligations and securities) from 10 to 25 years;
• 18 U.S.C. 477 (possessing or selling impressions of tools used for obligations or securities) from 10 to 25 years;
• 18 U.S.C. 484 (connecting parts of different notes) from 5 to 10 years;
• 18 U.S.C. 493 (bonds and obligations of certain lending agencies) from 5 to 10 years;
• 18 U.S.C. 478 (foreign obligations or securities) from 5 to 20 years;
• 18 U.S.C. 479 (uttering counterfeit foreign obligations or securities) from 3 to 20 years;
• 18 U.S.C. 480 (possessing counterfeit foreign obligations or securities) from 1 to 20 years;
• 18 U.S.C. 481 (plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities) from 5 to 25 years;
• 18 U.S.C. 482 (foreign bank notes) from 2 to 20 years; and
• 18 U.S.C. 483 (uttering counterfeit foreign bank notes) from 1 to 20 years.

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

**Bulk Cash.** Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act’s bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting.  

The section appears to be the product of reactions to the Supreme Court’s decision in *United States v. Bajakian*, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court’s

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75 “For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).
As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency – representing the proceeds of drug trafficking and other criminal offenses – is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad.

Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United States without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute,” H.R.Rep.No. 107-250 at 36-7 (2001).

Section 5317 of title 31 once called for civil forfeiture of property traceable to a violation of 31 U.S.C. 5316 (reports on exporting or importing money instruments worth $10,000 or more). Section 372 of the Act recasts section 5317 to provide for civil and criminal forfeitures for violations of 31 U.S.C. 5316, of 31 U.S.C. 5313 (reports on domestic coins and currency transactions involving $10,000 or more) and of 31 U.S.C. 5324 (structuring transactions to evade reporting requirements (smurfing)).

**Extraterritorial Jurisdiction.** The Act makes 18 U.S.C. 1029, the federal statute condemning various crimes involving credit cards, PIN numbers and other access devices, applicable overseas if the card or device is issued by or controlled by an American bank or other entity and some article is held in or transported to or through the United States during the course of the offense, section 377. The change was part of the original Justice Department proposals. Justice explained that, “[financial crime] admits of no border, utilizing the integrated global financial network for ill purposes. This provision would apply the financial crimes prohibitions to conduct committed abroad, so long as the tools or proceeds of the crimes pass through or are in the United States,” DoJ at §408. The section, however, appears to limit the otherwise applicable extraterritorial jurisdiction implicit in section 1029, since federal courts would likely recognize extraterritorial jurisdiction over a violation of title 31, United States Code.
under *either* circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.\(^77\)

**Venue.** Section 1004 relies on *dicta* in *United States v. Cabrales*, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering,\(^78\) in the state and district in which the monetary transaction takes place. The Supreme Court in *Cabrales* held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in *dicta*, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.\(^79\)

**Forfeiture.** Forfeiture is the government confiscation of property as a consequence of crime.\(^80\) The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 *et seq.* (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

**Constitutional Considerations.** The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 *et seq.*, which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the

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\(^78\) “The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed,” *U.S.Const.* Art.III, §2, cl.3.

“[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,” *U.S.Const.* Amend. VI.

\(^79\) See also, *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnapping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.

\(^80\) For general background information, see, Doyle, *Crime and Forfeiture*, CRS REP.NO. 97-139A (Oct. 11, 2000).
jurisdiction of the United States, belonging to any foreign individual, foreign entity, or foreign country whom they determine to have planned, authorized, aided or engaged in an attack on the United States by a foreign country or foreign nationals. The section also permits the government to present secretly (ex parte and in camera) any classified information upon which the forfeiture was based should the decision be subject to judicial review. The Justice Department requested the section as a revival of the President’s powers in times of unconventional wars. 81 By virtue of section 316, property owners may initiate a challenge to a confiscation by filing a claim under the rules applicable in maritime confiscations. The section permits two defenses to forfeiture—that the property is not subject to confiscation under section 106 or that the claimant is entitled to the innocent owner defense of 18 U.S.C. 983(d). 82 The characterization of the defenses as “affirmative defense” indicates that the claimant bears the burden of proof. The innocent owner defenses of 18 U.S.C. 983(d) are probably not available in cases under section 106, since that section is explicitly

81 “This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App.U.S.C. §5(b).

“This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress’s war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

“The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2),” DoJ at §159.

82 “An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
excepted from the coverage of 18 U.S.C. 983.\textsuperscript{83} The challenge proceedings permit the court to admit evidence, such as hearsay evidence, that would not otherwise be admissible under the Federal Rules of Evidence if the evidence is reliable and if national security might be imperiled should dictates of the Federal Rules be followed, \textsection{316(b)}. The section recognizes the rights of claimants to proceed alternatively under the Constitution or the Administrative Procedure Act.\textsuperscript{84}

The Justice Department also recommended enactment of an overlapping provision which ultimately passed as section 806 of the Act without any real discussion of the relationship of the two sections.\textsuperscript{85} Section 806 authorizes confiscation of all property, regardless of where it is found, of any individual, entity, or organization engaged in domestic or international terrorism (as defined in 18 U.S.C. 2331),\textsuperscript{86} against the United States, Americans or their property, 18 U.S.C.

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\textsuperscript{83} 18 U.S.C. 983(i)(2)(D).
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\textsuperscript{84} “The exclusion of certain provisions of Federal law from the definition of the term ‘civil forfeiture statute’ in section 983(i) of title 18, United States Code, shall not be construed to deny an owner of property the right to contest the confiscation of assets of suspected international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C) subchapter II of chapter 5 of title 5, United States Code (commonly known as the ‘Administrative Procedure Act’).” Sec. 316(c)(1).
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\textsuperscript{85} “Current law does not contain any authority tailored specifically to the confiscation of terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available current forfeiture laws require detailed tracing that is quite difficult for accounts coming through the banks of countries used by many terrorists.

‘This section increases the government's ability to strike at terrorist organizations' economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001,” DoJ, at \textsection{403}. The House Report on H.R. 2975 which contained versions of both sections is no more explicit on the relation of the two sections.
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\textsuperscript{86} “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States," 18 U.S.C. 2331(1),(5)(as amended by section 802 of the Act).

87 Austin v. United States, 509 U.S. 602, 611-12 (1993)("Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture . . . . Of England’s three kinds of forfeiture, only the third took hold in the United States").


89 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal in personam proceedings following criminal conviction as a means of accomplishing confiscation.

Confiscation based solely on the fact that the property is owned by a criminal offender, rather than that it is derived from or facilitates some crime is fairly uncommon. It is the mark of common law forfeiture of estate. At common law, a felon forfeited all of his property. Most contemporary forfeiture statutes employ statutory forfeiture, a more familiar presence in American law, which consists of the confiscation of things whose possession is criminal, of the fruits of crime, and of the means of crime – untaxed whiskey, the drug dealer’s profits, and the rum runner’s ship.

Three characteristics set forfeiture of estate apart. The property is lost solely by reason of its ownership by a felon. All of a felon’s property is confiscated, not merely that which is related to the crime for which he is convicted. Finally, it occasions attainder which negates the felon’s right to hold property or for title to property to pass through him to his heirs. It was with this in mind, that the Framers declared that “no attainder of treason shall work corruption of blood or forfeiture exception during the life of the person attainted.” And for this reason, President Lincoln insisted that the confiscated real estate of Confederate supporters should revert their heirs at death.
Neither section 106 nor 806 require conviction of the terrorist property owner.90 Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers.91 The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners.92 Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them.93 The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate

90 Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c)(“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act”).

91 Silesian American Corp. v. Clark, 332 U.S. 469 (1947); cf., Societe Internationale v. Rogers, 357 U.S. 197, 211 (1958)(“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).

92 Zittman v. McGrath, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’”).

any presumption of remedial purposes. The same has been said of the applicability of the ex post facto clause.

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO. If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

**Other Forfeiture Amendments.** In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.

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95 See e.g., United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.), 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994).

96 DoJ, at §403.

97 18 U.S.C. 1956(b). Cf., H.R.Rep.No. 107-250, at 54-5 (2001)(“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas. 98 Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted

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98 18 U.S.C. 981(k). H.R.Rep.No. 107-250, at 57-8 (2001)(“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank's customers.

“Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank's correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

“The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”).
defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation.\footnote{99}{Cf., H.R.Rep.No. 107-250, at 58-9 (2001) ("Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court in a criminal case may issue a repatriation order--either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. 853(e) to restrain property--so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both").}

Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here.\footnote{100}{Section 320 enlarges this provision to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements.\footnote{101}{This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.\footnote{102}{H.R.Rep.No. 107-250, at 56 (2001)("This section is intended to reinformce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act").}}}}

Section 320 enlarges this provision to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements.\footnote{101}{This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.\footnote{102}{H.R.Rep.No. 107-250, at 59-60 (2001)("Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country. Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking}}
A fugitive may not challenge a federal forfeiture. Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in “order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.”

to contest the restraining order could do so on the ground that 28 U.S.C. 2467 was not properly applied to the particular case, but could not oppose the restraining order on any ground that could also be raised in the proceedings pending in a foreign court. This provision prevents a litigant from taking ‘two bites at the apple’ by raising objections to the basis for the forfeiture in the Federal court that he also raised, or is entitled to raise, in the foreign court where the forfeiture action is pending. It complements the existing provision in section 2467(e) providing that the Federal court is bound by the findings of fact of the foreign court, and may not look behind such findings in determining whether to enter an order enforcing a foreign forfeiture judgment.

“This section also amends 28 U.S.C. 2467 to make clear that it is not necessary to prove that the person asserting an interest in the property received actual notice of the forfeiture proceedings. As is the case with respect to forfeitures under U.S. law, it is sufficient if the foreign nation takes steps to provide notice, in accordance with the principles of due process. See Gonzalez v. United States, 1997 WL 278123 (S.D.N.Y. 1997) (‘the [G]overnment is not required to ensure actual receipt of notice that is properly mailed’); Albajon v. Gugliotta , 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant’s identifications, and mailed after claimant released from jail, is sufficient to satisfy due process, even if claimant never received notice); United States v. Schiavo , 897 F. Supp. 644, 648 49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; due process satisfied even if he did not receive the notice).

“Finally, 28 U.S.C. 2467 is amended to authorize the enforcement of a forfeiture judgment based on any foreign offense that would constitute an offense giving rise to a civil or criminal forfeiture of the same property if the offense had been committed in the United States. This is one of two safeguards that the statute contains against the enforcement of judgments that the United States does not consider appropriate for enforcement: if the judgment is based on an act that would not constitute a crime in the United States, such as removing assets from the reach of a repressive regime, it could not be enforced. In addition, section 2467 already provides that a foreign judgment may only be enforced by a Federal court at the request of the United States, and only after the Attorney General has certified that the judgment was obtained in accordance with the principles of due process. Thus, neither a foreign Government nor a foreign private party could enforce a foreign judgment on its own under this provision.”).

Note that the safeguard to which the report refers is the range of foreign offenses that will support an enforceable confiscation order, i.e., drug offenses and crimes on the money laundering predicate offense list, and that the amendment narrows that safeguard by adding additional foreign offenses, i.e., any foreign equivalent of a federal crime which would support a confiscation order.

Alien Terrorists and Victims

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

Border Protection. The border protection provisions:

• authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401

• authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402

• remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404

• authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405

• authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.

• instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007

• direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418

• express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414

• add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415

• call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416

• limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).

- instruct the Attorney General to report on the feasibility of using biometric scanners to help prevent terrorists and other foreign criminals from entering the country, section 1008  

- authorize appropriations of $250,000 for the FBI to determine the feasibility of providing airlines with computer access to the names of suspected terrorists, section 1009  

- authorize reciprocal sharing of the State Department’s visa lookout data and related information with other nations in order to prevent terrorism, drug trafficking, slave marketing, and gun running, section 413  

**Detention and Removal.** Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity, 8 U.S.C. 1227 (a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(iv). Aliens may be inadmissible for any number of terrorism-related reasons, 8 U.S.C. 1182 (a)(3)(B). Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported.


Section 411 defines “terrorist organization” to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the Federal Register as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C.
Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).


An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in “premeditated, politically motivated violence perpetrated against noncombatant targets,” or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security or endanger some individual or the general public. The Attorney General's determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

Victims. The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

- permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421
- extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422

105 “The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

106 “The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks.

“The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application.

“Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
• preservation of certain immigration benefits available to alien family members that would otherwise be lost as a consequence of the death of a victim of September 11, section 423

• limited easing of age restrictions on visas available to aliens under 21 years of age for those whose 21st birthday occurred immediately before or soon after September 11, section 424

• temporary administrative relief for alien family members of a victim of September 11 who are not otherwise entitled to relief under the Act, section 425

the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

“Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 31.

“Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.


“Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

“The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

“The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death),” H.R.Rep.No. 107-236, at 68 (2001).

“Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien’s 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien’s 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
• a denial of benefits of the Act to terrorists and their families, section 427

• authority for the Attorney General to establish evidentiary standards to implement the alien victim provisions of the Act, section 426.

Other Crimes, Penalties, & Procedures

New Crimes. The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department, the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offenses for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents, 18 U.S.C. 175b. Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.

109 “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon, 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . . .” DoJ at §305.

110 The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

111 “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2)(“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.112

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D). The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

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112 U.S. Const. Art.III, §2, cl.3 (“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . .”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . .”); United States v. Cabrales, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from Cabrales when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnaping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999)(“By way of comparison, last Term in [Cabrales] we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).
The Justice Department sought the expansion along with the enlargement of the predicate offense list, "18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of 'material support or resources' is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill ('Federal terrorism offenses')," DoJ at 306.


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115 "The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill ('Federal terrorism offenses') is used in identifying the relevant crimes,” DoJ, at §304.

New Penalties. The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. 3571(b),(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense.117

The proposal, however, failed to identify the critical elements that would trigger the alternative.118 Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

- for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

- for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

117 “Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersede lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,” DoJ, at §302.

118 “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense,” Draft at §302.
• for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;

• for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;

• for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;

• for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and

• for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism.\(^{119}\) Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:

• arson committed within a federal enclave, 18 U.S.C. 81;
• killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);
• destruction of communications facilities, 18 U.S.C. 1362;
• destruction of property within a federal enclave, 18 U.S.C. 1363;
• causing a train wreck, 18 U.S.C. 1922;
• providing material support to a terrorist, 18 U.S.C. 2339A;
• torture committed overseas under color of law, 18 U.S.C. 2340A;
• sabotage of a nuclear facility, 42 U.S.C. 2284;

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\(^{119}\) “The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §§846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

“This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.
• interfering with a flight crew within U.S. special aircraft jurisdiction, 49 U.S.C. 46504;
• carrying a weapon or explosive abroad an aircraft within U.S. special aircraft jurisdiction, 49 U.S.C. 46505; and
• sabotage of interstate gas pipeline facilities, 49 U.S.C. 60123.

When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years). The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission), a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

120 Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 924-25 (6th Cir. 2001).

121 “Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-incarceration supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. 841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.

“This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders).\textsuperscript{122}

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

**Other Procedural Adjustments.** In other procedural adjustments designed to facilitate criminal investigations, the Act:

- increases the rewards for information in terrorism cases
- expands the Posse Comitatus Act exceptions
- authorizes “sneak and peek” search warrants
- permits nationwide and perhaps worldwide execution of warrants in terrorism cases
- eases government access to confidential information
- allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
- lengthens the statute of limitations applicable to crimes of terrorism
- clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
- adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B.\textsuperscript{123}

\textsuperscript{122} It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, e.g., damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

\textsuperscript{123} When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001)(remarks of Rep. Sensenbrenner); for general background, see, Doyle, *McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys*, CRS REP.NO. RL30060 (Dec. 14, 2001).
Rewards. The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L.105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism.\(^\text{124}\)

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

Posse Comitatus. The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.\(^\text{125}\)

Delayed notification of a search (sneak and peek). Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take

\(^{124}\) The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct threat assessments for federal agencies, and to reimburse federal agencies for the costs of detaining terrorist suspects overseas.

\(^{125}\) For a general discussion of the Posse Comitatus Act, see, Doyle, The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law, CRS Rep. No. 95-964 (June 1, 2000).
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, Richards v. Wisconsin, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, Wilson v. Arkansas, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, Dalia v. United States, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, cf., United States v. Miller, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, United States v. Freitas, 800 F.2d 1451, 1453 (9th Cir. 1986).  

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126 The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in United States v. New York Telephone Co., 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth
Amendment, demands that surreptitious entries be closely circumscribed,” United States v. Freitas (Freitas I), 800 F.2d 1451, 1455-456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, United States v. Freitas (Freitas II), 856 F.2d 1425 (9th Cir. 1988).

“No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in Dalia v. United States, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in Dalia, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property. . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. See United States v. New York Telephone Co., 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . . Although the Freitas I court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in United States v. Villegas, 899 F.2d 1324 (1999). Although the Freitas I court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in Villegas. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the Freitas I court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” United States v. Pangburn, 983 F.2d 449, 453-55 (2d Cir. 1993).

In Simons, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
The Justice Department urged that the conflict be resolved with a uniform rule which permitted sneak and peek warrants under the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage.\textsuperscript{129}

The Act, in section 213, stops short of the Justice Department proposal. Characterized as a codification of the Second Circuit decision, 147 Cong.Rec. H7197 (daily ed. Oct. 23, 2001), the Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C. 3103a. Its sneak and peek authorization reaches all federal search and seizure warrants where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (\textit{e.g.}, risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (\textit{e.g.}, jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, \textit{i.e.}, in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation.\textsuperscript{130} The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

\textsuperscript{129} The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities,” \textit{DoJ} at §353.

\textsuperscript{130} Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department’s initial proposal, the Department’s justification does not address the question.
constitutionally “reasonable,” that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

**Nationwide terrorism search warrants.** The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either “within or outside the district,” (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases. The provision may anticipate execution both in this country and overseas. The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage. Neither Rule 41 nor any other provision of federal

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131 The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum. . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

132 The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

133 *United States v. Barona*, 56 F.3d 1087, 1092 (9th Cir. 1995)(“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994)(“if American law enforcement officials substantially participated in the search or if the

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” F.R.Crim.P. 41, *Advisory Committee Notes: 1990 Amendment*. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

_Terrorists' DNA._ The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards _per se._ 135 Existing federal law allowed the Attorney General to collect samples from foreign officials conducting the search were actually acting as agents for their American counterparts”); *United States v. Maturo*, 982 F.2d 57, 61 (2d Cir. 1992)(“where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials” or “where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials”); *United States v. Mitro*, 880 F.2d 1480, 1482 (1st Cir. 1989)(“where American agents participated in the foreign search or the foreign officers acted as agents for their American counterparts”); *United States v. Mount*, 757 F.2d 1315, 1318 (D.C.Cir. 1985)(“if American officials or officers participated in some significant way”); *United States v. Marzano*, 537 F.2d 257, 270 (7th Cir. 1976)(declining to adopt the “joint venture” standards, but finding level of American participation in the case before it insignificant); *United States v. Morrow*, 537 F.2d 120, 139 (5th Cir. 1976)(“if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts”); each of the decisions also suggests that evidence secured in a manner which shocked the conscience of the court would be excluded.

134 The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, see, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), reprinted, 78 Cong.Rec. 4982-983 (1934)(“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.)(confering judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

federal prisoners convicted of a variety of violent crimes, 42 U.S.C. 14135a. The Act enlarges the predicate offense list to include any crime of violence or any terrorism offense, section 503.136

**Access to Educational Records.** Finally, the Act calls for an ex parte court order procedure under which senior Justice Department officials may seek authorization to collect educational records relevant to an investigation or prosecution of a crime of terrorism, section 507 (as an exception to the confidentiality requirements of the General Education Provisions Act, 20 U.S.C. 1232g), section 508 (as an exception to the confidentiality requirements of the National Education Statistics Act, 20 U.S.C. 9007).

**Statute of Limitations.** Prosecution for murder in violation of federal law may be initiated at any time, 18 U.S.C. 3281. A five year statute of limitations applied for most other federal crimes before passage of the Act, with a few exceptions. Among the relevant exceptions were an eight year statute of limitations for several terrorist offenses, 18 U.S.C. 3286,137 and a ten year statute of limitations for a few arson and explosives offenses, 18 U.S.C. 3295. The Justice Department recommended the elimination of a statute of limitations in terrorism cases.138

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136 Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples form convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes.” DoJ at §353.


137 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

138 “This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

“This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in
The Act takes less dramatic action in section 809. It eliminates the statute of limitations for any crime of terrorism\(^\text{139}\) that risks or results in a death or serious bodily injury, 18 U.S.C. 3286. In the absence of such a risk or result, all other terrorism offenses become subject to the eight year statute of limitations unless already covered by the ten year statute for explosives and arson offenses, 18 U.S.C. 3286.

Application of the statute of limitations rarely provokes a constitutional inquiry. Nevertheless, due process precludes prosecution when it can be shown that pre-indictment delay “caused substantial prejudice to [a defendant’s] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.”\(^\text{140}\) Moreover, a judicial difference of opinion has appeared in those cases

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\(^{139}\) As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 (sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period. Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (Grimes, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (Frazer, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

**Extraterritoriality.** Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States or elsewhere. . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnaping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.

141 United States v. De La Matta, 266 F.3d 1275, 1286 (11th Cir. 2001); United States v. Grimes, 142 F.3d 1342, 1351 (11th Cir. 1998); United States v. Morrow, 177 F.3d 272, 294 (5th Cir. 1999); Falter v. United States, 23 F.2d 420, 425-26 (2d Cir. 1928).


143 United States v. Layton, 855 F.2d 1388 (9th Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); United States v. Benítez, 741 F.2d 1312 (11th Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.¹⁴⁴

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

Victims. Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11th Victim Compensation Fund legislation before it passed the Act. Consequently, the Act’s victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 et seq., and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 et seq.

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:

• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year)(42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d)(5)), section 621(d)

• waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

• eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
• makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

• prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

• allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c), (e)

• reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

• makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

• allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

• establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

**Increasing Institutional Capacity.** A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

- $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)

- necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)

- $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)

- $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816

- $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701

- $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)

- $5 million for DEA police training in South and Central Asia, section 1007.

**Miscellaneous.** Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might to used for the *design* of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act, or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b), 807.

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145 *I.e.*, Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).

The USA PATRIOT Act: A Legal Analysis

Introduction

Congress passed the USA PATRIOT Act (the Act) in response to the terrorists’ attacks of September 11, 2001. The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to further close our borders to foreign terrorists and to detain and remove those within our borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it is not without safeguards, critics contend some of its provisions go too far. Although it grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough.


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1 P.L. 107-56, 115 Stat. 272 (2001); its full title is the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT).”

2 H.R. 2975 was introduced by Representative Sensenbrenner for himself and Representatives Conyers, Hyde, Coble, Goodlatte, Jenkins, Jackson-Lee, Cannon, Meehan, Graham, Bachus, Wexler, Hostettler, Keller, Issa, Hart, Flake, Schiff, Thomas, Goss, Rangel, Berman and Lofgren; S.1510 by Senator Daschle for himself and Senators Lott, Leahy, Hatch, Graham, Shelby and Sarbanes.

3 H.R. 3004 was introduced by Representative Oxley for himself and Represenatives LaFalce, Leach, Maloney, Roukema, Bentsen, Hooley, Bereuter, Baker, Bachus, King, Kelly, Gillmore, Cantor, Riley, Latourette, Green (of Wisconsin), and Grucci; and reported out of the House Financial Services Committee with amendments on October 15, 2001, H.R.Rep.No. 107-250. H.R. 3004, as reported out, included Internet gambling amendments that were not included in H.R. 2975/H.R.3108.
ed. Oct. 24, 2001), and H.R. 3162 was sent to the President who signed it on October 26, 2001.

**Criminal Investigations: Tracking and Gathering Communications**

A portion of the Act addresses issues suggested originally in a Department of Justice proposal circulated in mid-September. The first of its suggestions called for amendments to federal surveillance laws, laws which govern the capture and tracking of suspected terrorists’ communications within the United States. Federal law features a three tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications.

The tiers reflected the Supreme Court’s interpretation of the Fourth Amendment’s ban on unreasonable searches and seizures. The Amendment protects private conversations, *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967). It does not cloak information, even highly personal information, for which there is no individual justifiable expectation of privacy, such as telephone company records of calls made to and from an individual's home, *Smith v. Maryland*, 442 U.S. 735 (1979), or bank records of an individual's financial dealings, *United States v. Miller*, 425 U.S. 435 (1976).

Congress responded to *Berger* and *Katz*, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications, 18 U.S.C. 2511. At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious

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4 The Department’s proposal, dated September 20, 2001, came with a brief section by section analysis. Both the proposal (Draft) and analysis (DoJ) were printed as an appendix in *Administration's Draft Anti-Terrorism Act of 2001, Hearing Before the House Comm. on the Judiciary, 107th Cong., 1st Sess. 54 (2001).*


6 “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,” *U.S. Const. Amend. IV.*

7 Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
criminal cases. When approved by senior Justice Department officials, law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.

The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement), 1751 (presidential and presidential staff assassination, kidnapping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnaping, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or naturalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations, 18 U.S.C. 2518. The court notifies the parties to any conversations seized under the order after the order expires, 18 U.S.C. 2518(8).

Below Title III, the next tier of privacy protection covers some of those matters which the Supreme Court has described as beyond the reach of the Fourth Amendment protection – telephone records, e-mail held in third party storage, and the like, 18 U.S.C. 2701-2709 (Chapter 121). Here, the law permits law enforcement access, ordinarily pursuant to a warrant or court order or under a subpoena in some cases, but in connection with any criminal investigation and without the extraordinary levels of approval or constraint that mark a Title III interception, 18 U.S.C. 2703.

Least demanding and perhaps least intrusive of all is the procedure that governs court orders approving the government’s use of trap and trace devices and pen registers, a kind of secret “caller id”, which identify the source and destination of calls made to and from a particular telephone, 18 U.S.C. 3121-3127 (Chapter 206). The orders are available based on the government’s certification, rather than a finding of the court, that the use of the device is likely to produce information relevant to the investigation of a crime, any crime, 18 U.S.C. 3123. The devices record no more than the identity of the participants in a telephone conversation, but neither the orders nor the results they produce need ever be revealed to the participants.

The Act modifies the procedures at each of the three levels. It:

offense involving counterfeiting punishable under 18 U.S.C. 471, 472, or 473; (e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States; (f) any offense including extortionate credit transactions under 18 U.S.C. 892, 893, or 894; (g) a violation of 31 U.S.C. 5322 (dealing with the reporting of currency transactions); (h) any felony violation of 18 U.S.C. 2511 and 2512 (interception and disclosure of certain communications and to certain intercepting devices); (i) any felony violation of 18 U.S.C. ch. 71 (obscenity); (j) 49 U.S.C. 60123(b) (destruction of a natural gas pipeline), 46502 (aircraft piracy); (k) 22 U.S.C. 2778 (Arms Export Control Act); (l) the location of any fugitive from justice from an offense described in this section; (m) a violation of 8 U.S.C. 1324, 1327, or 1328; (n) any felony violation of 18 U.S.C. 922, 924 (firearms); (o) any violation of 26 U.S.C. 5861 (firearms); (p) a felony violation of 18 U.S.C. 1028 (production of false identification documents), 1542 (false statements in passport applications), 1546 (fraud and misuse of visas, permits, and other documents) or a violation of 8 U.S.C. 1324, 1327, or 1328 (smuggling of aliens); (p) 229 (chemical weapons), 2332 (terrorist violence against Americans overseas), 2332a (weapons of mass destruction), 2332b (multinational terrorism), 2332d (financial transactions with countries supporting terrorism), 2339A (support of terrorist), 2332B (support of terrorist organizations); (r) any conspiracy to commit any of these, 18 U.S.C. 2516(1)(crimes added by the Act in italics). Other than telephone face to face conversations (i.e., electronic communications), the approval of senior Justice Department officials is not required and an order may be sought in any felony investigation, 18 U.S.C. 2516(3).

Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
• permits pen register and trap and trace orders for electronic communications (e.g., e-mail)
• authorizes nationwide execution of court orders for pen registers, trap and trace devices, and access to stored e-mail or communication records
• treats stored voice mail like stored e-mail (rather than like telephone conversations)
• permits authorities to intercept communications to and from a trespasser within a computer system (with the permission of the system’s owner)
• adds terrorist and computer crimes to Title III’s predicate offense list
• reenforces protection for those who help execute Title III, ch. 121, and ch. 206 orders
• encourages cooperation between law enforcement and foreign intelligence investigators
• establishes a claim against the U.S. for certain communications privacy violations by government personnel
• terminates the authority found in many of the these provisions and several of the foreign intelligence amendments with a sunset provision (Dec. 31, 2005).

**Pen Registers and Trap and Trace Devices.** In section 216, the Act allows court orders authorizing trap and trace devices and pen registers to be used to capture source and addressee information for computer conversations (e.g., e-mail) as well as telephone conversations, 18 U.S.C. 3121, 3123. In answer to objections that e-mail header information can be more revealing than a telephone number, it creates a detailed report to the court, 18 U.S.C. 3123(a)(3).

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11 “Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public the agency shall ensure that a record will be maintained which will identify - (i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of the such device.

“(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof),” section 216(b)(1).
The use of pen registers or trap and trace devices was limited at one time to the judicial district in which the order was issued, 18 U.S.C. 3123 (2000 ed.). Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States, 18 U.S.C. 3123(b)(1)(C), 3127(2).

Communications Records and Stored E-Mail. With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber, 18 U.S.C. 2703(a),(b). A warrant will also suffice to seize records describing telephone and other communications transactions without customer notice, 18 U.S.C. 2703(c). In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation, officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records, 18 U.S.C. 2703(b),(c). They can obtain a limited amount of record information (subscribers' names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena, 18 U.S.C. 2703(c)(1)(C). There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial, 18 U.S.C. 2705.

In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider’s customer records, 18 U.S.C. 2703(c)(1)(C).13

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.

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12 The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” DoJ at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

13 Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user's true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” DoJ at §107.
Previously, only a federal court in the district in which the e-mail was stored could issue the order. Under section 220, federal courts in the district where an offense under investigation occurred may issue orders applicable “without geographic limitation,” 18 U.S.C. 2703.14

The Act, in section 209, treats voice mail like e-mail, that is, subject to the warrant or court order procedure, rather than to the more demanding coverage of Title III once required, United States v. Smith, 155 F.3d 1050, 1055-56 (9th Cir. 1998).

Finally, the Act resolves a conflict between chapter 121 and the federal law governing cable companies. Government entities may have access to cable company customer records only under a court order following an adversary hearing if they can show that the records will evidence that the customer is or has engaged in criminal activity, 47 U.S.C. 511(h). When cable companies began offering telephone and other communications services the question arose whether the more demanding cable rules applied or whether law enforcement agencies were entitled to ex parte court orders under the no-notice procedures applicable to communications providers.15 The Act makes it clear that the cable rules apply when cable television viewing services are

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14 Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

15 See e.g., DoJ at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement’s access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

**Electronic Surveillance.** To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202. A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(i). Yet only the interloper's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.

**Criminal Investigators' Access to Foreign Intelligence Information.** The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism. It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that “the purpose for the surveillance is to obtain foreign intelligence information,” 50 U.S.C. 1804(a)(7)(B)(2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps “the purpose” might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation

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16 18 U.S.C. 229 (chemical weapons), 2332(terrorist acts of violence committed against Americans overseas), 2332a(use of weapons of mass destruction), 2332b(acts of terrorism transcending national boundaries), 2332d(financial transactions with countries which support terrorists), 2339A(providing material support to terrorists), and 2339B(providing material support to terrorist organizations).

17 “Because service providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves as permitted under current law, they often have no way to exercise their rights to protect themselves from unauthorized attackers. Moreover, such attackers can target critical infrastructures and engage in cyberterrorism,” DoJ at §106. Elsewhere the Act defines “electronic surveillance” for purposes of the Foreign Intelligence Surveillance Act (FISA) to emphasize that the law enforcement authority for this intruder surveillance does not confer similar authority for purposes of foreign intelligence gathering, section 1003 (50 U.S.C. 1801(f)(2)).

Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment's warrant clause. It is here that the "primary purpose" notion originated. In *United States v. Truong Dinh Hung*, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, "as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.” Subsequent case law, however, is not as clear as it might be: see e.g., *United States v. Duggan*, 743 F.2d 59, 77 (2d Cir. 1984)("FISA permits federal officials to obtain orders authorizing electronic surveillance ‘for the purpose of obtaining foreign intelligence information.’ The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying officials’s belief that the information sought is the type of foreign intelligence information described”); *United States v. Pelton*, 835 F.2d 1067, 1075-76 (4th Cir. 1987)("We also reject Pelton’s claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial"); *United States v. Sarkissian*, 841 F.2d 959, 907-8 (9th Cir. 1988)(“Defendants rely on the primary purpose test articulated in *United States v. Truong Dinh Hung*. . . . One other court has applied the primary purpose test. Another court has rejected it . . . distinguishing Truong. A third court has declined to decide the issue. We also decline to decide the issue”); *United States v. Johnson*, 952 F.2d 565, 572 (1st Cir. 1991)(“Appellants attack the government's surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance”).

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20 “Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” DoJ at §153.
demanding standard than the “a purpose” threshold proposed by the Justice Department, but a clear departure from the original “the purpose” entry point. FISA once described a singular foreign intelligence focus prerequisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k), 1825(k).

**Protective Measures.** The Act reenforces two kinds of safeguards, one set designed to prevent abuse and the other to protect those who assist the government. The sunset clause is perhaps the best known of the Act’s safeguards. Under the direction of section 224, many of the law enforcement and foreign intelligence authorities granted by the Act expire as of December 31, 2005. The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter

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21 “(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. (2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, *infra*, quoting, 50 U.S.C. 1801.

22 “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210[subpoenas for communications provider customer records], 211[access to cable company communication service records], 213[sneak and peek], 216[pen register and trap and trace device amendments], 221[trade sanctions], and 222[assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005. “(b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers' communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices). Variants of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees, but could not recover against the United States. Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice's Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government's request until a court order authorizing access can be obtained. Another allows providers to disclose customer records to protect the provider's rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others. A third section, 23 18 U.S.C. 2511, 2701, and 3121 (2000 ed.), respectively.


26 Prior law already granted service providers immunity for disclosure of customer records in compliance with a court access order, 18 U.S.C. 2703(f).

27 "Existing law contains no provision that allows providers of electronic communications service to disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies that threaten death or serious bodily injury. This section amends 18 U.S.C. §2702 to authorize such disclosures if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay. "Current law also contains an odd disconnect: a provider may disclose the contents of the customer's communications in order to protect its rights or property but the current statute does not expressly permit a provider to voluntarily disclose non-content records (such as a subscriber's login records). 18 U.S.C. 2702(b)(5). This problem substantially hinders the ability of providers to protect themselves from cyber-terrorists and criminals. Yet the right to disclose the contents of communications necessarily implies the less intrusive ability to disclose non-content records. In order to promote the protection of our nation's critical infrastructures, this section's amendments allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems," DoJ at
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.  

**Foreign Intelligence Investigations**

Although both criminal investigations and foreign intelligence investigations are conducted in the United States, criminal investigations seek information about unlawful activity; foreign intelligence investigations seek information about other countries and their citizens. Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough.  

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA), something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President's authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, United States v. United States District Court, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage

§110.

28 Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

29 Thus in the name of assisting in the execution of Title III, chapter 121, or chapter 206 order, the courts may not cite the Act as the basis for an order compelling a service provider to make system modifications or provide any other technical assistance not already required under 18 U.S.C. 2518(4), 2706, or 3124(c), see, H.R.Rep.No. 107-236, at 62-3 (2001) (emphasis added) (“This Act is not intended to affect obligations under Communications Assistance for Law Enforcement Act [which addresses law enforcement-beneficial system modifications and the compensation to be paid for the changes], nor does the act impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance”).

30 *E.g.*, As amended by section 902 of the Act, “‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2)(language added by the Act in italics).

31 50 U.S.C. 1801 *et seq.*

33 “As used in this subchapter: (a) ‘Foreign power’ means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

“(b) ‘Agent of a foreign power’ means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C).

“(c) ‘International terrorism’ means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnaping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

“(d) ‘Sabotage’ means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

“(e) ‘Foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans ("United States persons," *i.e.*, citizens or permanent resident aliens). The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

- permits “roving” surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)

- increases the number of judges on the FISA court from 7 to 11

- allows application for a FISA surveillance or search order when gathering foreign intelligence is a significant reason for the application rather than the reason

- authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations

- sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses

- carries a sunset provision

- establishes a claim against the U.S. for certain communications privacy violations by government personnel

- expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

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agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to – (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States,” 50 U.S.C. 1801.

34 Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
**FISA.** FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases.\(^{35}\) It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

**Search and Surveillance for Intelligence Purposes.** Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, *Draft at §151*.\(^{36}\)

Section 901 of the Act address a concern raised during the 106th Congress relating to the availability of the FISA orders and the effective use of information gleaned from the execution of a FISA order.\(^{37}\) It vests the Director of Central

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\(^{36}\) See also, *DoJ at §151*, “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order’s minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed (50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

\(^{37}\) See *e.g.*, S.Rep.No. 106-352, at 3, 6, 7 (2000)(“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application
Intelligence with the responsibility to formulate requirements and priorities for the use of FISA to collect foreign intelligence information. He is also charged with the responsibility of assisting the Attorney General in the efficient and effective dissemination of FISA generated information (50 U.S.C. 403-3(c)).

**Pen Registers and Trap and Trace Devices for Intelligence Gathering.** Section 214 grants the request of the Department of Justice by dropping requirements which limited FISA pen register and trap and trace device orders to facilities used by foreign agents or those engaged in international terrorist or clandestine intelligence activities, 50 U.S.C. 1842(c)(3)(2000 ed.). It is enough that the order is sought as part of an investigation to protect against international terrorism or clandestine intelligence activities and is not motivated solely by an American’s exercise of his or her First Amendment rights. Elsewhere (section 505), the Act drops a similar limitation for intelligence officials’ access to telephone records, 18 U.S.C.

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process, as interpreted by the OIPR is administratively burdensome and, at times, extremely slow. Many applications undergo months of scrutiny before submission to the court because the OIPR prescribes standards and restrictions not imposed by the statute. . . . In particular, the OIPR has been criticized for an overly restrictive interpretation of the FISA ‘currency’ requirement. This is the issue of how recent a subject’s activities must be to support a finding of probable cause that the subject is engaged in clandestine intelligence gathering activities. . . . While existing law does not specifically address ”past activities," it does not preclude, and legislative history supports, the conclusion that past activities may be part of the totality of circumstances considered by the FISC in making a probable cause determination. . . . By definition, information collected pursuant to a court order issued under the Foreign Intelligence Surveillance Act is foreign intelligence not law enforcement information. Accordingly, the Committee wants to clarify that the FISA ‘take’ can and must be shared by the Federal Bureau of Investigation with appropriate intelligence agencies. For the intelligence mission of the United States to be successful, there must be a cooperative and concerted effort among intelligence agencies. Any information collected by one agency under foreign intelligence authorities that could assist another agency in executing its lawful mission should be shared fully and promptly. Only then can the United States Government pursue aggressively important national security targets including, for example, counterterrorist and counternarcotics targets”); see also, 147 Cong.Rec. S799-803 (daily ed. Feb. 24, 2000)(remarks of Sens. Specter, Torricelli and Biden).

38 “When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevancy, an additional factual showing that the communications device has been used to contact an ‘agent of a foreign power’ engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the ‘agent of a foreign power’ prong from the predication, and thus makes the FISA authority more closely track the criminal authority,” DoJ at §155.
Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise be entitled to confidentiality. Section 505, in response to the Justice Department’s suggestion, allows FBI field offices to make the requests, see DoJ at §157 (“At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports”).

Third Party Cooperation and Tangible Evidence. As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target’s activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.40

39 Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise be entitled to confidentiality. Section 505, in response to the Justice Department’s suggestion, allows FBI field offices to make the requests, see DoJ at §157 (“At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports”).

40 When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court’s order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance. This would enhance the FBI’s ability to monitor international terrorists and intelligence officers who are
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian. The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities, in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B);
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a);
- the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a);
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v;

41 “The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigative contexts. The time and difficulty involved in getting such pleadings before the Court usually outweighs the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” DoJ at §156.

42 Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.43

**Access to Law Enforcement Information.** Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community's access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, Draft at §103.44

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43 H.R.Rep.No. 107-205, at 60-1 (2001)(“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

“The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

“Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual’s credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding--without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information”).

44 See also, DoJ at §103, “This section facilitates the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, Draft at §354. 45 

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, Draft at §154. 46

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion. 47 It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions.”

45 See also, DoJ at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.” Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officers

46 See also, DoJ at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”

47 Blair v. United States, 250 U.S. 273, 281 (1919)(the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
These officers may receive: (1) “foreign intelligence information” that is, information regardless of whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

Critics may protest that the change could lead to the use of the grand jury for intelligence gathering purposes, or less euphemistically, to spy on Americans. The proposal was never among those scheduled to sunset, but earlier versions of the section followed the path used for most other disclosures of grand jury material: prior

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49 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25 Harvard Journal of Law & Public Policy 699, 719-20 (2002)(“There is a significant danger that the rule permitting disclosure will be treated as the de facto authorization of an expansion of the grand jury’s investigative role to encompass seeking material relevant only to matters of national security, national defense, immigration, and so forth. The grand jury’s awesome powers should not be unwittingly extended to a much wider range of issues. . . Since the grand jury operates in secret, there are no public checks on the scope of its investigations, and witnesses are not permitted to challenge its jurisdiction. Only the supervising court is in a position to keep the grand jury’s investigation within proper bounds. Requiring judicial approval of foreign intelligence and counterintelligence information disclosures would provide a natural check against the temptation to manipulate the grand jury to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6 (Nov. 2001)(“The grand jury secrecy rule is a rule of policy which has always had exceptions, and it has been frequently modified. The secrecy rule has no credible claim to constitutional stature”).
Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

51 “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person’s official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification. By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

**Increasing Institutional Capacity.** As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a

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52 *Duncan v. Walker*, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted) (“It is our duty to give effect, if possible, to every clause and word of a statute. *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)); see also *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879) (As early as in Bacon's Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage in any setting. *Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687, 698 (1995); see also *Ratzlaf v. United States*, 510 U.S. 135, 140 (1994)").

It is not possible to conclude that Congress intended the universal subsection (d) to apply until sunset and the grand jury and Title III subsections (a), (b), and (c) to operate thereafter, because the Title III subsection expires at the same time as the universal subsection.

53 *Draft at §154,* “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”
computerized translation capability to be used in foreign intelligence gathering.  Section 907 instructs the Director of the Central Intelligence, in consultation with the Director of the FBI, to report on the creation of a National Virtual Translation Center. The report is to include information concerning staffing, allocation of resources, compatibility with comparable systems to be used for law enforcement purposes, and features which permit its efficient and secure use by all of the intelligence agencies.

**Money Laundering**

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture. The Act bolsters federal efforts in each area.

**Regulation.** Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.

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54 “The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

“The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so,” S.Rep.No. 107-63, at 11 (2001).


56 See e.g., 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
Records and Reports. For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler’s checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to files SARs as well,57 reflecting Congress’ view that the information provided the IRS may be valuable for other law enforcement purposes.58 This concern is likewise

58 H.R.Rep.No. 107-250, at 38-9 (2001)(“Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

“Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a ‘Safeguard Procedures Report’ which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

“While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement
reflected in section 357 which asks the Secretary of the Treasury to report on the Internal Revenue Service’s role in the administration of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311 et seq.), and what transfers of authority, if any, are appropriate.

Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action.59 Section 355 expands the immunity to cover disclosures in

59 “Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

“First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor from civil liability applies in arbitration, as well as judicial, proceedings. Second, it amends section 5318(g)(3) to clarify the safe harbor’s coverage of voluntary disclosures (that is, those not covered by the SAR regulatory reporting requirement). The language in section 5318(g)(3)(A) providing that ‘any financial institution that *** makes a disclosure pursuant to *** any other authority *** shall not be liable to any person’ is not intended to avoid the application of the reporting and disclosure provisions of the Federal securities laws to any person, or to insulate any issuers from private rights of actions for disclosures made under the Federal securities laws.

“Subsection [351](b) amends section 5318(g)(2) of title 31—which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed—to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee’s official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
employment references to other insured depository financial institutions provided disclosure is not done with malicious intent.\textsuperscript{60}

The Financial Crimes Enforcement Network (FinCEN), a component within the Treasury Department long responsible for these anti-money laundering reporting and record-keeping requirements, 31 C.F.R. pt. 103, was administratively created in 1990 to provide other government agencies with an “intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes,” 55 Fed.Reg. 18433 (May 2, 1990).

The Act, in section 361, makes FinCEN a creature of statute, a bureau within the Treasury Department, 31 U.S.C. 310. Section 362 charges it with the responsibility of establishing a highly secure network to allow financial institutions to file required reports electronically and to permit FinCEN to provide those institutions with alerts and other information concerning money laundering protective measures, 31 U.S.C. 310 note.

\textbf{Special Measures.} In extraordinary circumstances involving international financial matters, the Act grants the Secretary of the Treasury, in consultation with other appropriate regulatory authorities, the power to issue regulations and orders involving additional required “special measures” and additional “due diligence” requirements to combat money laundering. The special measure authority, available under section 311, comes to life with the determination that particular institutions, jurisdictions, types of accounts, or types of transactions pose a primary money

\textsuperscript{60} 31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 67 (2001).
laundry concern. These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

The circumstances considered in the case of a suspect jurisdiction are:

- evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction’s banking regulation; the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’ including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

“Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate
business transactions.

“Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

“Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

“The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

“The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

“The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

“The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information that it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

“The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

“The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed
Due Diligence. Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.

See generally, H.R.Rep.No. 107-250, at 71-2 ("Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

"The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

"The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

"For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
The Act establishes several other regulatory mechanisms directed at the activities involving U.S. financial institutions and foreign individuals or institutions. Section 313, for instance, in another restriction on correspondent accounts for foreign financial institutions, prohibits U.S. financial institutions from maintaining correspondent accounts either directly or indirectly for foreign shell banks (banks with no physical place of business which have no affiliation with any financial institution through which their banking activities are subject to regulatory supervision).

The Act, in section 325, empowers the Secretary of the Treasury to promulgate regulations to prevent financial institutions from allowing their customers to conceal their financial activities by taking advantage of the institutions’ concentration account practices.

The Secretary of the Treasury is instructed in section 326 to issue regulations for financial institutions’ minimum new customer identification standards and record-
keeping and to recommend a means to effectively verify the identification of foreign customers.\footnote{31 U.S.C. 5318(l); H.R.Rep.No. 107-250, at 62-3 (2001)(“Section [326](a) amends 31 U.S.C. 5318 by adding a new subsection governing the identification of account holders. Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a ‘street name’ or omnibus account in the broker-dealer’s name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to ‘look through’ the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund’s customers. Thus, the fund would not be required to ‘look through’ the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).}
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature.68

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

Reports to Congress. Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

“Paragraph (6) requires that Treasury's regulations prescribed under paragraph (1) become effective within one year after enactment of this bill”).

exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings. 69

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

**International Cooperation.** Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers. 70

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (i.e., the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.

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70 H.R.Rep.No. 107-250, at 67 (2001)(“This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury's progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

“The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime”).
Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, smuggling, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
Section 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

“The definition of ‘financial institution’ in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of ‘commercial bank’ or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad--say to a Mexican bank--and launders them through a series of financial transactions, the government conceivably could not rely on the definition of a ‘financial institution’ in 1956(c)(6) to establish that the transaction was a ‘financial transaction’ within the meaning of 1956(c)(4)(B) (defining a ‘financial transaction’ as a transaction involving the use of a ‘financial institution’), or that it was a ‘monetary transaction’ within the meaning of 1957(f) (defining ‘monetary transaction’ as, inter alia, a transaction that would be a ‘financial transaction’ under 1956(c)(4)(B)).

Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launders the proceeds of one of the crimes set forth on a list of ‘specified unlawful activities.’ 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),” H.R.Rep.No. 107-250, at 38 (2000).

Violations of the special measures and special due diligence requirements of sections 311 and 312 are subject to both civil and criminal penalties by virtue of section 363’s amendments to 31 U.S.C. 5321(a) and 5322. The amendments authorize civil penalties and criminal fines of twice the amount of the transaction but not more than $1 million. Criminal offenders would be subject to a fine in the same amount.

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71 “[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.73

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents.74 They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

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73 The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business. “Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another. “Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive,” H.R.Rep.No. 107-250, at 54 (2001).

74 “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual, 31 U.S.C. 5332(a)(2).

- 18 U.S.C. 476 (taking impressions of tools used for obligations and securities) from 10 to 25 years;
- 18 U.S.C. 477 (possessing or selling impressions of tools used for obligations or securities) from 10 to 25 years;
- 18 U.S.C. 484 (connecting parts of different notes) from 5 to 10 years;
- 18 U.S.C. 493 (bonds and obligations of certain lending agencies) from 5 to 10 years;
- 18 U.S.C. 478 (foreign obligations or securities) from 5 to 20 years;
- 18 U.S.C. 479 (uttering counterfeit foreign obligations or securities) from 3 to 20 years;
- 18 U.S.C. 480 (possessing counterfeit foreign obligations or securities) from 1 to 20 years;
- 18 U.S.C. 481 (plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities) from 5 to 25 years;
- 18 U.S.C. 482 (foreign bank notes) from 2 to 20 years; and
- 18 U.S.C. 483 (uttering counterfeit foreign bank notes) from 1 to 20 years.

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

**Bulk Cash.** Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act's bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting.\(^75\)

The section appears to be the product of reactions to the Supreme Court’s decision in *United States v. Bajakian*, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court’s decision.

\(^75\) “For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).
As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency – representing the proceeds of drug trafficking and other criminal offenses – is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad.

Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United States without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

“Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute,” H.R.Rep.No. 107-250 at 36-7 (2001).

Section 5317 of title 31 once called for civil forfeiture of property traceable to a violation of 31 U.S.C. 5316 (reports on exporting or importing money instruments worth $10,000 or more). Section 372 of the Act recasts section 5317 to provide for civil and criminal forfeitures for violations of 31 U.S.C. 5316, of 31 U.S.C. 5313 (reports on domestic coins and currency transactions involving $10,000 or more) and of 31 U.S.C. 5324 (structuring transactions to evade reporting requirements (smurfing)).

Extraterritorial Jurisdiction. The Act makes 18 U.S.C. 1029, the federal statute condemning various crimes involving credit cards, PIN numbers and other access devices, applicable overseas if the card or device is issued by or controlled by an American bank or other entity and some article is held in or transported to or through the United States during the course of the offense, section 377. The change was part of the original Justice Department proposals. Justice explained that, “[financial crime] admits of no border, utilizing the integrated global financial network for ill purposes. This provision would apply the financial crimes prohibitions to conduct committed abroad, so long as the tools or proceeds of the crimes pass through or are in the United States,” DoJ at §408. The section, however, appears to limit the otherwise applicable extraterritorial jurisdiction implicit in section 1029, since federal courts would likely recognize extraterritorial jurisdiction over a violation

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under *either* circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.\(^77\)

**Venue.** Section 1004 relies on *dicta* in *United States v. Cabrales*, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering,\(^78\) in the state and district in which the monetary transaction takes place. The Supreme Court in *Cabrales* held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in *dicta*, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.\(^79\)

**Forfeiture.** Forfeiture is the government confiscation of property as a consequence of crime.\(^80\) The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 *et seq.* (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

**Constitutional Considerations.** The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 *et seq.*, which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the

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\(^{78}\) “The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed,” *U.S.Const.* Art.III, §2, cl.3.

“[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,” *U.S.Const.* Amend. VI.

\(^{79}\) *See also, United States v. Rodriguez-Moreno*, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnaping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.

jurisdiction of the United States, belonging to any foreign individual, foreign entity, or foreign country whom they determine to have planned, authorized, aided or engaged in an attack on the United States by a foreign country or foreign nationals. The section also permits the government to present secretly (ex parte and in camera) any classified information upon which the forfeiture was based should the decision be subject to judicial review. The Justice Department requested the section as a revival of the President’s powers in times of unconventional wars. By virtue of section 316, property owners may initiate a challenge to a confiscation by filing a claim under the rules applicable in maritime confiscations. The section permits two defenses to forfeiture – that the property is not subject to confiscation under section 106 or that the claimant is entitled to the innocent owner defense of 18 U.S.C. 983(d). The characterization of the defenses as “affirmative defense” indicates that the claimant bears the burden of proof. The innocent owner defenses of 18 U.S.C. 983(d) are probably not available in cases under section 106, since that section is explicitly

81 “This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App.U.S.C. §5(b).

“This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress's war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

“The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2),” DoJ at §159.

82 “An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
excepted from the coverage of 18 U.S.C. 983.\textsuperscript{83} The challenge proceedings permit the court to admit evidence, such as hearsay evidence, that would not otherwise be admissible under the Federal Rules of Evidence if the evidence is reliable and if national security might be imperiled should dictates of the Federal Rules be followed, §316(b). The section recognizes the rights of claimants to proceed alternatively under the Constitution or the Administrative Procedure Act.\textsuperscript{84}

The Justice Department also recommended enactment of an overlapping provision which ultimately passed as section 806 of the Act without any real discussion of the relationship of the two sections.\textsuperscript{85} Section 806 authorizes confiscation of all property, regardless of where it is found, of any individual, entity, or organization engaged in domestic or international terrorism (as defined in 18 U.S.C. 2331),\textsuperscript{86} against the United States, Americans or their property, 18 U.S.C.

\textsuperscript{83}18 U.S.C. 983(i)(2)(D).

\textsuperscript{84}“The exclusion of certain provisions of Federal law from the definition of the term ‘civil forfeiture statute’ in section 983(i) of title 18, United States Code, shall not be construed to deny an owner of property the right to contest the confiscation of assets of suspected international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C) subchapter II of chapter 5 of title 5, United States Code (commonly known as the ‘Administrative Procedure Act’).” Sec. 316(c)(1).

\textsuperscript{85}“Current law does not contain any authority tailored specifically to the confiscation of terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available current forfeiture laws require detailed tracing that is quite difficult for accounts coming through the banks of countries used by many terrorists.

“This section increases the government's ability to strike at terrorist organizations' economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001.” DoJ, at §403. The House Report on H.R. 2975 which contained versions of both sections is no more explicit on the relation of the two sections.

\textsuperscript{86}“(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
981(a)(1)(G). Section 806 as discussed below also calls for the more common confiscation of property derived from and or facilitating acts of domestic or international terrorism against the United States or its citizens. Confiscations under 806 may be challenged under the procedures of 18 U.S.C. 983, since they are not exempted there. To the extent that forfeiture under section 806 is based on international rather than domestic terrorism, claimants may also use the procedures of section 316.

Confiscation based solely on the fact that the property is owned by a criminal offender, rather than that it is derived from or facilitates some crime is fairly uncommon. It is the mark of common law forfeiture of estate. At common law, a felon forfeited all of his property. Most contemporary forfeiture statutes employ statutory forfeiture, a more familiar presence in American law, \(^\text{87}\) which consists of the confiscation of things whose possession is criminal, of the fruits of crime, and of the means of crime – untaxed whiskey, the drug dealer’s profits, and the rum runner’s ship.

Three characteristics set forfeiture of estate apart. The property is lost solely by reason of its ownership by a felon. All of a felon’s property is confiscated, not merely that which is related to the crime for which he is convicted. Finally, it occasions attainder which negates the felon’s right to hold property or for title to property to pass through him to his heirs. It was with this in mind, that the Framers declared that “no attainder of treason shall work corruption of blood or forfeiture exception during the life of the person attainted.” \(^\text{88}\) And for this reason, President Lincoln insisted that the confiscated real estate of Confederate supporters should revert their heirs at death. \(^\text{89}\)

\(^{87}\) *Austin v. United States*, 509 U.S. 602, 611-12 (1993)(“Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture . . . Of England’s three kinds of forfeiture, only the third took hold in the United States”).

\(^{88}\) *U.S.Const.* Art.III, §3, cl.2.

\(^{89}\) 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal *in personam* proceedings following criminal conviction as a means of accomplishing confiscation.
Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner. Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers. The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners. Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them. The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate

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90 Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c) (“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act”).

91 Silesian American Corp. V. Clark, 332 U.S. 469 (1947); cf., Societe Internationale v. Rogers, 357 U.S. 197, 211 (1958) (“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).

92 Zittman v. McGrath, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’

any presumption of remedial purposes.\textsuperscript{94} The same has been said of the applicability of the ex post facto clause.\textsuperscript{95}

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO.\textsuperscript{96} If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

\textbf{Other Forfeiture Amendments.} In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.\textsuperscript{97}

\textsuperscript{94} United States v. Ursery, 518 U.S. 267, 278 (1996).

\textsuperscript{95} See e.g., United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.), 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994).

\textsuperscript{96} DoJ, at §403.

\textsuperscript{97} 18 U.S.C. 1956(b). Cf., H.R.Rep.No. 107-250, at 54-5 (2001)(“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas. 98 Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted

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American Bank, 191 F.3d 30 (1st Cir. 1999).

“The second provision, modeled on 18 U.S.C. 1345(b), gives the district court the power to restrain property, issue seizure warrants, or take other action necessary to ensure that a defendant in an action covered by the statute does not dissipate the assets that would be needed to satisfy a judgment.

“This section also authorizes a court, on the motion of the Government or a State or Federal regulator, to appoint a receiver to gather and protect assets needed to satisfy a judgment under sections 1956 and 957, and the forfeiture provisions in sections 981 and 982. This authority is intended to apply in three circumstances: (1) when there is a judgment in a criminal case, including an order of restitution, following a conviction for a violation of section 1956 or 1957; (2) when there is a judgment in a civil case under section 1956(b) assessing a penalty for a violation of either section 1956 or 1957; and (3) when there is a civil forfeiture judgment under section 981 or a criminal forfeiture judgment, including a personal money judgment, under section 982.

“The amendment also makes section 1956(b) applicable to violations of section 1957. It applies to conduct occurring before the effective date of the Act”).

98 18 U.S.C. 981(k).  H.R.Rep.No. 107-250, at 57-8 (2001)(“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture.  To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank’s customers.

“Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank’s correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

“The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”).
Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here. Section 320 enlarges this provision to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements. This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.

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99 Cf., H.R.Rep.No. 107-250, at 58-9 (2001) (“Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of ‘substitute assets’ when the defendant has placed the property otherwise subject to forfeiture ‘beyond the jurisdiction of the court.’ Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

“This section amends 21 U.S.C. 853 to make clear that a court in a criminal case may issue a repatriation order—either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. 853(e) to restrain property—so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both”.


101 H.R.Rep.No. 107-250, at 56 (2001) (“This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act”).

102 H.R.Rep.No. 107-250, at 59-60 (2001) (“Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country.

“Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
A fugitive may not challenge a federal forfeiture. Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in “order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.”

to contest the restraining order could do so on the ground that 28 U.S.C. 2467 was not properly applied to the particular case, but could not oppose the restraining order on any ground that could also be raised in the proceedings pending in a foreign court. This provision prevents a litigant from taking ‘two bites at the apple’ by raising objections to the basis for the forfeiture in the Federal court that he also raised, or is entitled to raise, in the foreign court where the forfeiture action is pending. It complements the existing provision in section 2467(e) providing that the Federal court is bound by the findings of fact of the foreign court, and may not look behind such findings in determining whether to enter an order enforcing a foreign forfeiture judgment.

“This section also amends 28 U.S.C. 2467 to make clear that it is not necessary to prove that the person asserting an interest in the property received actual notice of the forfeiture proceedings. As is the case with respect to forfeitures under U.S. law, it is sufficient if the foreign nation takes steps to provide notice, in accordance with the principles of due process. See Gonzalez v. United States, 1997 WL 278123 (S.D.N.Y. 1997) (‘the [G]overnment is not required to ensure actual receipt of notice that is properly mailed’); Albajon v. Gugliotta, 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant’s identifications, and mailed after claimant released from jail, is sufficient to satisfy due process, even if claimant never received notice); United States v. Schiavo, 897 F. Supp. 644, 648-49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; due process satisfied even if he did not receive the notice).

“Finally, 28 U.S.C. 2467 is amended to authorize the enforcement of a forfeiture judgment based on any foreign offense that would constitute an offense giving rise to a civil or criminal forfeiture of the same property if the offense had been committed in the United States. This is one of two safeguards that the statute contains against the enforcement of judgments that the United States does not consider appropriate for enforcement: if the judgment is based on an act that would not constitute a crime in the United States, such as removing assets from the reach of a repressive regime, it could not be enforced. In addition, section 2467 already provides that a foreign judgment may only be enforced by a Federal court at the request of the United States, and only after the Attorney General has certified that the judgment was obtained in accordance with the principles of due process. Thus, neither a foreign Government nor a foreign private party could enforce a foreign judgment on its own under this provision.”). Note that the safeguard to which the report refers is the range of foreign offenses that will support an enforceable confiscation order, i.e., drug offenses and crimes on the money laundering predicate offense list, and that the amendment narrows that safeguard by adding additional foreign offenses, i.e., any foreign equivalent of a federal crime which would support a confiscation order.

Alien Terrorists and Victims

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

Border Protection. The border protection provisions:

• authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401

• authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402

• remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404

• authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405

• authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.

• instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007

• direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418

• express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414

• add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415

• call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416

• limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
• instruct the Attorney General to report on the feasibility of using biometric scanners to help prevent terrorists and other foreign criminals from entering the country, section 1008

• authorize appropriations of $250,000 for the FBI to determine the feasibility of providing airlines with computer access to the names of suspected terrorists, section 1009

• authorize reciprocal sharing of the State Department’s visa lookout data and related information with other nations in order to prevent terrorism, drug trafficking, slave marketing, and gun running, section 413

**Detention and Removal.** Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity, 8 U.S.C. 1227 (a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(iv). Aliens may be inadmissible for any number of terrorism-related reasons, 8 U.S.C. 1182 (a)(3)(B). Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported.


Section 411 defines “terrorist organization” to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the *Federal Register* as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C.

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104 As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).
Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).


An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in “premeditated, politically motivated violence perpetrated against noncombatant targets,” or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security or endanger some individual or the general public. The Attorney General's determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
The USA PATRIOT Act: A Legal Analysis

April 15, 2002

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The USA PATRIOT Act: A Legal Analysis

Summary

The USA PATRIOT Act passed in the wake of the September 11 terrorist attacks. It flows from a consultation draft circulated by the Department of Justice, to which Congress made substantial modifications and additions. The stated purpose of the Act is to enable law enforcement officials to track down and punish those responsible for the attacks and to protect against any similar attacks.

The Act grants federal officials greater powers to trace and intercept terrorists’ communications both for law enforcement and foreign intelligence purposes. It reenforces federal anti-money laundering laws and regulations in an effort to deny terrorists the resources necessary for future attacks. It tightens our immigration laws to close our borders to foreign terrorists and to expel those among us. Finally, it creates a few new federal crimes, such as the one outlawing terrorists’ attacks on mass transit; increases the penalties for many others; and institutes several procedural changes, such as a longer statute of limitations for crimes of terrorism.

Critics have suggested that it may go too far. The authority to monitor e-mail traffic, to share grand jury information with intelligence and immigration officers, to confiscate property, and to impose new book-keeping requirements on financial institutions, are among the features troubling to some.

The Act itself responds to some of these reservations. Many of the wiretapping and foreign intelligence amendments sunset on December 31, 2005. The Act creates judicial safeguards for e-mail monitoring and grand jury disclosures; recognizes innocent owner defenses to forfeiture; and entrusts enhanced anti-money laundering powers to those regulatory authorities whose concerns include the well being of our financial institutions.

This report, stripped of its citations and footnotes, is available in an abbreviated form as The USA PATRIOT Act: A Sketch, CRS Rep.No. RS21203. In addition, much of the information contained here may also be found under a different arrangement in a report entitled, Terrorism: Section by Section Analysis of the USA PATRIOT Act, CRS Rep.No. RL31200 (Dec. 10, 2001). A wider array of terrorism-related analysis appears on the CRS terrorism electronic briefing book page.
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The USA PATRIOT Act: A Legal Analysis

Introduction

Congress passed the USA PATRIOT Act (the Act) in response to the terrorists’ attacks of September 11, 2001.1 The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to further close our borders to foreign terrorists and to detain and remove those within our borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it is not without safeguards, critics contend some of its provisions go too far. Although it grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough.


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1 P.L. 107-56, 115 Stat. 272 (2001); its full title is the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act).”

2 H.R. 2975 was introduced by Representative Sensenbrenner for himself and Representatives Conyers, Hyde, Coble, Goodlatte, Jenkins, Jackson-Lee, Cannon, Meehan, Graham, Bachus, Wexler, Hostettler, Keller, Issa, Hart, Flake, Schiff, Thomas, Goss, Rangel, Berman and Lofgren; S.1510 by Senator Daschle for himself and Senators Lott, Leahy, Hatch, Graham, Shelby and Sarbanes.

3 H.R. 3004 was introduced by Representative Oxley for himself and Represenatives LaFalce, Leach, Maloney, Roukema, Bentsen, Hooley, Bereuter, Baker, Bachus, King, Kelly, Gillmore, Cantor, Riley, Latourette, Green (of Wisconsin), and Grucci; and reported out of the House Financial Services Committee with amendments on October 15, 2001, H.R.Rep.No. 107-250. H.R. 3004, as reported out, included Internet gambling amendments that were not included in H.R. 2975/H.R.3108.
ed. Oct. 24, 2001), and H.R. 3162 was sent to the President who signed it on October 26, 2001.

**Criminal Investigations: Tracking and Gathering Communications**

A portion of the Act addresses issues suggested originally in a Department of Justice proposal circulated in mid-September. The first of its suggestions called for amendments to federal surveillance laws, laws which govern the capture and tracking of suspected terrorists’ communications within the United States. Federal law features a three tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications.

The tiers reflected the Supreme Court’s interpretation of the Fourth Amendment’s ban on unreasonable searches and seizures. The Amendment protects private conversations, *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967). It does not cloak information, even highly personal information, for which there is no individual justifiable expectation of privacy, such as telephone company records of calls made to and from an individual’s home, *Smith v. Maryland*, 442 U.S. 735 (1979), or bank records of an individual’s financial dealings, *United States v. Miller*, 425 U.S. 435 (1976).

Congress responded to *Berger* and *Katz*, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications, 18 U.S.C. 2511. At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious

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4 The Department’s proposal, dated September 20, 2001, came with a brief section by section analysis. Both the proposal (Draft) and analysis (DoJ) were printed as an appendix in *Administration's Draft Anti-Terrorism Act of 2001, Hearing Before the House Comm. on the Judiciary*, 107th Cong., 1st Sess. 54 (2001).


6 “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,” U.S. Const. Amend. IV.

7 Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
criminal cases. When approved by senior Justice Department officials, law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.

8 “The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of” one or more predicate offense, 18 U.S.C. 2516.

9 The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement), 1751 (presidential and presidential staff assassination, kidnapping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnapping, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or nationalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations, 18 U.S.C. 2518. The court notifies the parties to any conversations seized under the order after the order expires, 18 U.S.C. 2518(8).

Below Title III, the next tier of privacy protection covers some of those matters which the Supreme Court has described as beyond the reach of the Fourth Amendment protection – telephone records, e-mail held in third party storage, and the like, 18 U.S.C. 2701-2709 (Chapter 121). Here, the law permits law enforcement access, ordinarily pursuant to a warrant or court order or under a subpoena in some cases, but in connection with any criminal investigation and without the extraordinary levels of approval or constraint that mark a Title III interception, 18 U.S.C. 2703.

Least demanding and perhaps least intrusive of all is the procedure that governs court orders approving the government’s use of trap and trace devices and pen registers, a kind of secret “caller id”, which identify the source and destination of calls made to and from a particular telephone, 18 U.S.C. 3121-3127 (Chapter 206). The orders are available based on the government's certification, rather than a finding of the court, that the use of the device is likely to produce information relevant to the investigation of a crime, any crime, 18 U.S.C. 3123. The devices record no more than the identity of the participants in a telephone conversation, but neither the orders nor the results they produce need ever be revealed to the participants.

The Act modifies the procedures at each of the three levels. It:

**offense involving counterfeiting punishable under 18 U.S.C. 471, 472, or 473; (e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marijuana, or other dangerous drugs, punishable under any law of the United States; (f) any offense including extortionate credit transactions under 18 U.S.C. 892, 893, or 894; (g) a violation of 31 U.S.C. 5322 (dealing with the reporting of currency transactions); (h) any felony violation of 18 U.S.C. 2511 and 2512 (interception and disclosure of certain communications and to certain intercepting devices); (i) any felony violation of 18 U.S.C. ch. 71 (obscenity); (j) 49 U.S.C. 60123(b) (destruction of a natural gas pipeline), 46502 (aircraft piracy); (k) 22 U.S.C. 2778 (Arms Export Control Act); (l) the location of any fugitive from justice from an offense described in this section; (m) a violation of 8 U.S.C. 1324, 1327, or 1328; (n) any felony violation of 18 U.S.C. 922, 924 (firearms); (o) any violation of 26 U.S.C. 5861 (firearms); (p) a felony violation of 18 U.S.C. 1028 (production of false identification documents), 1542 (false statements in passport applications), 1546 (fraud and misuse of visas, permits, and other documents) or a violation of 8 U.S.C. 1324, 1327, or 1328 (smuggling of aliens); (p) 229 (chemical weapons), 2332 (terrorist violence against Americans overseas), 2332a (weapons of mass destruction), 2332b (multinational terrorism), 2332d (financial transactions with countries supporting terrorism), 2339A (support of terrorist), 2332B (support of terrorist organizations); (r) any conspiracy to commit any of these, 18 U.S.C. 2516(1)(crimes added by the Act in italics). Other than telephone face to face conversations (i.e., electronic communications), the approval of senior Justice Department officials is not required and an order may be sought in any felony investigation, 18 U.S.C. 2516(3).

Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
• permits pen register and trap and trace orders for electronic communications (e.g., e-mail)  

• authorizes nationwide execution of court orders for pen registers, trap and trace devices, and access to stored e-mail or communication records  

• treats stored voice mail like stored e-mail (rather than like telephone conversations)  

• permits authorities to intercept communications to and from a trespasser within a computer system (with the permission of the system’s owner)  

• adds terrorist and computer crimes to Title III’s predicate offense list  

• reenforces protection for those who help execute Title III, ch. 121, and ch. 206 orders  

• encourages cooperation between law enforcement and foreign intelligence investigators  

• establishes a claim against the U.S. for certain communications privacy violations by government personnel  

• terminates the authority found in many of the these provisions and several of the foreign intelligence amendments with a sunset provision (Dec. 31, 2005).  

Pen Registers and Trap and Trace Devices. In section 216, the Act allows court orders authorizing trap and trace devices and pen registers to be used to capture source and addressee information for computer conversations (e.g., e-mail) as well as telephone conversations, 18 U.S.C. 3121, 3123. In answer to objections that e-mail header information can be more revealing than a telephone number, it creates a detailed report to the court, 18 U.S.C. 3123(a)(3).11  

11 Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public the agency shall ensure that a record will be maintained which will identify – (i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of the such device.  

“(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof),” section 216(b)(1).
The use of pen registers or trap and trace devices was limited at one time to the judicial district in which the order was issued, 18 U.S.C. 3123 (2000 ed.). Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States, 18 U.S.C. 3123(b)(1)(C), 3127(2).

**Communications Records and Stored E-Mail.** With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber, 18 U.S.C. 2703(a),(b). A warrant will also suffice to seize records describing telephone and other communications transactions without customer notice, 18 U.S.C. 2703(c). In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation, officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records, 18 U.S.C. 2703(b),(c). They can obtain a limited amount of record information (subscribers' names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena, 18 U.S.C. 2703(c)(1)(C). There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial, 18 U.S.C. 2705.

In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider’s customer records, 18 U.S.C. 2703(c)(1)(C).

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.

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12 The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” DoJ at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

13 Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user's true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” DoJ at §107.
Previously, only a federal court in the district in which the e-mail was stored could issue the order. Under section 220, federal courts in the district where an offense under investigation occurred may issue orders applicable "without geographic limitation," 18 U.S.C. 2703.\textsuperscript{14}

The Act, in section 209, treats voice mail like e-mail, that is, subject to the warrant or court order procedure, rather than to the more demanding coverage of Title III once required, \textit{United States v. Smith}, 155 F.3d 1050, 1055-56 (9th Cir. 1998).

Finally, the Act resolves a conflict between chapter 121 and the federal law governing cable companies. Government entities may have access to cable company customer records only under a court order following an adversary hearing if they can show that the records will evidence that the customer is or has engaged in criminal activity, 47 U.S.C. 511(h). When cable companies began offering telephone and other communications services the question arose whether the more demanding cable rules applied or whether law enforcement agencies were entitled to ex parte court orders under the no-notice procedures applicable to communications providers.\textsuperscript{15} The Act makes it clear that the cable rules apply when cable television viewing services are

\textsuperscript{14} Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” \textit{DoJ} at §108.

\textsuperscript{15} See e.g., \textit{DoJ} at §109 ("Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement’s access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations").
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

**Electronic Surveillance.** To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202. A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(i). Yet only the interloper's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.

**Criminal Investigators' Access to Foreign Intelligence Information.** The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism. It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that “the purpose for the surveillance is to obtain foreign intelligence information,” 50 U.S.C. 1804(a)(7)(B)(2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps “the purpose” might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation

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16 18 U.S.C. 229 (chemical weapons), 2332(terrorist acts of violence committed against Americans overseas), 2332a(use of weapons of mass destruction), 2332b(acts of terrorism transcending national boundaries), 2332d(financial transactions with countries which support terrorists), 2339A(providing material support to terrorists), and 2339B(providing material support to terrorist organizations).

17 “Because service providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves as permitted under current law, they often have no way to exercise their rights to protect themselves from unauthorized attackers. Moreover, such attackers can target critical infrastructures and engage in cyberterrorism,” DoJ at §106. Elsewhere the Act defines “electronic surveillance” for purposes of the Foreign Intelligence Surveillance Act (FISA) to emphasize that the law enforcement authority for this intruder surveillance does not confer similar authority for purposes of foreign intelligence gathering, section 1003 (50 U.S.C. 1801(f)(2)).

The Justice Department sought FISA surveillance and physical search authority on the basis of “a” foreign intelligence purpose. Section 218 of the Act insists that foreign intelligence gathering be a “significant purpose” for the request for the FISA surveillance or physical search order, 50 U.S.C. 1804(a)(7)(B), 1823(a)(7)(B), a more

19 Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment's warrant clause. It is here that the “primary purpose” notion originated. In United States v. Truong Dinh Hung, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, “as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.” Subsequent case law, however, is not as clear as it might be: see e.g., United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984) (“FISA permits federal officials to obtain orders authorizing electronic surveillance ‘for the purpose of obtaining foreign intelligence information.’ The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying officials’ belief that the information sought is the type of foreign intelligence information described”); United States v. Pelton, 835 F.2d 1067, 1075-76 (4th Cir. 1987) (“We also reject Pelton’s claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial”); United States v. Sarkissian, 841 F.2d 959, 907-8 (9th Cir. 1988) (“Defendants rely on the primary purpose test articulated in United States v. Truong Dinh Hung. . . . One other court has applied the primary purpose test. Another court has rejected it . . . distinguishing Truong. A third court has declined to decide the issue. We also decline to decide the issue”); United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1991) (“Appellants attack the government's surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance”).

20 “Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” DoJ at §153.
demanding standard than the “a purpose” threshold proposed by the Justice Department, but a clear departure from the original “the purpose” entry point. FISA once described a singular foreign intelligence focus prerequisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k), 1825(k).

**Protective Measures.** The Act reenforces two kinds of safeguards, one set designed to prevent abuse and the other to protect those who assist the government. The sunset clause is perhaps the best known of the Act’s safeguards. Under the direction of section 224, many of the law enforcement and foreign intelligence authorities granted by the Act expire as of December 31, 2005. The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter

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21 “(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. (2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, infra, quoting, 50 U.S.C. 1801.

22 “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205[FBI translators], 208[seizure of stored voice-mail], 210[subpoenas for communications provider customer records], 211[access to cable company communication service records], 213[sneak and peek], 216[pen register and trap and trace device amendments], 221[trade sanctions], and 222[assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005. “(b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers’ communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices).23 Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees,24 but could not recover against the United States.25 Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice's Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government's request until a court order authorizing access can be obtained.26 Another allows providers to disclose customer records to protect the provider's rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others.27 A third section,

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26 Prior law already granted service providers immunity for disclosure of customer records in compliance with a court access order, 18 U.S.C. 2703(f).
27 “Existing law contains no provision that allows providers of electronic communications service to disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies that threaten death or serious bodily injury. This section amends 18 U.S.C. §2702 to authorize such disclosures if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.

“Current law also contains an odd disconnect: a provider may disclose the contents of the customer's communications in order to protect its rights or property but the current statute does not expressly permit a provider to voluntarily disclose non-content records (such as a subscriber's login records). 18 U.S.C. 2702(b)(5). This problem substantially hinders the ability of providers to protect themselves from cyber-terrorists and criminals. Yet the right to disclose the contents of communications necessarily implies the less intrusive ability to disclose non-content records. In order to promote the protection of our nation's critical infrastructures, this section's amendments allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems,” DoJ at
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

**Foreign Intelligence Investigations**

Although both criminal investigations and foreign intelligence investigations are conducted in the United States, criminal investigations seek information about unlawful activity; foreign intelligence investigations seek information about other countries and their citizens. Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough.

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA), something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President's authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, *United States v. United States District Court*, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage

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28 Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

29 Thus in the name of assisting in the execution of Title III, chapter 121, or chapter 206 order, the courts may not cite the Act as the basis for an order compelling a service provider to make system modifications or provide any other technical assistance not already required under 18 U.S.C. 2518(4), 2706, or 3124(c), see, H.R.Rep.No. 107-236, at 62-3 (2001) (emphasis added) (“This Act is not intended to affect obligations under Communications Assistance for Law Enforcement Act [which addresses law enforcement-beneficial system modifications and the compensation to be paid for the changes], nor does the act impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance”).

30 *E.g.*, As amended by section 902 of the Act, “‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2)(language added by the Act in italics).

31 50 U.S.C. 1801 *et seq.*
lockers, 50 U.S.C. 1861-1863 (2000 ed.). Intelligence authorities gained narrow passages through other privacy barriers as well.\(^\text{32}\)

In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs.\(^\text{33}\) There were and still are extra


\(^{33}\)“As used in this subchapter: (a) ‘Foreign power’ means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

“(b) ‘Agent of a foreign power’ means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power, (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C).

“(c) ‘International terrorism’ means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnapping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

“(d) ‘Sabotage’ means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

“(e) ‘Foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans (“United States persons,” i.e., citizens or permanent resident aliens).\textsuperscript{34} The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

- permits “roving” surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)
- increases the number of judges on the FISA court from 7 to 11
- allows application for a FISA surveillance or search order when gathering foreign intelligence is \textit{a significant} reason for the application rather than \textit{the} reason
- authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations
- sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses
- carries a sunset provision
- establishes a claim against the U.S. for certain communications privacy violations by government personnel
- expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

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\textsuperscript{34} Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
**FISA.** FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases.\(^{35}\) It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

**Search and Surveillance for Intelligence Purposes.** Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, Draft at §151.\(^{36}\)

Section 901 of the Act address a concern raised during the 106th Congress relating to the availability of the FISA orders and the effective use of information gleaned from the execution of a FISA order.\(^{37}\) It vests the Director of Central

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\(^{36}\) *See also, DoJ* at §151, “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order’s minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed (50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

\(^{37}\) *See e.g., S.Rep.No. 106-352, at 3, 6, 7 (2000)(“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application*
Intelligence with the responsibility to formulate requirements and priorities for the use of FISA to collect foreign intelligence information. He is also charged with the responsibility of assisting the Attorney General in the efficient and effective dissemination of FISA generated information (50 U.S.C. 403-3(c)).

**Pen Registers and Trap and Trace Devices for Intelligence Gathering.** Section 214 grants the request of the Department of Justice by dropping requirements which limited FISA pen register and trap and trace device orders to facilities used by foreign agents or those engaged in international terrorist or clandestine intelligence activities, 50 U.S.C. 1842(c)(3)(2000 ed.). It is enough that the order is sought as part of an investigation to protect against international terrorism or clandestine intelligence activities and is not motivated solely by an American’s exercise of his or her First Amendment rights. Elsewhere (section 505), the Act drops a similar limitation for intelligence officials’ access to telephone records, 18 U.S.C.

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38 "When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevance, an additional factual showing that the communications device has been used to contact an ‘agent of a foreign power’ engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the ‘agent of a foreign power’ prong from the predication, and thus makes the FISA authority more closely track the criminal authority,” *DoJ* at §155.
Section 214 adjusts the language of the FISA pen register-trap and trace authority to permit its use to capture source and destination information relating to electronic communications (e.g., e-mail) as well as telephone communications, 50 U.S.C. 1842(d). The section makes it clear that requests for a FISA pen register-trap and trace order, like requests for other FISA orders, directed against Americans (U.S. persons) may not be based solely on activities protected by the First Amendment, 50 U.S.C. 1842, 1843.

Third Party Cooperation and Tangible Evidence. As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target's activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.40

39 Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise to be entitled to confidentiality. Section 505, in response to the Justice Department's suggestion, allows FBI field offices to make the requests, see DoJ at §157 ("At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports").

40 When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court's order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.’ This would enhance the FBI's ability to monitor international terrorists and intelligence officers who are
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian. The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities, in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B);
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a);
- the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a);
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v;

trained to thwart surveillance by rapidly changing hotel accommodations, cell phones, Internet accounts, etc., just prior to important meetings or communications. Under the current law, the government would have to return to the FISA Court for an order that named the new carrier, landlord, etc., before effecting surveillance. Under the proposed amendment, the FBI could simply present the newly discovered carrier, landlord, custodian or other person with a generic order issued by the Court and could then effect FISA coverage as soon as technically feasible.” DoJ at 152.


41 “The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigative contexts. The time and difficulty involved in getting such pleadings before the Court usually outweighs the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” DoJ at §156.

42 Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.43

**Access to Law Enforcement Information.** Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community’s access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, Draft at §103.44

43 H.R.Rep.No. 107-205, at 60-1 (2001)(“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

“The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

“Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual’s credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding—without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information”).

44 See also, DoJ at §103, “This section facilities the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, Draft at §354.45

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, Draft at §154.46

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion.47 It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its

wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions.”

45 See also, DoJ at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.” Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officers

46 See also, DoJ at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transational data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”

47 Blair v. United States, 250 U.S. 273, 281 (1919)(the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

The Act, in section 203(a), allows disclosure of matters occurring before the grand jury to “any federal law enforcement, intelligence, protective, immigration, national defense, or national security” officer to assist in the performance of his official duties, F.R.Crim.P. 6(e)(3)(C)(i)(V). 48

Critics may protest that the change could lead to the use of the grand jury for intelligence gathering purposes, or less euphemistically, to spy on Americans. 49 The proposal was never among those scheduled to sunset, but earlier versions of the section followed the path used for most other disclosures of grand jury material: prior

48 These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

49 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25 HARVARD JOURNAL OF LAW & PUBLIC POLICY 699, 719-20 (2002)(“There is a significant danger that the rule permitting disclosure will be treated as the de facto authorization of an expansion of the grand jury’s investigative role to encompass seeking material relevant only to matters of national security, national defense, immigration, and so forth. The grand jury’s awesome powers should not be unwittingly extended to a much wider range of issues. . . Since the grand jury operates in secret, there are no public checks on the scope of its investigations, and witnesses are not permitted to challenge its jurisdiction. Only the supervising court is in a position to keep the grand jury’s investigation within proper bounds. Requiring judicial approval of foreign intelligence and counterintelligence information disclosures would provide a natural check against the temptation to manipulate the grand jury to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6 (Nov. 2001)(“The grand jury secrecy rule is a rule of policy which has always had exceptions, and it has been frequently modified. The secrecy rule has no credible claim to constitutional stature”).
Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

“Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification.\(^5^2\) By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.\(^5^3\)

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

**Increasing Institutional Capacity.** As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a

\(^{52}\) *Duncan v. Walker*, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted) (“It is our duty to give effect, if possible, to every clause and word of a statute. *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)); see also *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879)(As early as in Bacon's Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage in any setting. *Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687, 698 (1995); see also *Ratzlaf v. United States*, 510 U.S. 135, 140 (1994))

It is not possible to conclude that Congress intended the universal subsection (d) to apply until sunset and the grand jury and Title III subsections (a), (b), and (c) to operate thereafter, because the Title III subsection expires at the same time as the universal subsection.

\(^{53}\) Draft at §154, “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”
computerized translation capability to be used in foreign intelligence gathering.\(^5^4\) Section 907 instructs the Director of the Central Intelligence, in consultation with the Director of the FBI, to report on the creation of a National Virtual Translation Center. The report is to include information concerning staffing, allocation of resources, compatibility with comparable systems to be used for law enforcement purposes, and features which permit its efficient and secure use by all of the intelligence agencies.

**Money Laundering**

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture.\(^5^5\) The Act bolsters federal efforts in each area.

**Regulation.** Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.\(^5^6\)

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54 “The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

“The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so,” S.Rep.No. 107-63, at 11 (2001).


56 See e.g., 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler’s checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to files SARs as well, reflecting Congress’ view that the information provided the IRS may be valuable for other law enforcement purposes. This concern is likewise

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58 H.R.Rep.No. 107-250, at 38-9 (2001) (“Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

“Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a ‘Safeguard Procedures Report’ which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

“While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement
reflected in section 357 which asks the Secretary of the Treasury to report on the Internal Revenue Service’s role in the administration of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311 et seq.), and what transfers of authority, if any, are appropriate.

Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action. Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

Subsection [351](b) amends section 5318(g)(2) of title 31—which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed—to clarify that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee’s official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the

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59 "Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

"First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor from civil liability applies in arbitration, as well as judicial, proceedings. Second, it amends section 5318(g)(3) to clarify the safe harbor’s coverage of voluntary disclosures (that is, those not covered by the SAR regulatory reporting requirement). The language in section 5318(g)(3)(A) providing that ‘any financial institution that *** makes a disclosure pursuant to *** any other authority *** shall not be liable to any person’ is not intended to avoid the application of the reporting and disclosure provisions of the Federal securities laws to any person, or to insulate any issuers from private rights of actions for disclosures made under the Federal securities laws.

"Subsection [351](b) amends section 5318(g)(2) of title 31--which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed--to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee’s official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
employment references to other insured depository financial institutions provided disclosure is not done with malicious intent.\textsuperscript{60}

The Financial Crimes Enforcement Network (FinCEN), a component within the Treasury Department long responsible for these anti-money laundering reporting and record-keeping requirements, 31 C.F.R. pt. 103, was administratively created in 1990 to provide other government agencies with an “intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes,” \textit{55 Fed.Reg.} 18433 (May 2, 1990).

The Act, in section 361, makes FinCEN a creature of statute, a bureau within the Treasury Department, 31 U.S.C. 310. Section 362 charges it with the responsibility of establishing a highly secure network to allow financial institutions to file required reports electronically and to permit FinCEN to provide those institutions with alerts and other information concerning money laundering protective measures, 31 U.S.C. 310 note.

\textbf{Special Measures.} In extraordinary circumstances involving international financial matters, the Act grants the Secretary of the Treasury, in consultation with other appropriate regulatory authorities, the power to issue regulations and orders involving additional required “special measures” and additional “due diligence” requirements to combat money laundering. The special measure authority, available under section 311, comes to life with the determination that particular institutions, jurisdictions, types of accounts, or types of transactions pose a primary money

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\item \textsuperscript{60} 31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 66 (2001).
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laundering concern. These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

31 U.S.C. 5318A. The circumstances considered in the case of a suspect jurisdiction are: evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction’s banking regulation; the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’ including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate
business transactions.

“Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

“Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

“The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

“The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

“The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

“The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

“The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

“The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed
Due Diligence. Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.63

63 See generally, H.R.Rep.No. 107-250, at 71-2 ("Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
**General Regulatory Matters.** The Act establishes several other regulatory mechanisms directed at the activities involving U.S. financial institutions and foreign individuals or institutions. Section 313, for instance, in another restriction on correspondent accounts for foreign financial institutions, prohibits U.S. financial institutions from maintaining correspondent accounts either directly or indirectly for foreign shell banks (banks with no physical place of business) which have no affiliation with any financial institution through which their banking activities are subject to regulatory supervision.

The Act, in section 325, empowers the Secretary of the Treasury to promulgate regulations to prevent financial institutions from allowing their customers to conceal their financial activities by taking advantage of the institutions’ concentration account practices.

The Secretary of the Treasury is instructed in section 326 to issue regulations for financial institutions’ minimum new customer identification standards and record-
Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

“Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature.68

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

**Reports to Congress.** Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

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“Paragraph (6) requires that Treasury's regulations prescribed under paragraph (1) become effective within one year after enactment of this bill”.

exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.69

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

**International Cooperation.** Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.70

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (i.e., the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.

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70 H.R.Rep.No. 107-250, at 67 (2001)(“This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury’s progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

“The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime”).
**Crimes.** Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, smuggling, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
Section 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

The definition of ‘financial institution’ in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of ‘commercial bank’ or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad--say to a Mexican bank--and launders them through a series of financial transactions, the government conceivably could not rely on the definition of a ‘financial institution’ in 1956(c)(6) to establish that the transaction was a ‘financial transaction’ within the meaning of 1956(c)(4)(B) (defining a ‘financial transaction’ as a transaction involving the use of a ‘financial institution’), or that it was a ‘monetary transaction’ within the meaning of 1957(f) (defining ‘monetary transaction’ as, inter alia, a transaction that would be a ‘financial transaction’ under 1956(c)(4)(B)).

Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launders the proceeds of one of the crimes set forth on a list of ‘specified unlawful activities.’ 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),” H.R.Rep.No. 107-250, at 38 (2000).

Section 329 makes it a federal crime to corruptly administer the money laundering regulatory scheme. Offenders are punishable by imprisonment for not more than 15 years and a fine of not more than three times the amount of the bribe.

Section 5326 of title 31 authorizes the Secretary of the Treasury to impose temporary, enhanced reporting requirements upon financial institutions in areas victimized by substantial money laundering activity (geographic targeting regulations and orders). Section 353 makes it clear that the civil sanctions, criminal penalties, and prohibitions on smurfing (structuring transactions to evade reporting requirements) apply to violations of the regulations and orders issued under 31 U.S.C. 5326. It also extends the permissible length of the temporary geographical orders from 60 to 180 days.

Violations of the special measures and special due diligence requirements of sections 311 and 312 are subject to both civil and criminal penalties by virtue of section 363's amendments to 31 U.S.C. 5321(a) and 5322. The amendments authorize civil penalties and criminal fines of twice the amount of the transaction but not more than $1 million. Criminal offenders would be subject to a fine in the same amount.

71 “[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.73

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents.74 They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

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73 “The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business.

“Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.

“Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive,” H.R.Rep.No. 107-250, at 54 (2001).

74 “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual, 31 U.S.C. 5332(a)(2).

- 18 U.S.C. 476 (taking impressions of tools used for obligations and securities) from 10 to 25 years;
- 18 U.S.C. 477 (possessing or selling impressions of tools used for obligations or securities) from 10 to 25 years;
- 18 U.S.C. 484 (connecting parts of different notes) from 5 to 10 years;
- 18 U.S.C. 493 (bonds and obligations of certain lending agencies) from 5 to 10 years;
- 18 U.S.C. 478 (foreign obligations or securities) from 5 to 20 years;
- 18 U.S.C. 479 (uttering counterfeit foreign obligations or securities) from 3 to 20 years;
- 18 U.S.C. 480 (possessing counterfeit foreign obligations or securities) from 1 to 20 years;
- 18 U.S.C. 481 (plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities) from 5 to 25 years;
- 18 U.S.C. 482 (foreign bank notes) from 2 to 20 years; and
- 18 U.S.C. 483 (uttering counterfeit foreign bank notes) from 1 to 20 years.

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

**Bulk Cash.** Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act’s bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting.

The section appears to be the product of reactions to the Supreme Court’s decision in *United States v. Bajakian*, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court’s

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75 "For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual," 31 U.S.C. 5332(a)(2).
As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency — representing the proceeds of drug trafficking and other criminal offenses — is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad.

Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United States without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute,” H.R.Rep.No. 107-250 at 36-7 (2001).
under either circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.77

**Venue.** Section 1004 relies on dicta in United States v. Cabrales, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering, in the state and district in which the monetary transaction takes place. The Supreme Court in Cabrales held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in dicta, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.79

**Forfeiture.** Forfeiture is the government confiscation of property as a consequence of crime.80 The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 et seq. (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

**Constitutional Considerations.** The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 et seq., which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the


78 “The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed,” U.S.Const. Art.III, §2, cl.3.

“[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,” U.S.Const. Amend. VI.

79 See also, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnaping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.

80 For general background information, see, Doyle, Crime and Forfeiture, CRS REP.NO. 97-139A (Oct. 11, 2000).
jurisdiction of the United States, belonging to any foreign individual, foreign entity, or foreign country whom they determine to have planned, authorized, aided, or engaged in an attack on the United States by a foreign country or foreign nationals. The section also permits the government to present secretly (ex parte and in camera) any classified information upon which the forfeiture was based should the decision be subject to judicial review. The Justice Department requested the section as a revival of the President's powers in times of unconventional wars. By virtue of section 316, property owners may initiate a challenge to a confiscation by filing a claim under the rules applicable in maritime confiscations. The section permits two defenses to forfeiture – that the property is not subject to confiscation under section 106 or that the claimant is entitled to the innocent owner defense of 18 U.S.C. 983(d).

The characterization of the defenses as “affirmative defense” indicates that the claimant bears the burden of proof. The innocent owner defenses of 18 U.S.C. 983(d) are probably not available in cases under section 106, since that section is explicitly

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81 “This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App.U.S.C. §5(b).

“This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress's war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

“The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2),” DoJ at §159.

82 “An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
excepted from the coverage of 18 U.S.C. 983. The challenge proceedings permit the court to admit evidence, such as hearsay evidence, that would not otherwise be admissible under the Federal Rules of Evidence if the evidence is reliable and if national security might be imperiled should dictates of the Federal Rules be followed, §316(b). The section recognizes the rights of claimants to proceed alternatively under the Constitution or the Administrative Procedure Act.

The Justice Department also recommended enactment of an overlapping provision which ultimately passed as section 806 of the Act without any real discussion of the relationship of the two sections. Section 806 authorizes confiscation of all property, regardless of where it is found, of any individual, entity, or organization engaged in domestic or international terrorism (as defined in 18 U.S.C. 2331), against the United States, Americans or their property, 18 U.S.C.

83 18 U.S.C. 983(i)(2)(D).
84 “The exclusion of certain provisions of Federal law from the definition of the term ‘civil forfeiture statute’ in section 983(i) of title 18, United States Code, shall not be construed to deny an owner of property the right to contest the confiscation of assets of suspected international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C) subchapter II of chapter 5 of title 5, United States Code (commonly known as the ‘Administrative Procedure Act’).” Sec. 316(c)(1).
85 “Current law does not contain any authority tailored specifically to the confiscation of terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available current forfeiture laws require detailed tracing that is quite difficult for accounts coming through the banks of countries used by many terrorists.

“This section increases the government’s ability to strike at terrorist organizations’ economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001,” DoJ, at §403. The House Report on H.R. 2975 which contained versions of both sections is no more explicit on the relation of the two sections.
86 “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5)(as amended by section 802 of the Act).

87 Austin v. United States, 509 U.S. 602, 611-12 (1993)(“Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture . . . . Of England’s three kinds of forfeiture, only the third took hold in the United States”).


89 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal in personam proceedings following criminal conviction as a means of accomplishing confiscation.
Neither section 106 nor 806 require conviction of the terrorist property owner.\textsuperscript{90} Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers.\textsuperscript{91} The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners.\textsuperscript{92} Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them.\textsuperscript{93} The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate

\textsuperscript{90} Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c) (“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act”).

\textsuperscript{91} Silesian American Corp. v. Clark, 332 U.S. 469 (1947); cf., Societe Internationale v. Rogers, 357 U.S. 197, 211 (1958) (“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).

\textsuperscript{92} Zittman v. McGrath, 341 U.S. 471, 473-74 (1951) (citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’”).

any presumption of remedial purposes. The same has been said of the applicability of the ex post facto clause.

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO. If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

Other Forfeiture Amendments. In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.

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95 See e.g., United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.), 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994).

96 DoJ, at §403.

97 18 U.S.C. 1956(b). Cf., H.R.Rep.No. 107-250, at 54-5 (2001)(“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas. Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted

American Bank, 191 F.3d 30 (1st Cir. 1999).

“The second provision, modeled on 18 U.S.C. 1345(b), gives the district court the power to restrain property, issue seizure warrants, or take other action necessary to ensure that a defendant in an action covered by the statute does not dissipate the assets that would be needed to satisfy a judgment.

“This section also authorizes a court, on the motion of the Government or a State or Federal regulator, to appoint a receiver to gather and protect assets needed to satisfy a judgment under sections 1956 and 957, and the forfeiture provisions in sections 981 and 982. This authority is intended to apply in three circumstances: (1) when there is a judgment in a criminal case, including an order of restitution, following a conviction for a violation of section 1956 or 1957; (2) when there is a judgment in a civil case under section 1956(b) assessing a penalty for a violation of either section 1956 or 1957; and (3) when there is a civil forfeiture judgment under section 981 or a criminal forfeiture judgment, including a personal money judgment, under section 982.

“The amendment also makes section 1956(b) applicable to violations of section 1957. It applies to conduct occurring before the effective date of the Act”).

98 18 U.S.C. 981(k). H.R.Rep.No. 107-250, at 57-8 (2001)(“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank's customers.

“Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank's correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

“The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”).
defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation.\textsuperscript{99}

Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here.\textsuperscript{100} Section 320 enlarges this provisions to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements.\textsuperscript{101} This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.\textsuperscript{102}

\textsuperscript{99} Cf. H.R.Rep.No. 107-250, at 58-9 (2001) (“Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of ‘substitute assets’ when the defendant has placed the property otherwise subject to forfeiture ‘beyond the jurisdiction of the court.’ Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction. “This section amends 21 U.S.C. 853 to make clear that a court in a criminal case may issue a repatriation order--either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. 853(e) to restrain property--so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both”).

\textsuperscript{100} 18 U.S.C. 981(a)(1)(B).

\textsuperscript{101} H.R.Rep.No. 107-250, at 56 (2001)(“This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act”).

\textsuperscript{102} H.R.Rep.No. 107-250, at 59-60 (2001)(“Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country. “Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
A fugitive may not challenge a federal forfeiture.\footnote{\textsuperscript{103}} Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in “order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.”

to contest the restraining order could do so on the ground that 28 U.S.C. 2467 was not properly applied to the particular case, but could not oppose the restraining order on any ground that could also be raised in the proceedings pending in a foreign court. This provision prevents a litigant from taking ‘two bites at the apple’ by raising objections to the basis for the forfeiture in the Federal court that he also raised, or is entitled to raise, in the foreign court where the forfeiture action is pending. It complements the existing provision in section 2467(e) providing that the Federal court is bound by the findings of fact of the foreign court, and may not look behind such findings in determining whether to enter an order enforcing a foreign forfeiture judgment.

“This section also amends 28 U.S.C. 2467 to make clear that it is not necessary to prove that the person asserting an interest in the property received actual notice of the forfeiture proceedings. As is the case with respect to forfeitures under U.S. law, it is sufficient if the foreign nation takes steps to provide notice, in accordance with the principles of due process. See Gonzalez v. United States, 1997 WL 278123 (S.D.N.Y. 1997) (‘the [G]overnment is not required to ensure actual receipt of notice that is properly mailed’); Albajon v. Gugliotta, 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant's identifications, and mailed after claimant released from jail, is sufficient to satisfy due process, even if claimant never received notice); United States v. Schiavo, 897 F. Supp. 644, 648 49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; due process satisfied even if he did not receive the notice).

“Finally, 28 U.S.C. 2467 is amended to authorize the enforcement of a forfeiture judgment based on any foreign offense that would constitute an offense giving rise to a civil or criminal forfeiture of the same property if the offense had been committed in the United States. This is one of two safeguards that the statute contains against the enforcement of judgments that the United States does not consider appropriate for enforcement: if the judgment is based on an act that would not constitute a crime in the United States, such as removing assets from the reach of a repressive regime, it could not be enforced. In addition, section 2467 already provides that a foreign judgment may only be enforced by a Federal court at the request of the United States, and only after the Attorney General has certified that the judgment was obtained in accordance with the principles of due process. Thus, neither a foreign Government nor a foreign private party could enforce a foreign judgment on its own under this provision.”). Note that the safeguard to which the report refers is the range of foreign offenses that will support an enforceable confiscation order, \textit{i.e.}, drug offenses and crimes on the money laundering predicate offense list, and that the amendment narrows that safeguard by adding additional foreign offenses, \textit{i.e.}, any foreign equivalent of a federal crime which would support a confiscation order.

\footnote{\textsuperscript{103} 28 U.S.C. 2466.}
Alien Terrorists and Victims

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

Border Protection. The border protection provisions:

- authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401
- authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402
- remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404
- authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405
- authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.
- instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007
- direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418
- express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414
- add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415
- call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416
- limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
• instruct the Attorney General to report on the feasibility of using biometric scanners to help prevent terrorists and other foreign criminals from entering the country, section 1008

• authorize appropriations of $250,000 for the FBI to determine the feasibility of providing airlines with computer access to the names of suspected terrorists, section 1009

• authorize reciprocal sharing of the State Department’s visa lookout data and related information with other nations in order to prevent terrorism, drug trafficking, slave marketing, and gun running, section 413

**Detention and Removal.** Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity, 8 U.S.C. 1227 (a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(iv). Aliens may be inadmissible for any number of terrorism-related reasons, 8 U.S.C. 1182 (a)(3)(B). Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported.


Section 411 defines “terrorist organization” to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the Federal Register as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C.

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104 As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).
Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).


An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in “premeditated, politically motivated violence perpetrated against noncombatant targets,” or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security or endanger some individual or the general public. The Attorney General's determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

Victims. The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

- permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421
- extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422

105 “The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

106 “The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks. The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application.

“Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by
September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001
diversity visa program has already been exceeded, the alien shall be counted under the 2002
program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks,
the spouse and children of the alien shall still be eligible for permanent residence under the
program. The ceiling placed on the number of diversity immigrants shall not be exceeded in
any case.

“Under the Act, in the case of an alien who was issued an immigrant visa that expires
before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result
of the terrorist attacks, the validity shall be extended until December 31.

“Under the Act, in the case of an alien who was granted parole that expired on or after
September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct
result of the terrorist attacks, the parole is extended an additional 90 days.

“Under the Act, in the case of an alien granted voluntary departure that expired between
September 11 and October 11, 2001, voluntary departure is extended an additional 30 days,”

107 “Current law provides that an alien who was the spouse of a U.S. citizen for at least 2
years before the citizen died shall remain eligible for immigrant status as an immediate
relative. This also applies to the children of the alien. The Act provides that if the citizen died
as a direct result of the terrorist attacks, the 2 year requirement is waived.

“The Act provides that if an alien spouse, child, or unmarried adult son or daughter had
been the beneficiary of an immigrant visa petition filed by a permanent resident who died as
a direct result of the terrorist attacks, the alien will still be eligible for permanent residence.
In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent
resident who died as a direct result of the terrorist attacks was present in the U.S. on
September 11 but had not yet been petitioned for permanent residence, the alien can
self-petition for permanent residence.

“The Act provides that an alien spouse or child of an alien who 1) died as a direct result
of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an
applicant for adjustment of status for an employment-based immigrant visa, may have his or
her application for adjustment adjudicated despite the death (if the application was filed prior

108 “Under current law, certain visas are only available to an alien until the alien’s 21st
birthday. The Act provides that an alien whose 21st birthday occurs this September and who
is a beneficiary for a petition or application filed on or before September 11 shall be
considered to remain a child for 90 days after the alien’s 21st birthday. For an alien whose
21st birthday occurs after this September, (and who had a petition for application filed on his
or her behalf on or before September 11) the alien shall be considered to remain a child for
• a denial of benefits of the Act to terrorists and their families, section 427

• authority for the Attorney General to establish evidentiary standards to implement the alien victim provisions of the Act, section 426.

Other Crimes, Penalties, & Procedures

New Crimes. The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department, the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offenses for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents, 18 U.S.C. 175b. Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.

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109 “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . . .” DoJ at §305.

110 The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

111 “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2)(“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.112

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D). The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

112 U.S. Const. Art.III, § 2, cl.3 (“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . . .”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . .”); United States v. Cabrales, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from Cabrales when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnaping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999)(“By way of comparison, last Term in Cabrales we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).
The Justice Department sought the expansion along with the enlargement of the predicate offense list, "18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of 'material support or resources' is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill ('Federal terrorism offenses')," DoJ, at §304.

Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.115


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115 “The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill ('Federal terrorism offenses') is used in identifying the relevant crimes,” DoJ, at §304.

New Penalties. The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. 3571(b),(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense.\footnote{Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersede lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,” DoJ, at §302.}

The proposal, however, failed to identify the critical elements that would trigger the alternative.\footnote{A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense,” Draft at §302.} Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

- for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

- for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;
• for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;

• for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;

• for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;

• for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and

• for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism.\(^\text{119}\) Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:

• arson committed within a federal enclave, 18 U.S.C. 81;
• killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);
• destruction of communications facilities, 18 U.S.C. 1362;
• destruction of property within a federal enclave, 18 U.S.C. 1363;
• causing a train wreck, 18 U.S.C. 1922;
• providing material support to a terrorist, 18 U.S.C. 2339A;
• torture committed overseas under color of law, 18 U.S.C. 2340A;
• sabotage of a nuclear facility, 42 U.S.C. 2284;

\(^{119}\) “The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §§846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

“This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.
• interfering with a flight crew within U.S. special aircraft jurisdiction, 49 U.S.C. 46504;
• carrying a weapon or explosive abroad an aircraft within U.S. special aircraft jurisdiction, 49 U.S.C. 46505; and
• sabotage of interstate gas pipeline facilities, 49 U.S.C. 60123.

When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years). The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission), a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

120 Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

121 “Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.

“This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders).\(^{122}\)

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

**Other Procedural Adjustments.** In other procedural adjustments designed to facilitate criminal investigations, the Act:

- increases the rewards for information in terrorism cases
- expands the Posse Comitatus Act exceptions
- authorizes “sneak and peek” search warrants
- permits nationwide and perhaps worldwide execution of warrants in terrorism cases
- eases government access to confidential information
- allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
- lengthens the statute of limitations applicable to crimes of terrorism
- clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
- adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B.\(^{123}\)

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\(^{122}\) It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, e.g., damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

\(^{123}\) When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001) (remarks of Rep. Sensenbrenner); for general background, see, Doyle, *McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys*, CRS REP.NO. RL30060 (Dec. 14, 2001).
**Rewards.** The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L.105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism.124

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

**Posse Comitatus.** The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.125

**Delayed notification of a search (sneak and peek).** Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take

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124 The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct threat assessments for federal agencies, and to reimburse federal agencies for the costs of detaining terrorist suspects overseas.

125 For a general discussion of the Posse Comitatus Act, see, Doyle, *The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law*, CRS REP.NO. 95-964 (June 1, 2000).
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, Richards v. Wisconsin, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, Wilson v. Arkansas, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, Dalia v. United States, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, cf., United States v. Miller, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, United States v. Freitas, 800 F.2d 1451, 1453 (9th Cir. 1986).126

126 The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in United States v. New York Telephone Co., 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth
The Second Circuit was less convinced and preferred to hold sneak and peek searches to the demands of Rule 41, United States v. Pangburn, 983 F.2d 449 (2d Cir. 1993). The Fourth Circuit was, if anything, less convinced. Moreover, the facts in the case demonstrate the potential impact of the issue on computer privacy, United States v. Simons, 206 F.3d 392 (4th Cir. 2000).

Amendment, demands that surreptitious entries be closely circumscribed,” United States v. Freitas (Freitas I), 800 F.2d 1451, 1455-56 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, United States v. Freitas (Freitas II), 856 F.2d 1425 (9th Cir. 1988).

127 “No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in Dalia v. United States, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in Dalia, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property. . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. See United States v. New York Telephone Co., 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . .Although the Freitas I court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in United States v. Villegas, 899 F.2d 1324 (1999). Although the Freitas I court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in Villegas. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the Freitas I court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” United States v. Pangburn, 983 F.2d 449, 453-55 (2d Cir. 1993).

128 In Simons, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
The Justice Department urged that the conflict be resolved with a uniform rule which permitted sneak and peek warrants under the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage.129

The Act, in section 213, stops short of the Justice Department proposal. Characterized as a codification of the Second Circuit decision, 147 Cong.Rec. H7197 (daily ed. Oct. 23, 2001), the Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C. 3103a. Its sneak and peek authorization reaches all federal search and seizure warrants where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (e.g., risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (e.g., jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, i.e., in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation.130 The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

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129 The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities,” DoJ at §353.

130 Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department’s initial proposal, the Department’s justification does not address the question.
The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

Neither Rule 41 nor any other provision of federal law generally applies to searches of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage.

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133 United States v. Barona, 56 F.3d 1087, 1092 (9th Cir. 1995)(“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); United States v. Behety, 32 F.3d 503, 510 (11th Cir. 1994)(“if American law enforcement officials substantially participated in the search or if the...
law apparently contemplated extraterritorial execution, cf., F.R.Crim.P. 41, Advisory Committee Notes: 1990 Amendment (discussing a proposal for extraterritorial execution that the Supreme Court rejected). 134

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person” within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” F.R.Crim.P. 41, Advisory Committee Notes: 1990 Amendment. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

Terrorists' DNA. The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards per se. 135 Existing federal law allowed the Attorney General to collect samples from foreign officials conducting the search were actually acting as agents for their American counterparts’); United States v. Maturo, 982 F.2d 57, 61 (2d Cir. 1992) (“where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials” or “where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials”); United States v. Mitro, 880 F.2d 1480, 1482 (1st Cir. 1989) (“where American agents participated in the foreign search or the foreign officers acted as agents for their American counterparts”); United States v. Mount, 757 F.2d 1315, 1318 (D.C.Cir. 1985) (“if American officials or officers participated in some significant way”); United States v. Marzano, 537 F.2d 120, 139 (5th Cir. 1976) (“if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts”); each of the decisions also suggests that evidence secured in a manner which shocked the conscience of the court would be excluded.

134 The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, see, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), reprinted, 78 Cong.Rec. 4982-983 (1934) (“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.) (conferring judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

135 Roe v. Marcotte, 193 F.3d 72 (2d Cir. 1999); Shaffer v. Saffle, 148 F.3d 1180 (10th Cir. 1998); Rise v. Oregon, 59 F.3d 1556 (9th Cir. 1995); Jones v. Murray, 962 F.2d 302 (4th Cir. 1992).
Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples from convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes,” DoJ at §353.

For a general discussion, see, Fischer, DNA Identification: Applications and Issues, CRS REP NO. RL30717 (Jan. 12, 2001).

This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in federal prisoners convicted of a variety of violent crimes, 42 U.S.C. 14135a. The Act enlarges the predicate offense list to include any crime of violence or any terrorism offense, section 503.136

Access to Educational Records. Finally, the Act calls for an ex parte court order procedure under which senior Justice Department officials may seek authorization to collect educational records relevant to an investigation or prosecution of a crime of terrorism, section 507 (as an exception to the confidentiality requirements of the General Education Provisions Act, 20 U.S.C. 1232g), section 508 (as an exception to the confidentiality requirements of the National Education Statistics Act, 20 U.S.C. 9007).

Statute of Limitations. Prosecution for murder in violation of federal law may be initiated at any time, 18 U.S.C. 3281. A five year statute of limitations applied for most other federal crimes before passage of the Act, with a few exceptions. Among the relevant exceptions were an eight year statute of limitations for several terrorist offenses, 18 U.S.C. 3286,137 and a ten year statute of limitations for a few arson and explosives offenses, 18 U.S.C. 3295. The Justice Department recommended the elimination of a statute of limitations in terrorism cases.138

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137 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

138 “This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

“This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in
The Act takes less dramatic action in section 809. It eliminates the statute of limitations for any crime of terrorism that risks or results in a death or serious bodily injury, 18 U.S.C. 3286. In the absence of such a risk or result, all other terrorism offenses become subject to the eight year statute of limitations unless already covered by the ten year statute for explosives and arson offenses, 18 U.S.C. 3286.

Application of the statute of limitations rarely provokes a constitutional inquiry. Nevertheless, due process precludes prosecution when it can be shown that pre-indictment delay “caused substantial prejudice to [a defendant’s] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.” Moreover, a judicial difference of opinion has appeared in those cases

connection with the September 11, 2001 terrorist attacks. The constitutionality of such retroactive applications of changes in statutes of limitations is well-settled, See, e.g., United States v. Grimes, 142 F.3d 1342, 1350-51 (11th Cir. 1998); People v. Frazer, 982 P.2d 180 (Cal. 1999).

“Existing federal law (18 U.S.C. §3282) bars prosecuting most offenses after five years. 18 U.S.C. §3286, as currently formulated, extends the limitation period for prosecution for certain offenses that may be committed by terrorists – but only to eight years. While this is a limited improvement over the five-year limitation period for most federal offenses, it is patently inadequate in relation to the catastrophic human and social costs that frequently follow from such crimes as destruction of aircraft (18 U.S.C. §32), aircraft hijackings (49 U.S.C. §§46502, 46504-06, attempted political assassinations (18 U.S.C. §§351, 1116, 1751), or hostage taking (18 U.S.C. §1203). These are not minor acts of misconduct which can properly be forgiven or forgotten merely because the perpetrator has avoided apprehension for some period of time. Anomalously, existing law provides longer limitation periods for such offenses as bank frauds and certain artwork thefts (18 U.S.C.§§3293-94) than it does for crimes characteristically committed by terrorists.

“In many American jurisdictions, the limitation periods for prosecution for serious offenses are more permissible than those found in federal law, including a number of states which have no limitation period for the prosecution of felonies generally. While this section does not go so far, it does eliminate the limitation period for prosecution of the major crimes that are most likely to be committed by terrorists (‘Federal terrorism offenses’), as specified in section 309 of this bill,” DoJ at 301.

139 As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to main overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 ( sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period. Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (Grimes, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (Frazer, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

**Extraterritoriality.** Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States or elsewhere. . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnapping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.

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141 United States v. De La Matta, 266 F.3d 1275, 1286 (11th Cir. 2001); United States v. Grimes, 142 F.3d 1342, 1351 (11th Cir. 1998); United States v. Morrow, 177 F.3d 272, 294 (5th Cir. 1999); Falter v. United States, 23 F.2d 420, 425-26 (2d Cir. 1928).


143 United States v. Layton, 855 F.2d 1388 (9th Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); United States v. Benitez, 741 F.2d 1312 (11th Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.144

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

Victims. Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11th Victim Compensation Fund legislation before it passed the Act. Consequently, the Act’s victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 et seq., and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 et seq.

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:

• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year)(42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d)(5)), section 621(d)

• waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

• eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
• makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

• prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

• allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

• reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

• makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

• allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

• establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

**Increasing Institutional Capacity.** A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybersecurity, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

- $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)

- necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)

- $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)

- $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816

- $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701

- $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)

- $5 million for DEA police training in South and Central Asia, section 1007.

Miscellaneous. Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might to used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act, or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b), 807.  

145 *I.e.*, Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).

express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

Victims. The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

• permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421

• extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422

105 “The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

106 “The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks.

“The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application.

“Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
• preservation of certain immigration benefits available to alien family members that would be otherwise lost as a consequence of the death of a victim of September 11, section 423\textsuperscript{107}

• limited easing of age restrictions on visas available to aliens under 21 years of age for those whose 21\textsuperscript{st} birthday occurred immediately before or soon after September 11, section 424\textsuperscript{108}

• temporary administrative relief for alien family members of a victim of September 11 who are not otherwise entitled to relief under the Act, section 425

the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

“Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 31.

“Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.


\textsuperscript{107} “Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

“The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

“The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death),” H.R.Rep.No. 107-236, at 68 (2001).

\textsuperscript{108} “Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien’s 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien’s 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
• a denial of benefits of the Act to terrorists and their families, section 427

• authority for the Attorney General to establish evidentiary standards to implement the alien victim provisions of the Act, section 426.

Other Crimes, Penalties, & Procedures

New Crimes. The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department, the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offenses for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents, 18 U.S.C. 175b.

Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.

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109 “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . . .” DoJ at §305.

110 The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

111 “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2)(“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D). The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

\[112\] U.S. Const. Art.III, §2, cl.3 (“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . . .”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . .”); United States v. Cabrales, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from Cabrales when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnapping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999)(“By way of comparison, last Term in [Cabrales] we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).
• chemical weapons offenses, 18 U.S.C. 229;
• terrorist attacks on mass transportation, 18 U.S.C. 1993;
• sabotage of a nuclear facility, 42 U.S.C. 2284; and
• sabotage of interstate pipelines, 49 U.S.C. 60123(b).

And it adds expert advice or assistance to the types of assistance that may not be
provided under section 2339A. This last addition may encounter the same First
Amendment vagueness problems some courts have found in assistance which takes
the form of “training” and “personnel,” Humanitarian Law Project v. Reno, 205 F.3d
1130, 1137-136 (9th Cir. 2000).113 Finally, the section announces that a prosecution
for violation of section 2339A (support of terrorists) may be brought where the
support is provided or where the predicate act of terrorism occurs. There may be
some question whether the Constitution permits prosecution where the predicate act
occurs.114

Section 813 of the Act also accepts the Justice Department’s suggestion that
various terrorism offenses be added to the predicate offense list for RICO (racketeer
influenced and corrupt organizations) which proscribes acquiring or operating,
through the patterned commission of any of a series of predicate offenses, an
enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.115

Prior law, 18 U.S.C. 2325-2327, outlawed violation of Federal Trade
Commission (FTC) telemarketing regulations promulgated under 15 U.S.C. 6101 et
seq. Section 1011 of the Act brings fraudulent charitable solicitations within the
FTC’s regulatory authority.116

113 The Justice Department sought the expansion along with the enlargement of the predicate
offense list, “18 U.S.C. §2339A prohibits providing material support or resources to
terrorists. The existing definition of ‘material support or resources’ is generally not broad
enough to encompass expert services and assistance – for example, advice provided by a
person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided
by an accountant to facilitate the concealment of funds used to support terrorist activities.
This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance,
making the offense applicable to experts who provide services or assistance knowing or
intending that the services or assistance is to be used in preparing for or carrying out terrorism
offences. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism
offences to the more complete list specified in section 309 of the bill (‘Federal terrorism
offenses’),” DoJ at 306.

114 U.S.Const. Art.III, §2, cl.3; Amend. IV; United States v. Cabrales, 524 U.S. 1 (1998);

includes none of the offenses which are most likely to be committed by terrorists. This section
adds terrorism crimes to the list of RICO predicates, so that RICO can be used more
frequently in the prosecution of terrorist organizations. As in various other provisions, the list
of offenses in section 309 of the bill (‘Federal terrorism offenses’) is used in identifying the
relevant crimes,” DoJ, at §304.

116 For a general discussion, see, Wellborn, Combating Charitable Fraud: An Overview of
New Penalties. The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. 3571(b),(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense.\(^{117}\)

The proposal, however, failed to identify the critical elements that would trigger the alternative.\(^ {118}\) Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

- for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;  
- for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

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\(^ {117}\) “Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersedes lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,” DoJ, at §302.

\(^ {118}\) “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense,” Draft at §302.
The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object of offense – see e.g., 21 U.S.C. §846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.

• for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;

• for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;

• for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;

• for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and

• for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism. Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:

• arson committed within a federal enclave, 18 U.S.C. 81;
• killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);
• destruction of communications facilities, 18 U.S.C. 1362;
• destruction of property within a federal enclave, 18 U.S.C. 1363;
• causing a train wreck, 18 U.S.C. 1922;
• providing material support to a terrorist, 18 U.S.C. 2339A;
• torture committed overseas under color of law, 18 U.S.C. 2340A;
• sabotage of a nuclear facility, 42 U.S.C. 2284;

119 “The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §§846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

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When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years). The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission), a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

120 Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

121 “Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.

“This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders).\textsuperscript{122}

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

**Other Procedural Adjustments.** In other procedural adjustments designed to facilitate criminal investigations, the Act:

- increases the rewards for information in terrorism cases
- expands the Posse Comitatus Act exceptions
- authorizes “sneak and peek” search warrants
- permits nationwide and perhaps worldwide execution of warrants in terrorism cases
- eases government access to confidential information
- allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
- lengthens the statute of limitations applicable to crimes of terrorism
- clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
- adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B.\textsuperscript{123}

\textsuperscript{122} It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, e.g., damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

\textsuperscript{123} When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001)(remarks of Rep. Sensenbrenner); for general background, see, Doyle, *McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys*, CRS Rep.No. RL30060 (Dec. 14, 2001).
Rewards. The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L. 105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism.124

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

Posse Comitatus. The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.125

Delayed notification of a search (sneak and peek). Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take

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124 The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct threat assessments for federal agencies, and to reimburse federal agencies for the costs of detaining terrorist suspects overseas.

125 For a general discussion of the Posse Comitatus Act, see, Doyle, The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law, CRS Rep. No. 95-964 (June 1, 2000).
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, Richards v. Wisconsin, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, Wilson v. Arkansas, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, Dalia v. United States, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, cf., United States v. Miller, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, United States v. Freitas, 800 F.2d 1451, 1453 (9th Cir. 1986).126

126 "The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in United States v. New York Telephone Co., 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41... Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause... The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41... we hold that there was no compliance with Rule 41 under the facts of this case... While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth
Amendment, demands that surreptitious entries be closely circumscribed,” United States v. Freitas (Freitas I), 800 F.2d 1451, 1455-456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, United States v. Freitas (Freitas II), 856 F.2d 1425 (9th Cir. 1988).

127 “No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in Dalia v. United States, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in Dalia, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property. . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. See United States v. New York Telephone Co., 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . . Although the Freitas I court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in United States v. Villegas, 899 F.2d 1324 (1999). Although the Freitas I court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in Villegas. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the Freitas I court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” United States v. Pangburn, 983 F.2d 449, 453-55 (2d Cir. 1993).

128 In Simons, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
The Justice Department urged that the conflict be resolved with a uniform rule which permitted sneak and peek warrants under the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage.\textsuperscript{129}

The Act, in section 213, stops short of the Justice Department proposal. Characterized as a codification of the Second Circuit decision, \textit{147 Cong.Rec.} H7197 (daily ed. Oct. 23, 2001), the Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C. 3103a. Its sneak and peek authorization reaches all federal search and seizure warrants where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (\textit{e.g.}, risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (\textit{e.g.}, jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, \textit{i.e.}, in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation.\textsuperscript{130} The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

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\textsuperscript{129} “The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities,” \textit{DoJ} at §353.

\textsuperscript{130} Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department’s initial proposal, the Department’s justification does not address the question.
constitutionally “reasonable,” that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

**Nationwide terrorism search warrants.** The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either “within or outside the district,” (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases. The provision may anticipate execution both in this country and overseas. The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage. Neither Rule 41 nor any other provision of federal

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131 The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

132 The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

133 *United States v. Barona*, 56 F.3d 1087, 1092 (9th Cir. 1995)(“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994)(“if American law enforcement officials substantially participated in the search or if the
law apparently contemplated extraterritorial execution, cf., F.R.Crim.P.41, Advisory Committee Notes: 1990 Amendment (discussing a proposal for extraterritorial execution that the Supreme Court rejected).  

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” F.R.Crim.P. 41, Advisory Committee Notes: 1990 Amendment. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

**Terrorists’ DNA.** The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards *per se.* 135 Existing federal law allowed the Attorney General to collect samples from foreign officials conducting the search were actually acting as agents for their American counterparts”); *United States v. Maturo,* 982 F.2d 57, 61 (2d Cir. 1992)(“where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials” or “where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials”); *United States v. Mitro,* 880 F.2d 1480, 1482 (1st Cir. 1989)(“where American agents participated in the foreign search or the foreign officers acted as agents for their American counterparts”); *United States v. Mount,* 757 F.2d 1315, 1318 (D.C.Cir. 1985)(“if American officials or officers participated in some significant way”); *United States v. Marzano,* 537 F.2d 257, 270 (7th Cir. 1976)(declining to adopt the “joint venture” standards, but finding level of American participation in the case before it insignificant); *United States v. Morrow,* 537 F.2d 120, 139 (5th Cir. 1976)(“if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts”); each of the decisions also suggests that evidence secured in a manner which shocked the conscience of the court would be excluded.

134 The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, see, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), *reprinted,* 78 Cong.Rec. 4982-983 (1934)(“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.)(conferring judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

135 *Roe v. Marcotte,* 193 F.3d 72 (2d Cir. 1999); *Shaffer v. Saffle,* 148 F.3d 1180 (10th Cir. 1998); *Rise v. Oregon,* 59 F.3d 1556 (9th Cir. 1995); *Jones v. Murray,* 962 F.2d 302 (4th Cir. 1992).
federal prisoners convicted of a variety of violent crimes, 42 U.S.C. 14135a. The Act enlarges the predicate offense list to include any crime of violence or any terrorism offense, section 503.\textsuperscript{136}

**Access to Educational Records.** Finally, the Act calls for an ex parte court order procedure under which senior Justice Department officials may seek authorization to collect educational records relevant to an investigation or prosecution of a crime of terrorism, section 507 (as an exception to the confidentiality requirements of the General Education Provisions Act, 20 U.S.C. 1232g), section 508 (as an exception to the confidentiality requirements of the National Education Statistics Act, 20 U.S.C. 9007).

**Statute of Limitations.** Prosecution for murder in violation of federal law may be initiated at any time, 18 U.S.C. 3281. A five year statute of limitations applied for most other federal crimes before passage of the Act, with a few exceptions. Among the relevant exceptions were an eight year statute of limitations for several terrorist offenses, 18 U.S.C. 3286,\textsuperscript{137} and a ten year statute of limitations for a few arson and explosives offenses, 18 U.S.C. 3295. The Justice Department recommended the elimination of a statute of limitations in terrorism cases.\textsuperscript{138}

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\textsuperscript{136} Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples form convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes,” DoJ at §353.


\textsuperscript{137} 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

\textsuperscript{138} “This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

“This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in
The Act takes less dramatic action in section 809. It eliminates the statute of limitations for any crime of terrorism\(^ {139} \) that risks or results in a death or serious bodily injury, 18 U.S.C. 3286. In the absence of such a risk or result, all other terrorism offenses become subject to the eight year statute of limitations unless already covered by the ten year statute for explosives and arson offenses, 18 U.S.C. 3286.

Application of the statute of limitations rarely provokes a constitutional inquiry. Nevertheless, due process precludes prosecution when it can be shown that pre-indictment delay “caused substantial prejudice to [a defendant’s] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.”\(^ {140} \) Moreover, a judicial difference of opinion has appeared in those cases connection with the September 11, 2001 terrorist attacks. The constitutionality of such retroactive applications of changes in statutes of limitations is well-settled, See, e.g., United States v. Grimes, 142 F.3d 1342, 1350-51 (11th Cir. 1998); People v. Frazer, 982 P.2d 180 (Cal. 1999).

“Existing federal law (18 U.S.C. §3282) bars prosecuting most offenses after five years. 18 U.S.C. §3286, as currently formulated, extends the limitation period for prosecution for certain offenses that may be committed by terrorists – but only to eight years. While this is a limited improvement over the five-year limitation period for most federal offenses, it is patently inadequate in relation to the catastrophic human and social costs that frequently follow from such crimes as destruction of aircraft (18 U.S.C. §32), aircraft hijackings ([49] U.S.C. §§46502, 46504-06, attempted political assassinations (18 U.S.C. §§351, 1116, 1751), or hostage taking (18 U.S.C. §1203). These are not minor acts of misconduct which can properly be forgiven or forgotten merely because the perpetrator has avoided apprehension for some period of time. Anomalously, existing law provides longer limitation periods for such offenses as bank frauds and certain artwork thefts (18 U.S.C.§§3293-94) than it does for crimes characteristically committed by terrorists.

“In many American jurisdictions, the limitation periods for prosecution for serious offenses are more permissible than those found in federal law, including a number of states which have no limitation period for the prosecution of felonies generally. While this section does not go so far, it does eliminate the limitation period for prosecution of the major crimes that are most likely to be committed by terrorists (‘Federal terrorism offenses’), as specified in section 309 of this bill,” DoJ at 301.

\(^ {139} \) As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 (sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period. Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (Grimes, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (Frazer, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

**Extraterritoriality.** Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States or elsewhere. . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnaping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.

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141 United States v. De La Matta, 266 F.3d 1275, 1286 (11th Cir. 2001); United States v. Grimes, 142 F.3d 1342, 1351 (11th Cir. 1998); United States v. Morrow, 177 F.3d 272, 294 (5th Cir. 1999); Falter v. United States, 23 F.2d 420, 425-26 (2d Cir. 1928).


143 United States v. Layton, 855 F.2d 1388 (9th Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); United States v. Benitez, 741 F.2d 1312 (11th Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.  

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

Victims. Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11th Victim Compensation Fund legislation before it passed the Act. Consequently, the Act’s victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 et seq., and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 et seq.

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:

• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year)(42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d) (5)), section 621(d)

• waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

• eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
• makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

• prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

• allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

• reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

• makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

• allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

• establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

**Increasing Institutional Capacity.** A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

- $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)

- necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)

- $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)

- $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816

- $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701

- $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)

- $5 million for DEA police training in South and Central Asia, section 1007.

**Miscellaneous.** Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might to used for the *design* of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act,\textsuperscript{145} or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b), 807.\textsuperscript{146}

\textsuperscript{145} \textit{i.e.}, Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).

\textsuperscript{146} For a general discussion of trade sanctions legislation, see, Jurenas, \textit{Exempting Food and Agriculture Products from U.S. Economic Sanctions: Status and Implementation}, CRS\textsc{issue} BRIEF IB100061.
This invention appertains to toys and more particularly to a wheeled figured toy.

One of the primary objects of my invention is to provide a novel wheeled toy simulating the appearance of an animal, such as a rabbit, provided with automatic means for depositing candy eggs on the ground during the pulling of the toy over a surface.

Another salient object of my invention is to provide a novel wheeled toy figure so constructed that the same will not only deposit eggs as the same is being drawn over the ground, but it will also have a jumping animated appearance.

A further important object of my invention is to provide a wheeled toy embodying pivotally connected front and rear sections with means operatively connecting said sections together to produce the animated jumping effect.

A still further object of my invention is the formation of a hopper in the rear section of the figure for receiving the candy eggs with a ground wheel supporting said rear section having a dispensing notch in its periphery for receiving and carrying one of the candy eggs at a time from the hopper and for depositing such egg on the ground.

A still further important object of my invention is the provision of novel means for actuating the mechanism for giving the figure the jumping or dancing effect from said ground wheel.

A still further object of my invention is to provide a child's toy of the above character, which will be durable and efficient in use, one that will be simple and easy to manufacture and one which can be placed upon the market at a reasonable cost.

With these and other objects in view, the invention consists in the novel construction, arrangement and formation of parts, as will be hereinafter more specifically described, claimed and illustrated in the accompanying drawings, in which:

Figure 1 is a side elevational view of my novel wheeled toy, parts of the view being shown broken away to illustrate structural detail.

Figure 2 is a top plan view of my toy.

Figure 3 is an enlarged, transverse, sectional view through the toy taken on the line 3—3 of Figure 1 looking in the direction of the arrows.

Figure 4 is a view similar to Figure 1, but taken on a smaller scale and showing a different position of the toy.

Figure 5 is a view similar to Figure 4, but showing a different position of the figure and immediately after a candy egg has been deposited on the ground.

Referring to the drawing in detail, wherein similar reference characters designate corresponding parts throughout the several views, the letter "T" generally indicates my novel toy and the same includes a front main section 10 and a rear section 11. These sections 10 and 11 are pivotally connected together by a pivot pin 12, for a purpose which will later appear.

The toy is formed to simulate the appearance of a known object such as a hen or some animal. In the drawings, for the purpose of illustration, I have shown the toy constructed to simulate the appearance of a rabbit. Hence, the front section 10 includes a body portion 13, a head 14 and forwardly projected front legs 15. An axle 16 is carried by the front legs and front ground wheels 17 are mounted on the axle. This front section 10, with the exception of the axle 15 and wheels 11, is preferably cut from a single block of wood.

The rear section 11 is shaped to simulate the hind quarters of the rabbit and hence, includes an upper main section 18 and depending rear legs 19.

In accordance with my invention, the rear section 11 includes side plates 20 secured to and held in spaced relation by a block 21. This block 21 is so formed as to provide, in conjunction with the side plates 20, a receptacle or hopper 22 for the reception of the candy eggs. The upper end of the hopper can be left partly open so as to permit the filling of the hopper with the eggs and, if desired, the opening can be closed by a suitable door. The lower end of the hopper is provided with an outlet opening 23 for the eggs.

The side plates 20 extend below the spacing block 21 and the side plates below the blocks rotatably support a rear axle 24. Keyed, or otherwise secured, to the rear axle is a rear ground wheel 25 and this wheel includes circular side wheel discs 26 and a central cylindrical body or spool 27. The spool or body 27 has formed in its periphery a dispensing notch 28. Normally the spool or body 27 closes the dispensing opening 23 of the hopper, but as the rear wheel 25 rotates and the dispensing notch 28 passes the hopper, a candy egg will drop into said notch and upon continued rotation of the wheel, and as the notch passes the ground, the egg will be deposited on the ground.

Also keyed, or otherwise secured, to the rear axle 24 is a crank 29 and the outer end of the crank has pivotally connected thereto a piston or link 30. The forward end of this link is piv-
totally connected, as at 31, to the front section 10 of the figure forwardly of, and below, the pivot 11.

The toy is adapted to be pulled over the ground by a pull-cord and during the movement of the figure over the ground the wheel 25 will be rotated and each time the dispensing notch 28 passes the hopper an egg will be picked up from said hopper and deposited upon the ground. During the turning of the rear ground wheel the crank 29 will be turned which will actuate the link 30 causing the sections 10 and 11 of the figure to pivot one on the other which will give a jumping or running effect to the rabbit.

Thus it can be seen that I have provided a novel animated figure which will give a child a maximum amount of amusement and which will deposit eggs on the ground and thus create in the minds of children the laying of eggs by an Easter rabbit.

Attention is called to the fact that the side plates 20 of the rear section 11 project forwardly of the block 21 and that these side plates receive therebetween the rear section of the body portion 13 of the front part 10 of the figure.

Changes in details may be made without departing from the spirit or the scope of my invention, but what I claim as new is:

1. A wheeled toy comprising a front and a rear section pivotally connected together, front ground wheels carried by the front section and a main rear ground wheel carried by the rear section, means operatively connecting the rear ground wheel to the front section and swinging said sections on their pivot during the travel of the toy over the ground, a hopper formed in one of said sections for the reception of candy eggs and means controlled by a main rear ground wheel for depositing one candy egg at a time on the ground from said hopper.

2. A wheeled toy shaped to simulate the appearance of an animal, or the like, comprising a front and a rear section, means pivotally connecting said sections together, front ground wheels for supporting the front section, a main rear ground wheel supporting the rear section, a crank rotatable with the rear ground wheel, a link pivotally connected to the crank and to the front section, a hopper for the reception of candy eggs in said rear section and means controlled by said rear ground wheel for receiving one candy egg at a time from the hopper and for depositing the same on the ground during the travel of the toy over the ground.

3. A wheeled toy constructed to simulate the appearance of an animal, or the like, comprising a front section, a rear section, means pivotally connecting such sections together, a front ground wheel supporting the front section, a main rear ground wheel assembly supporting the rear section, a hopper for the reception of candy eggs in said rear section having an outlet opening, a portion of said rear ground wheel assembly normally closing said opening and having a dispensing notch for movement past said opening during the rotation of said wheel assembly and receiving one candy egg at a time from the hopper and for depositing the same on the ground, a crank rotatable with the rear ground wheel assembly, and a link pivotally connecting the crank to the front section.

4. A wheeled toy constructed to simulate the appearance of an animal, or the like, comprising a body, front wheels supporting the front of the body, a rear ground wheel assembly supporting the rear of the body so that the toy can be pulled over the ground, a hopper in said body having a bottom outlet opening, said wheel assembly including a cylindrical portion normally closing said opening and having a dispensing slot moveable past the opening for receiving candy eggs therefrom.

5. A wheeled toy constructed to simulate the appearance of an animal, or the like, comprising a front section formed from a single piece of material, front wheels rotatably carried by said front section, a rear section including spaced plates and a spacing block between said plates for securing the same together, said spacing block and plates forming a hopper for the reception of candy eggs, said hopper having an outlet opening, said plates extending forwardly of, and below, the block, the forward ends of the plates receiving the front section, a pivot pin connecting the forward ends of said plates to the front section, a rear ground wheel assembly rotatably mounted between the lower ends of the side plates having a cylindrical portion normally closing the opening in the hopper and provided with a dispensing notch moveable past the opening for receiving candy eggs from the hopper, a crank rotatable with the rear ground wheel assembly, and a link pivotally connected to the crank and to said front section.

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The USA PATRIOT Act: A Legal Analysis

April 15, 2002

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Summary

The USA PATRIOT Act passed in the wake of the September 11 terrorist attacks. It flows from a consultation draft circulated by the Department of Justice, to which Congress made substantial modifications and additions. The stated purpose of the Act is to enable law enforcement officials to track down and punish those responsible for the attacks and to protect against any similar attacks.

The Act grants federal officials greater powers to trace and intercept terrorists’ communications both for law enforcement and foreign intelligence purposes. It reinforces federal anti-money laundering laws and regulations in an effort to deny terrorists the resources necessary for future attacks. It tightens our immigration laws to close our borders to foreign terrorists and to expel those among us. Finally, it creates a few new federal crimes, such as the one outlawing terrorists’ attacks on mass transit; increases the penalties for many others; and institutes several procedural changes, such as a longer statute of limitations for crimes of terrorism.

Critics have suggested that it may go too far. The authority to monitor e-mail traffic, to share grand jury information with intelligence and immigration officers, to confiscate property, and to impose new book-keeping requirements on financial institutions, are among the features troubling to some.

The Act itself responds to some of these reservations. Many of the wiretapping and foreign intelligence amendments sunset on December 31, 2005. The Act creates judicial safeguards for e-mail monitoring and grand jury disclosures; recognizes innocent owner defenses to forfeiture; and entrusts enhanced anti-money laundering powers to those regulatory authorities whose concerns include the well being of our financial institutions.

This report, stripped of its citations and footnotes, is available in an abbreviated form as The USA PATRIOT Act: A Sketch, CRS Rep. No. RS21203. In addition, much of the information contained here may also be found under a different arrangement in a report entitled, Terrorism: Section by Section Analysis of the USA PATRIOT Act, CRS Rep. No. RL31200 (Dec. 10, 2001). A wider array of terrorism-related analysis appears on the CRS terrorism electronic briefing book page.
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The USA PATRIOT Act: A Legal Analysis

Introduction

Congress passed the USA PATRIOT Act (the Act) in response to the terrorists’ attacks of September 11, 2001. The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to further close our borders to foreign terrorists and to detain and remove those within our borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it is not without safeguards, critics contend some of its provisions go too far. Although it grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough.


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1 P.L. 107-56, 115 Stat. 272 (2001); its full title is the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT).”

2 H.R. 2975 was introduced by Representative Sensenbrenner for himself and Representatives Conyers, Hyde, Coble, Goodlatte, Jenkins, Jackson-Lee, Cannon, Meehan, Graham, Bachus, Wexler, Hostettler, Keller, Issa, Hart, Flake, Schiff, Thomas, Goss, Rangel, Berman and Lofgren; S.1510 by Senator Daschle for himself and Senators Lott, Leahy, Hatch, Graham, Shelby and Sarbanes.

3 H.R. 3004 was introduced by Representative Oxley for himself and Representatives LaFalce, Leach, Maloney, Roukema, Bentsen, Hooley, Bereuter, Baker, Bachus, King, Kelly, Gillmore, Cantor, Riley, Latourette, Green (of Wisconsin), and Grucci; and reported out of the House Financial Services Committee with amendments on October 15, 2001, H.R.Rep.No. 107-250. H.R. 3004, as reported out, included Internet gambling amendments that were not included in H.R. 2975/H.R.3108.
ed. Oct. 24, 2001), and H.R. 3162 was sent to the President who signed it on October 26, 2001.

Criminal Investigations: Tracking and Gathering Communications

A portion of the Act addresses issues suggested originally in a Department of Justice proposal circulated in mid-September. The first of its suggestions called for amendments to federal surveillance laws, laws which govern the capture and tracking of suspected terrorists’ communications within the United States. Federal law features a three-tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications.

The tiers reflected the Supreme Court’s interpretation of the Fourth Amendment’s ban on unreasonable searches and seizures. The Amendment protects private conversations, *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967). It does not cloak information, even highly personal information, for which there is no individual justifiable expectation of privacy, such as telephone company records of calls made to and from an individual’s home, *Smith v. Maryland*, 442 U.S. 735 (1979), or bank records of an individual’s financial dealings, *United States v. Miller*, 425 U.S. 435 (1976).

Congress responded to *Berger* and *Katz*, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications, 18 U.S.C. 2511. At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious

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4 The Department’s proposal, dated September 20, 2001, came with a brief section by section analysis. Both the proposal (Draft) and analysis (DoJ) were printed as an appendix in *Administration’s Draft Anti-Terrorism Act of 2001, Hearing Before the House Comm. on the Judiciary*, 107th Cong., 1st Sess. 54 (2001).


6 “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,” *U.S. Const.* Amend. IV.

7 Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
criminal cases. When approved by senior Justice Department officials, law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.

8 “The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of” one or more predicate offense, 18 U.S.C. 2516.

9 The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement), 1751 (presidential and presidential staff assassination, kidnapping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnapping, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or naturalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations, 18 U.S.C. 2518. The court notifies the parties to any conversations seized under the order after the order expires, 18 U.S.C. 2518(8).

Below Title III, the next tier of privacy protection covers some of those matters which the Supreme Court has described as beyond the reach of the Fourth Amendment protection – telephone records, e-mail held in third party storage, and the like, 18 U.S.C. 2701-2709 (Chapter 121). Here, the law permits law enforcement access, ordinarily pursuant to a warrant or court order or under a subpoena in some cases, but in connection with any criminal investigation and without the extraordinary levels of approval or constraint that mark a Title III interception, 18 U.S.C. 2703.

Least demanding and perhaps least intrusive of all is the procedure that governs court orders approving the government’s use of trap and trace devices and pen registers, a kind of secret “caller id”, which identify the source and destination of calls made to and from a particular telephone, 18 U.S.C. 3121-3127 (Chapter 206). The orders are available based on the government's certification, rather than a finding of the court, that the use of the device is likely to produce information relevant to the investigation of a crime, any crime, 18 U.S.C. 3123. The devices record no more than the identity of the participants in a telephone conversation, but neither the orders nor the results they produce need ever be revealed to the participants.

The Act modifies the procedures at each of the three levels. It:

- offense involving counterfeiting punishable under 18 U.S.C. 471, 472, or 473;
- (e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;
- (f) any offense including extortionate credit transactions under 18 U.S.C. 892, 893, or 894;
- (g) a violation of 31 U.S.C. 5322 (dealing with the reporting of currency transactions);
- (h) any felony violation of 18 U.S.C. 2511 and 2512 (interception and disclosure of certain communications and to certain intercepting devices);
- (i) any felony violation of 18 U.S.C. ch. 71 (obscenity);
- (j) 49 U.S.C. 60123(b) (destruction of a natural gas pipeline), 46502 (aircraft piracy);
- (k) 22 U.S.C. 2778 (Arms Export Control Act);
- (l) the location of any fugitive from justice from an offense described in this section;
- (m) a violation of 8 U.S.C. 1324, 1327, or 1328;
- (n) any felony violation of 18 U.S.C. 922, 924 (firearms);
- (o) any violation of 26 U.S.C. 5861 (firearms);
- (p) a felony violation of 18 U.S.C. 1028 (production of false identification documents), 1542 (false statements in passport applications), 1546 (fraud and misuse of visas, permits, and other documents) or a violation of 8 U.S.C. 1324, 1327, or 1328 (smuggling of aliens);
- (p) 229 (chemical weapons), 2332 (terrorist violence against Americans overseas), 2332a (weapons of mass destruction), 2332b (multinational terrorism), 2332d (financial transactions with countries supporting terrorism), 2339A (support of terrorist), 2332B (support of terrorist organizations);
- (r) any conspiracy to commit any of these, 18 U.S.C. 2516(1)(crimes added by the Act in italics). Other than telephone face to face conversations (i.e., electronic communications), the approval of senior Justice Department officials is not required and an order may be sought in any felony investigation, 18 U.S.C. 2516(3).

10 Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
• permits pen register and trap and trace orders for electronic communications (e.g., e-mail)

• authorizes nationwide execution of court orders for pen registers, trap and trace devices, and access to stored e-mail or communication records

• treats stored voice mail like stored e-mail (rather than like telephone conversations)

• permits authorities to intercept communications to and from a trespasser within a computer system (with the permission of the system’s owner)

• adds terrorist and computer crimes to Title III’s predicate offense list

• reinforces protection for those who help execute Title III, ch. 121, and ch. 206 orders

• encourages cooperation between law enforcement and foreign intelligence investigators

• establishes a claim against the U.S. for certain communications privacy violations by government personnel

• terminates the authority found in many of the these provisions and several of the foreign intelligence amendments with a sunset provision (Dec. 31, 2005).

Pen Registers and Trap and Trace Devices. In section 216, the Act allows court orders authorizing trap and trace devices and pen registers to be used to capture source and addressee information for computer conversations (e.g., e-mail) as well as telephone conversations, 18 U.S.C. 3121, 3123. In answer to objections that e-mail header information can be more revealing than a telephone number, it creates a detailed report to the court, 18 U.S.C. 3123(a)(3).  

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11 “Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public the agency shall ensure that a record will be maintained which will identify – (i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of the such device.

“(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof),” section 216(b)(1).
The use of pen registers or trap and trace devices was limited at one time to the judicial district in which the order was issued, 18 U.S.C. 3123 (2000 ed.). Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States, 18 U.S.C. 3123(b)(1)(C), 3127(2).12

Communications Records and Stored E-Mail. With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber, 18 U.S.C. 2703(a),(b). A warrant will also suffice to seize records describing telephone and other communications transactions without customer notice, 18 U.S.C. 2703(c). In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation, officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records, 18 U.S.C. 2703(b),(c). They can obtain a limited amount of record information (subscribers' names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena, 18 U.S.C. 2703(c)(1)(C). There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial, 18 U.S.C. 2705.

In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider’s customer records, 18 U.S.C. 2703(c)(1)(C).13

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.

12 The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” DoJ at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

13 Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user's true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” DoJ at §107.
Previously, only a federal court in the district in which the e-mail was stored could issue the order. Under section 220, federal courts in the district where an offense under investigation occurred may issue orders applicable “without geographic limitation,” 18 U.S.C. 2703.14

The Act, in section 209, treats voice mail like e-mail, that is, subject to the warrant or court order procedure, rather than to the more demanding coverage of Title III once required, United States v. Smith, 155 F.3d 1050, 1055-56 (9th Cir. 1998).

Finally, the Act resolves a conflict between chapter 121 and the federal law governing cable companies. Government entities may have access to cable company customer records only under a court order following an adversary hearing if they can show that the records will evidence that the customer is or has engaged in criminal activity, 47 U.S.C. 511(h). When cable companies began offering telephone and other communications services the question arose whether the more demanding cable rules applied or whether law enforcement agencies were entitled to ex parte court orders under the no-notice procedures applicable to communications providers.15 The Act makes it clear that the cable rules apply when cable television viewing services are

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14 Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

15 See e.g., DoJ at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement’s access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

**Electronic Surveillance.** To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202. A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(i). Yet only the interloper's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.

**Criminal Investigators' Access to Foreign Intelligence Information.** The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism. It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that “the purpose for the surveillance is to obtain foreign intelligence information,” 50 U.S.C. 1804(a)(7)(B)(2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps “the purpose” might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation...

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16 18 U.S.C. 229 (chemical weapons), 2332 (terrorist acts of violence committed against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2332d (financial transactions with countries which support terrorists), 2339A (providing material support to terrorists), and 2339B (providing material support to terrorist organizations).

17 “Because service providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves as permitted under current law, they often have no way to exercise their rights to protect themselves from unauthorized attackers. Moreover, such attackers can target critical infrastructures and engage in cyberterrorism,” DoJ at §106. Elsewhere the Act defines “electronic surveillance” for purposes of the Foreign Intelligence Surveillance Act (FISA) to emphasize that the law enforcement authority for this intruder surveillance does not confer similar authority for purposes of foreign intelligence gathering, section 1003 (50 U.S.C. 1801(f)(2)).

Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment's warrant clause. It is here that the “primary purpose” notion originated. In United States v. Truong Dinh Hung, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, “as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.” 

Subsequent case law, however, is not as clear as it might be: see e.g., United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984)(“FISA permits federal officials to obtain orders authorizing electronic surveillance ‘for the purpose of obtaining foreign intelligence information.’ The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying officials’ belief that the information sought is the type of foreign intelligence information described”); United States v. Pelton, 835 F.2d 1067, 1075-76 (4th Cir. 1987)(“We also reject Pelton’s claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial”); United States v. Sarkissian, 841 F.2d 959, 907-8 (9th Cir. 1988)(“Defendants rely on the primary purpose test articulated in United States v. Truong Dinh Hung. . . . One other court has applied the primary purpose test. Another court has rejected it . . . distinguishing Truong. A third court has declined to decide the issue. We also decline to decide the issue”); United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1991)(“Appellants attack the government’s surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance”).

The Justice Department sought FISA surveillance and physical search authority on the basis of “a” foreign intelligence purpose. Section 218 of the Act insists that foreign intelligence gathering be a “significant purpose” for the request for the FISA surveillance or physical search order, 50 U.S.C. 1804(a)(7)(B), 1823(a)(7)(B), a more

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20 “Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” DoJ at §153.
demanding standard than the “a purpose” threshold proposed by the Justice Department, but a clear departure from the original “the purpose” entry point. FISA once described a singular foreign intelligence focus prerequisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k), 1825(k).21

Protective Measures. The Act reenforces two kinds of safeguards, one set designed to prevent abuse and the other to protect those who assist the government. The sunset clause is perhaps the best known of the Act’s safeguards. Under the direction of section 224, many of the law enforcement and foreign intelligence authorities granted by the Act expire as of December 31, 2005.22 The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter

21 “(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. (2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, infra, quoting, 50 U.S.C. 1801.

22 “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210[subpoenas for communications provider customer records], 211[access to cable company communication service records], 213[sneak and peek], 216[pen register and trap and trace device amendments], 221[trade sanctions], and 222[assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005.22 With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers’ communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices).\textsuperscript{23} Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees,\textsuperscript{24} but could not recover against the United States.\textsuperscript{25} Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice's Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government's request until a court order authorizing access can be obtained.\textsuperscript{26} Another allows providers to disclose customer records to protect the provider's rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others.\textsuperscript{27} A third section,

\textsuperscript{24} 18 U.S.C. 2520 and 2707 (2000 ed.).
\textsuperscript{26} Prior law already granted service providers immunity for disclosure of customer records in compliance with a court access order, 18 U.S.C. 2703(f).
\textsuperscript{27} “Existing law contains no provision that allows providers of electronic communications service to disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies that threaten death or serious bodily injury. This section amends 18 U.S.C. §2702 to authorize such disclosures if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.

“Current law also contains an odd disconnect: a provider may disclose the \textit{contents} of the customer's communications in order to protect its rights or property but the current statute does not expressly permit a provider to voluntarily disclose \textit{non-content} records (such as a subscriber's login records). 18 U.S.C. 2702(b)(5). This problem substantially hinders the ability of providers to protect themselves from cyber-terrorists and criminals. Yet the right to disclose the contents of communications necessarily implies the less intrusive ability to disclose non-content records. In order to promote the protection of our nation's critical infrastructures, this section's amendments allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems,” \textit{DoJ at
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

**Foreign Intelligence Investigations**

Although both criminal investigations and foreign intelligence investigations are conducted in the United States, criminal investigations seek information about unlawful activity; foreign intelligence investigations seek information about other countries and their citizens. Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough.

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA), something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President's authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, *United States v. United States District Court*, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage

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28 Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

29 Thus in the name of assisting in the execution of Title III, chapter 121, or chapter 206 order, the courts may not cite the Act as the basis for an order compelling a service provider to make system modifications or provide any other technical assistance not already required under 18 U.S.C. 2518(4), 2706, or 3124(c), see, H.R.Rep.No. 107-236, at 62-3 (2001) (emphasis added) (“This Act is not intended to affect obligations under Communications Assistance for Law Enforcement Act [which addresses law enforcement-beneficial system modifications and the compensation to be paid for the changes], nor does the act impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance”).

30 E.g., As amended by section 902 of the Act, “‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2)(language added by the Act in italics).

31 50 U.S.C. 1801 et seq.
In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs. There were and still are extra


33 "As used in this subchapter: (a) ‘Foreign power’ means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

“(b) ‘Agent of a foreign power’ means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C).

“(c) ‘International terrorism’ means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnaping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

“(d) ‘Sabotage’ means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

“(e) ‘Foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans (“United States persons,” i.e., citizens or permanent resident aliens). The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

• permits “roving” surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)

• increases the number of judges on the FISA court from 7 to 11

• allows application for a FISA surveillance or search order when gathering foreign intelligence is a significant reason for the application rather than the reason

• authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations

• sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses

• carries a sunset provision

• establishes a claim against the U.S. for certain communications privacy violations by government personnel

• expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to – (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States,” 50 U.S.C. 1801.

34 Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
**FISA.** FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases. It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

**Search and Surveillance for Intelligence Purposes.** Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, Draft at §151.36

Section 901 of the Act address a concern raised during the 106th Congress relating to the availability of the FISA orders and the effective use of information gleaned from the execution of a FISA order.37 It vests the Director of Central

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36 See also, DoJ at §151, “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order’s minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed (50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

37 See e.g., S.Rep.No. 106-352, at 3, 6, 7 (2000)(“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application
Intelligence with the responsibility to formulate requirements and priorities for the use of FISA to collect foreign intelligence information. He is also charged with the responsibility of assisting the Attorney General in the efficient and effective dissemination of FISA generated information (50 U.S.C. 403-3(c)).

**Pen Registers and Trap and Trace Devices for Intelligence Gathering.** Section 214 grants the request of the Department of Justice by dropping requirements which limited FISA pen register and trap and trace device orders to facilities used by foreign agents or those engaged in international terrorist or clandestine intelligence activities, 50 U.S.C. 1842(c)(3)(2000 ed.).³⁸ It is enough that the order is sought as part of an investigation to protect against international terrorism or clandestine intelligence activities and is not motivated solely by an American’s exercise of his or her First Amendment rights. Elsewhere (section 505), the Act drops a similar limitation for intelligence officials’ access to telephone records, 18 U.S.C. 2518(2).³⁸

³⁸ “When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevance, an additional factual showing that the communications device has been used to contact an ‘agent of a foreign power’ engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the ‘agent of a foreign power’ prong from the predication, and thus makes the FISA authority more closely track the criminal authority,” DoJ at §155.
Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise be entitled to confidentiality. Section 505, in response to the Justice Department's suggestion, allows FBI field offices to make the requests, see DoJ at §157 (“At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports”).

Third Party Cooperation and Tangible Evidence. As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target’s activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.40

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40 When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court’s order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.’ This would enhance the FBI’s ability to monitor international terrorists and intelligence officers who are
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian. The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities, in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B);
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a);
- the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a);
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v;

 trained to thwart surveillance by rapidly changing hotel accommodations, cell phones, Internet accounts, etc., just prior to important meetings or communications. Under the current law, the government would have to return to the FISA Court for an order that named the new carrier, landlord, etc., before effecting surveillance. Under the proposed amendment, the FBI could simply present the newly discovered carrier, landlord, custodian or other person with a generic order issued by the Court and could then effect FISA coverage as soon as technically feasible.” DoJ at 152.


41 “The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigative contexts. The time and difficulty involved in getting such pleadings before the Court usually outweighs the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” DoJ at §156.

42 Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.\textsuperscript{43}

**Access to Law Enforcement Information.** Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community's access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, Draft at §103.\textsuperscript{44}

\textsuperscript{43} H.R.Rep.No. 107-205, at 60-1 (2001) (“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

“The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

“Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual’s credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding--without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency’s request for information”).

\textsuperscript{44} See also, DoJ at §103, “This section facilities the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, Draft at §354.45

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, Draft at §154.46

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion.47 It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions.”

45 See also, DoJ at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.” Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officers

46 See also, DoJ at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”

47 Blair v. United States, 250 U.S. 273, 281 (1919)(the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
These officers may receive: (1) “foreign intelligence information” that is, information regardless of whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

The Act, in section 203(a), allows disclosure of matters occurring before the grand jury to “any federal law enforcement, intelligence, protective, immigration, national defense, or national security” officer to assist in the performance of his official duties, F.R.Crim.P. 6(e)(3)(C)(i)(V). 48

Critics may protest that the change could lead to the use of the grand jury for intelligence gathering purposes, or less euphemistically, to spy on Americans. 49 The proposal was never among those scheduled to sunset, but earlier versions of the section followed the path used for most other disclosures of grand jury material: prior

48 These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

49 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25 HARVARD JOURNAL OF LAW & PUBLIC POLICY 699, 719-20 (2002)(“There is a significant danger that the rule permitting disclosure will be treated as the de facto authorization of an expansion of the grand jury’s investigative role to encompass seeking material relevant only to matters of national security, national defense, immigration, and so forth. The grand jury’s awesome powers should not be unwittingly extended to a much wider range of issues. . . Since the grand jury operates in secret, there are no public checks on the scope of its investigations, and witnesses are not permitted to challenge its jurisdiction. Only the supervising court is in a position to keep the grand jury’s investigation within proper bounds. Requiring judicial approval of foreign intelligence and counterintelligence information disclosures would provide a natural check against the temptation to manipulate the grand jury to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6 (Nov. 2001)(“The grand jury secrecy rule is a rule of policy which has always had exceptions, and it has been frequently modified. The secrecy rule has no credible claim to constitutional stature”).
Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

Law enforcement officials may share Title III information with the intelligence community under the same conditions, section 203(b), although the grand jury and Title III sharing provisions differ in at least three important respects. The court need not be notified of Title III disclosures. On the other hand, the authority for sharing Title III information expires on December 31, 2005, section 224, and agencies and their personnel guilty of intentional improper disclosures may be subject to a claim for damages and disciplinary action, 18 U.S.C. 2520.

The third subsection of section 203 remains something of an enigma. It speaks in much the same language as its counterparts. It allows law enforcement officials to share information with the intelligence community, “notwithstanding any other provisions of law,” section 203(d). It either swallows the other subsections, or supplements them. Several factors argue for its classification as a supplement. Congress is unlikely to have crafted subsections (a), (b) and (c) only to completely

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51 “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification. By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

**Increasing Institutional Capacity.** As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a
computerized translation capability to be used in foreign intelligence gathering.\textsuperscript{54} Section 907 instructs the Director of the Central Intelligence, in consultation with the Director of the FBI, to report on the creation of a National Virtual Translation Center. The report is to include information concerning staffing, allocation of resources, compatibility with comparable systems to be used for law enforcement purposes, and features which permit its efficient and secure use by all of the intelligence agencies.

**Money Laundering**

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture.\textsuperscript{55} The Act bolsters federal efforts in each area.

**Regulation.** Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.\textsuperscript{56}

\textsuperscript{54} "The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

"The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so,” S.Rep.No. 107-63, at 11 (2001).

\textsuperscript{55} For a brief overview, see, Murphy, Money Laundering: Current Law and Proposals, CRS REP.NO. RS21032 (DEC. 21, 2001).

\textsuperscript{56} See e.g., 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
**Records and Reports.** For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler’s checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to files SARs as well, reflecting Congress’ view that the information provided the IRS may be valuable for other law enforcement purposes. This concern is likewise  

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58 H.R.Rep.No. 107-250, at 38-9 (2001) (“Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

“Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a ‘Safeguard Procedures Report’ which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

“While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement
authorities as the various reports mandated by the Bank Secrecy Act, which can typically be retrieved electronically from a database maintained by the Treasury Department. The differential access to the two kinds of reports is made anomalous by the fact that Form 8300 elicits much the same information that is required to be disclosed by the Bank Secrecy Act. For example, just as Form 8300 seeks the name, address, and social security number of a customer who engages in a cash transaction exceeding $10,000 with a trade or business, Currency Transaction Reports (CTRs) mandated by the Bank Secrecy Act require the same information to be reported on a cash transaction exceeding $10,000 between a financial institution and its customer.

Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action. Subsection (b) of section [355] amends section 5318(g)(2) of title 31--which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed--to clarify that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee's official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the

59 “Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act. “First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor from civil liability applies in arbitration, as well as judicial, proceedings. Second, it amends section 5318(g)(3) to clarify the safe harbor's coverage of voluntary disclosures (that is, those not covered by the SAR regulatory reporting requirement). The language in section 5318(g)(3)(A) providing that ‘any financial institution that *** makes a disclosure pursuant to *** any other authority *** shall not be liable to any person’ is not intended to avoid the application of the reporting and disclosure provisions of the Federal securities laws to any person, or to insulate any issuers from private rights of actions for disclosures made under the Federal securities laws.

“Subsection [351](b) amends section 5318(g)(2) of title 31—which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed—to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee's official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
employment references to other insured depository financial institutions provided disclosure is not done with malicious intent.60

The Financial Crimes Enforcement Network (FinCEN), a component within the Treasury Department long responsible for these anti-money laundering reporting and record-keeping requirements, 31 C.F.R. pt. 103, was administratively created in 1990 to provide other government agencies with an “intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes,” 55 Fed.Reg. 18433 (May 2, 1990).

The Act, in section 361, makes FinCEN a creature of statute, a bureau within the Treasury Department, 31 U.S.C. 310. Section 362 charges it with the responsibility of establishing a highly secure network to allow financial institutions to file required reports electronically and to permit FinCEN to provide those institutions with alerts and other information concerning money laundering protective measures, 31 U.S.C. 310 note.

Special Measures. In extraordinary circumstances involving international financial matters, the Act grants the Secretary of the Treasury, in consultation with other appropriate regulatory authorities, the power to issue regulations and orders involving additional required “special measures” and additional “due diligence” requirements to combat money laundering. The special measure authority, available under section 311, comes to life with the determination that particular institutions, jurisdictions, types of accounts, or types of transactions pose a primary money

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60 31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 66 (2001).
These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

61 31 U.S.C. 5318A. The circumstances considered in the case of a suspect jurisdiction are: evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction’s banking regulation; the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

62 The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’ including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

“Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate
business transactions.

"Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

"Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

"The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

"The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

"The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

"The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent’ account for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

"The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

"The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed
Due Diligence. Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watchdog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.

by regulation, order, or otherwise as permitted by law. However, if the Secretary proceeds by issuing an order, the order must be accompanied by a notice of proposed rulemaking relating to the imposition of the special measure, and may not remain in effect for more than 120 days, except pursuant to a regulation prescribed on or before the end of the 120-day period. The fifth special measure may be imposed only by regulation,” H.R.Rep.No. 107-250, at 68-9.

See generally, H.R.Rep.No. 107-250, at 71-2 (“Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

“The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

“The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

“For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, his immediate family members or close associates, to prevent,
General Regulatory Matters. The Act establishes several other regulatory mechanisms directed at the activities involving U.S. financial institutions and foreign individuals or institutions. Section 313, for instance, in another restriction on correspondent accounts for foreign financial institutions, prohibits U.S. financial institutions from maintaining correspondent accounts either directly or indirectly for foreign shell banks (banks with no physical place of business) which have no affiliation with any financial institution through which their banking activities are subject to regulatory supervision.

The Act, in section 325, empowers the Secretary of the Treasury to promulgate regulations to prevent financial institutions from allowing their customers to conceal their financial activities by taking advantage of the institutions’ concentration account practices.

The Secretary of the Treasury is instructed in section 326 to issue regulations for financial institutions’ minimum new customer identification standards and record-
Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a ‘street name’ or omnibus account in the broker-dealer's name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to ‘look through’ the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund's customers. Thus, the fund would not be required to ‘look through’ the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature.\(^{68}\)

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

**Reports to Congress.** Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

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exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.\textsuperscript{69}

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

\textbf{International Cooperation.} Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.\textsuperscript{70}

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (\textit{i.e.}, the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.


\textsuperscript{70} H.R.Rep.No. 107-250, at 67 (2001)(“This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury's progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

“The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime”).
Crimes. Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, smuggling, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
expands 18 U.S.C. 1956 to cover financial transactions conducted in foreign financial institutions.\textsuperscript{71}

Section 329 makes it a federal crime to corruptly administer the money laundering regulatory scheme. Offenders are punishable by imprisonment for not more than 15 years and a fine of not more than three times the amount of the bribe.

Section 5326 of title 31 authorizes the Secretary of the Treasury to impose temporary, enhanced reporting requirements upon financial institutions in areas victimized by substantial money laundering activity (geographic targeting regulations and orders). Section 353 makes it clear that the civil sanctions, criminal penalties, and prohibitions on smurfing (structuring transactions to evade reporting requirements) apply to violations of the regulations and orders issued under 31 U.S.C. 5326.\textsuperscript{72} It also extends the permissible length of the temporary geographical orders from 60 to 180 days.

Violations of the special measures and special due diligence requirements of sections 311 and 312 are subject to both civil and criminal penalties by virtue of section 363's amendments to 31 U.S.C. 5321(a) and 5322. The amendments authorize civil penalties and criminal fines of twice the amount of the transaction but not more than $1 million. Criminal offenders would be subject to a fine in the same amount.

\textsuperscript{71} \textquotedblleft[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

\textsuperscript{72} ‘The definition of ‘financial institution’ in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of ‘commercial bank’ or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad--say to a Mexican bank--and launders them through a series of financial transactions, the government conceivably could not rely on the definition of a ‘financial institution’ in 1956(c)(6) to establish that the transaction was a ‘financial transaction’ within the meaning of 1956(c)(4)(B) (defining a ‘financial transaction’ as a transaction involving the use of a ‘financial institution’), or that it was a ‘monetary transaction’ within the meaning of 1957(f) (defining ‘monetary transaction’ as, inter alia, a transaction that would be a ‘financial transaction’ under 1956(c)(4)(B)).

Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launders the proceeds of one of the crimes set forth on a list of ‘specified unlawful activities.’ 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),” H.R.Rep.No. 107-250, at 38 (2000).

Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.73

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents.74 They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

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73 “The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business.

“Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.

“Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive,” H.R.Rep.No. 107-250, at 54 (2001).

74 “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
• 18 U.S.C. 476 (taking impressions of tools used for obligations and securities) from 10 to 25 years;
• 18 U.S.C. 477 (possessing or selling impressions of tools used for obligations or securities) from 10 to 25 years;
• 18 U.S.C. 484 (connecting parts of different notes) from 5 to 10 years;
• 18 U.S.C. 493 (bonds and obligations of certain lending agencies) from 5 to 10 years;
• 18 U.S.C. 478 (foreign obligations or securities) from 5 to 20 years;
• 18 U.S.C. 479 (uttering counterfeit foreign obligations or securities) from 3 to 20 years;
• 18 U.S.C. 480 (possessing counterfeit foreign obligations or securities) from 1 to 20 years;
• 18 U.S.C. 481 (plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities) from 5 to 25 years;
• 18 U.S.C. 482 (foreign bank notes) from 2 to 20 years; and
• 18 U.S.C. 483 (uttering counterfeit foreign bank notes) from 1 to 20 years.

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

**Bulk Cash.** Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act’s bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting. 75

The section appears to be the product of reactions to the Supreme Court’s decision in *United States v. Bajakian*, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court’s

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75 “For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).
As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency – representing the proceeds of drug trafficking and other criminal offenses – is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad.

Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United States without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

Extraterritorial Jurisdiction. The Act makes 18 U.S.C. 1029, the federal statute condemning various crimes involving credit cards, PIN numbers and other access devices, applicable overseas if the card or device is issued by or controlled by an American bank or other entity and some article is held in or transported to or through the United States during the course of the offense, section 377. The change was part of the original Justice Department proposals. Justice explained that, “[financial crime] admits of no border, utilizing the integrated global financial network for ill purposes. This provision would apply the financial crimes prohibitions to conduct committed abroad, so long as the tools or proceeds of the crimes pass through or are in the United States,” DoJ at §408. The section, however, appears to limit the otherwise applicable extraterritorial jurisdiction implicit in section 1029, since federal courts would likely recognize extraterritorial jurisdiction over a violation.

Section 5317 of title 31 once called for civil forfeiture of property traceable to a violation of 31 U.S.C. 5316 (reports on exporting or importing money instruments worth $10,000 or more). Section 372 of the Act recasts section 5317 to provide for civil and criminal forfeitures for violations of 31 U.S.C. 5316, of 31 U.S.C. 5313 (reports on domestic coins and currency transactions involving $10,000 or more) and of 31 U.S.C. 5324 (structuring transactions to evade reporting requirements (smurfing)).

Examination of forfeiture in false reporting cases under the Constitution’s Excessive Fines Clause.

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76 “As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency – representing the proceeds of drug trafficking and other criminal offenses – is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad.

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Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute,” H.R.Rep.No. 107-250 at 36-7 (2001).
under *either* circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.\(^77\)

**Venue.** Section 1004 relies on *dicta* in *United States v. Cabrales*, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering,\(^78\) in the state and district in which the monetary transaction takes place. The Supreme Court in *Cabrales* held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in *dicta*, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.\(^79\)

**Forfeiture.** Forfeiture is the government confiscation of property as a consequence of crime.\(^80\) The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 *et seq.* (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

**Constitutional Considerations.** The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 *et seq.*, which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the


\(^78\) “The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed,” *U.S.Const.* Art.III, §2, cl.3.

“[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,” *U.S.Const.* Amend. VI.

\(^79\) See also, *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnaping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.

\(^80\) For general background information, see, Doyle, *Crime and Forfeiture*, CRS REP.NO. 97-139A (Oct. 11, 2000).
jurisdiction of the United States, belonging to any foreign individual, foreign entity, or foreign country whom they determine to have planned, authorized, aided or engaged in an attack on the United States by a foreign country or foreign nationals. The section also permits the government to present secretly (ex parte and in camera) any classified information upon which the forfeiture was based should the decision be subject to judicial review. The Justice Department requested the section as a revival of the President's powers in times of unconventional wars. By virtue of section 316, property owners may initiate a challenge to a confiscation by filing a claim under the rules applicable in maritime confiscations. The section permits two defenses to forfeiture — that the property is not subject to confiscation under section 106 or that the claimant is entitled to the innocent owner defense of 18 U.S.C. 983(d). The characterization of the defenses as "affirmative defense" indicates that the claimant bears the burden of proof. The innocent owner defenses of 18 U.S.C. 983(d) are probably not available in cases under section 106, since that section is explicitly

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81 "This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only 'during the time of war.' 50 App.U.S.C. §5(b).

"This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress's war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

"The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2),” DoJ at §159.

82 "An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
excepted from the coverage of 18 U.S.C. 983.\textsuperscript{83} The challenge proceedings permit the court to admit evidence, such as hearsay evidence, that would not otherwise be admissible under the Federal Rules of Evidence if the evidence is reliable and if national security might be imperiled should dictates of the Federal Rules be followed, §316(b). The section recognizes the rights of claimants to proceed alternatively under the Constitution or the Administrative Procedure Act.\textsuperscript{84}

The Justice Department also recommended enactment of an overlapping provision which ultimately passed as section 806 of the Act without any real discussion of the relationship of the two sections.\textsuperscript{85} Section 806 authorizes confiscation of all property, regardless of where it is found, of any individual, entity, or organization engaged in domestic or international terrorism (as defined in 18 U.S.C. 2331),\textsuperscript{86} against the United States, Americans or their property, 18 U.S.C.

\textsuperscript{83} 18 U.S.C. 983(i)(2)(D).

\textsuperscript{84} “The exclusion of certain provisions of Federal law from the definition of the term ‘civil forfeiture statute’ in section 983(i) of title 18, United States Code, shall not be construed to deny an owner of property the right to contest the confiscation of assets of suspected international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C) subchapter II of chapter 5 of title 5, United States Code (commonly known as the ‘Administrative Procedure Act’).” Sec. 316(c)(1).

\textsuperscript{85} “Current law does not contain any authority tailored specifically to the confiscation of terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available current forfeiture laws require detailed tracing that is quite difficult for accounts coming through the banks of countries used by many terrorists.

“This section increases the government's ability to strike at terrorist organizations' economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001,” DoJ, at §403. The House Report on H.R. 2975 which contained versions of both sections is no more explicit on the relation of the two sections.

\textsuperscript{86} “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
Section 806 as discussed below also calls for the more common confiscation of property derived from and or facilitating acts of domestic or international terrorism against the United States or its citizens. Confiscations under 806 may be challenged under the procedures of 18 U.S.C. 983, since they are not exempted there. To the extent that forfeiture under section 806 is based on international rather than domestic terrorism, claimants may also use the procedures of section 316.

Confiscation based solely on the fact that the property is owned by a criminal offender, rather than that it is derived from or facilitates some crime is fairly uncommon. It is the mark of common law forfeiture of estate. At common law, a felon forfeited all of his property. Most contemporary forfeiture statutes employ statutory forfeiture, a more familiar presence in American law, which consists of the confiscation of things whose possession is criminal, of the fruits of crime, and of the means of crime – untaxed whiskey, the drug dealer’s profits, and the rum runner’s ship.

Three characteristics set forfeiture of estate apart. The property is lost solely by reason of its ownership by a felon. All of a felon’s property is confiscated, not merely that which is related to the crime for which he is convicted. Finally, it occasions attainder which negates the felon’s right to hold property or for title to property to pass through him to his heirs. It was with this in mind, that the Framers declared that “no attainder of treason shall work corruption of blood or forfeiture exception during the life of the person attained.” And for this reason, President Lincoln insisted that the confiscated real estate of Confederate supporters should revert their heirs at death.

of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5) (as amended by section 802 of the Act).

87 Austin v. United States, 509 U.S. 602, 611-12 (1993) (“Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture . . . . Of England’s three kinds of forfeiture, only the third took hold in the United States”).


89 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal in personam proceedings following criminal conviction as a means of accomplishing confiscation.
Neither section 106 nor 806 require conviction of the terrorist property owner.\footnote{90} Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers.\footnote{91} The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners.\footnote{92} Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them.\footnote{93} The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate

\footnote{90} Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c)(“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act”).

\footnote{91} \textit{Silesian American Corp. V. Clark}, 332 U.S. 469 (1947); cf., \textit{Societe Internationale v. Rogers}, 357 U.S. 197, 211 (1958)(“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).

\footnote{92} \textit{Zitzman v. McGrath}, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’”).

any presumption of remedial purposes. The same has been said of the applicability of the ex post facto clause.

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO. If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

**Other Forfeiture Amendments.** In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.

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95 See *United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.)*, 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, *Landgraf v. USI Film Products*, 511 U.S. 244, 265-66 (1994).

96 DoJ, at §403.

97 18 U.S.C. 1956(b). Cf., H.R.Rep.No. 107-250, at 54-5 (2001)(“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas.\textsuperscript{98} Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted

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\textsuperscript{98} 18 U.S.C. 981(k). H.R.Rep.No. 107-250, at 57-8 (2001)(“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank's customers.

“Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank's correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

“The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”).
Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here. Section 320 enlarges this provisions to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements. This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.

99 Cf., H.R.Rep.No. 107-250, at 58-9 (2001) (“Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of ‘substitute assets’ when the defendant has placed the property otherwise subject to forfeiture ‘beyond the jurisdiction of the court.’ Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

“Specifically, a Federal court could issue a repatriation order--either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. 853(e) to restrain property--so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both”.


101 H.R.Rep.No. 107-250, at 56 (2001)(“This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act”).

102 H.R.Rep.No. 107-250, at 59-60 (2001)(“Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country.

“Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
A fugitive may not challenge a federal forfeiture.\textsuperscript{103} Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in “order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.”

to contest the restraining order could do so on the ground that 28 U.S.C. 2467 was not properly applied to the particular case, but could not oppose the restraining order on any ground that could also be raised in the proceedings pending in a foreign court. This provision prevents a litigant from taking ‘two bites at the apple’ by raising objections to the basis for the forfeiture in the Federal court that he also raised, or is entitled to raise, in the foreign court where the forfeiture action is pending. It complements the existing provision in section 2467(e) providing that the Federal court is bound by the findings of fact of the foreign court, and may not look behind such findings in determining whether to enter an order enforcing a foreign forfeiture judgment.

“This section also amends 28 U.S.C. 2467 to make clear that it is not necessary to prove that the person asserting an interest in the property received actual notice of the forfeiture proceedings. As is the case with respect to forfeitures under U.S. law, it is sufficient if the foreign nation takes steps to provide notice, in accordance with the principles of due process. See Gonzalez v. United States, 1997 WL 278123 (S.D.N.Y. 1997) (‘the [G]overnment is not required to ensure actual receipt of notice that is properly mailed’); Albajon v. Gugliotta, 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant’s identifications, and mailed after claimant released from jail, is sufficient to satisfy due process, even if claimant never received notice); United States v. Schiavo, 897 F. Supp. 644, 648 49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; due process satisfied even if he did not receive the notice).

“Finally, 28 U.S.C. 2467 is amended to authorize the enforcement of a forfeiture judgment based on any foreign offense that would constitute an offense giving rise to a civil or criminal forfeiture of the same property if the offense had been committed in the United States. This is one of two safeguards that the statute contains against the enforcement of judgments that the United States does not consider appropriate for enforcement: if the judgment is based on an act that would not constitute a crime in the United States, such as removing assets from the reach of a repressive regime, it could not be enforced. In addition, section 2467 already provides that a foreign judgment may only be enforced by a Federal court at the request of the United States, and only after the Attorney General has certified that the judgment was obtained in accordance with the principles of due process. Thus, neither a foreign Government nor a foreign private party could enforce a foreign judgment on its own under this provision.”). Note that the safeguard to which the report refers is the range of foreign offenses that will support an enforceable confiscation order, \textit{i.e.,} drug offenses and crimes on the money laundering predicate offense list, and that the amendment narrows that safeguard by adding additional foreign offenses, \textit{i.e.,} any foreign equivalent of a federal crime which would support a confiscation order.

\textsuperscript{103} 28 U.S.C. 2466.
Alien Terrorists and Victims

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

**Border Protection.** The border protection provisions:

- authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401

- authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402

- remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404

- authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405

- authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.

- instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007

- direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418

- express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414

- add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415

- call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416

- limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
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• instruct the Attorney General to report on the feasibility of using biometric scanners to help prevent terrorists and other foreign criminals from entering the country, section 1008

• authorize appropriations of $250,000 for the FBI to determine the feasibility of providing airlines with computer access to the names of suspected terrorists, section 1009

• authorize reciprocal sharing of the State Department’s visa lookout data and related information with other nations in order to prevent terrorism, drug trafficking, slave marketing, and gun running, section 413

Detention and Removal. Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity, 8 U.S.C. 1227 (a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(iv). Aliens may be inadmissible for any number of terrorism-related reasons, 8 U.S.C. 1182(a)(3)(B). Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported.


Section 411 defines “terrorist organization” to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the Federal Register as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C.

104 As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).
Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).

Prior law made representatives of terrorist organizations designated by the Secretary under section 219 (8 U.S.C. 1189) inadmissible, 8 U.S.C. 1182(a)(3)(B)(i)(IV)(2000 ed.). And so they remain. Section 411 makes representatives of political, social or similar groups, whose public endorsements of terrorist activities undermines U.S. efforts to reduce or eliminate terrorism, inadmissible as well, 8 U.S.C. 1882(a)(3) (B)(i)(IV).

An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in “premeditated, politically motivated violence perpetrated against noncombatant targets,” or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien’s release would threaten national security or endanger some individual or the general public. The Attorney General’s determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President’s Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

Victims. The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

- permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421
- extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422

105 “The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

106 “The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks.

“The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application.

“Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

“Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 31.

“Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.


107 “Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

“The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

“The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death),” H.R.Rep.No. 107-236, at 68 (2001).

108 “Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien’s 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien’s 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
• a denial of benefits of the Act to terrorists and their families, section 427

• authority for the Attorney General to establish evidentiary standards to implement the alien victim provisions of the Act, section 426.

Other Crimes, Penalties, & Procedures

New Crimes. The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department, the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offenses for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents, 18 U.S.C. 175b. Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

109 “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . . .” DoJ at §305.

110 The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

111 “18 U.S.C. §792 makes it an offense to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.”
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.\(^{112}\)

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D). The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

\(^{112}\) U.S. Const. Art.III, §2, cl.3 (“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . .”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . . .”); United States v. Cabrales, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from Cabrales when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnapping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999)(“By way of comparison, last Term in [Cabrales] we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).
• chemical weapons offenses, 18 U.S.C. 229;
• terrorist attacks on mass transportation, 18 U.S.C. 1993;
• sabotage of a nuclear facility, 42 U.S.C. 2284; and
• sabotage of interstate pipelines, 49 U.S.C. 60123(b).

And it adds expert advice or assistance to the types of assistance that may not be provided under section 2339A. This last addition may encounter the same First Amendment vagueness problems some courts have found in assistance which takes the form of “training” and “personnel,” Humanitarian Law Project v. Reno, 205 F.3d 1130, 1137-136 (9th Cir. 2000). Finally, the section announces that a prosecution for violation of section 2339A (support of terrorists) may be brought where the support is provided or where the predicate act of terrorism occurs. There may be some question whether the Constitution permits prosecution where the predicate act occurs.

Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.


113 The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of ‘material support or resources’ is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’),” DoJ at 306.


115 “The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill (‘Federal terrorism offenses’) is used in identifying the relevant crimes,” DoJ, at §304.

New Penalties. The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. 3571(b),(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense.\(^\text{117}\)

The proposal, however, failed to identify the critical elements that would trigger the alternative.\(^\text{118}\) Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

- for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

- for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

\(^{117}\) “Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersede lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,” *DoJ*, at §302.

\(^{118}\) “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense,” *Draft* at §302.
• for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;

• for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;

• for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;

• for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and

• for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism. Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:

• arson committed within a federal enclave, 18 U.S.C. 81;
• killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);
• destruction of communications facilities, 18 U.S.C. 1362;
• destruction of property within a federal enclave, 18 U.S.C. 1363;
• causing a train wreck, 18 U.S.C. 1922;
• providing material support to a terrorist, 18 U.S.C. 2339A;
• torture committed overseas under color of law, 18 U.S.C. 2340A;
• sabotage of a nuclear facility, 42 U.S.C. 2284;

119 "The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §§846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

"This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.
• interfering with a flight crew within U.S. special aircraft jurisdiction, 49 U.S.C. 46504;
• carrying a weapon or explosive abroad an aircraft within U.S. special aircraft jurisdiction, 49 U.S.C. 46505; and
• sabotage of interstate gas pipeline facilities, 49 U.S.C. 60123.

When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years).[120] The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission),[121] a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

120 Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

121 “Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.

“This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders).\(^{122}\)

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

**Other Procedural Adjustments.** In other procedural adjustments designed to facilitate criminal investigations, the Act:

- increases the rewards for information in terrorism cases
- expands the Posse Comitatus Act exceptions
- authorizes “sneak and peek” search warrants
- permits nationwide and perhaps worldwide execution of warrants in terrorism cases
- eases government access to confidential information
- allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
- lengthens the statute of limitations applicable to crimes of terrorism
- clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
- adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B.\(^{123}\)

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\(^{122}\) It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, e.g., damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

Rewards. The Attorney General already enjoys the power to pay rewards in
criminal cases, but his powers under other authorities is often subject to caps on the
amount he might pay. Thus as a general rule, he may award amounts up to $25,000
for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any
amount in recognition of assistance to the Department of Justice as long as the
Appropriations and Judiciary Committees are notified of any rewards in excess of
$100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism
cases, individual awards were capped at $500,000, the ceiling for the total amount
paid in such rewards was $5 million, and rewards of $100,000 or more required his
personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last
several years, annual appropriation acts have raised the $500,000 cap to $2 million
and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67

The Act supplies the Attorney General with the power to pay rewards to combat
terrorism in any amount and without an aggregate limitation, but for rewards of
$250,000 or more it insists on personal approval of the Attorney General or the
President and on notification of the Appropriations and Judiciary Committees, section
501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be
used “without limitation” to pay rewards to prevent, investigate, or prosecute
terrorism.124

The Secretary of State's reward authority was already somewhat more generous
than that of the Attorney General. He may pay rewards of up to $5 million for
information in international terrorism cases as long as he personally approves
payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap
and allows rewards to be paid for information concerning the whereabouts of terrorist
leaders and facilitating the dissolution of terrorist organizations, section 502.

Posse Comitatus. The Posse Comitatus Act and its administrative auxiliaries,
18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law,
absent explicit statutory permission. One existing statutory exception covers
Department of Justice requests for technical assistance in connection with
emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10
U.S.C. 382. The Act enlarges the exception to include emergencies involving other
weapons of mass destruction, section 104.125

Delayed notification of a search (sneak and peek). Rule 41 of the
Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants
before passage of the Act. A sneak and peek warrant is one that authorizes officers
to secretly enter, either physically or virtually; conduct a search, observe, take

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124 The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct
threat assessments for federal agencies, and to reimburse federal agencies for the costs of
detaining terrorist suspects overseas.

125 For a general discussion of the Posse Comitatus Act, see, Doyle, The Posse Comitatus Act
& Related Matters: The Use of the Military to Execute Civilian Law, CRS REP.NO. 95-964
(June 1, 2000).
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, Richards v. Wisconsin, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, Wilson v. Arkansas, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, Dalia v. United States, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, cf., United States v. Miller, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, United States v. Freitas, 800 F.2d 1451, 1453 (9th Cir. 1986).126

126 "The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in United States v. New York Telephone Co., 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth
Amendment, demands that surreptitious entries be closely circumscribed,” United States v. Freitas (Freitas I), 800 F.2d 1451, 1455-456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, United States v. Freitas (Freitas II), 856 F.2d 1425 (9th Cir. 1988).

“No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in Dalia v. United States, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in Dalia, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property. . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. See United States v. New York Telephone Co., 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . . Although the Freitas I court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in United States v. Villegas, 899 F.2d 1324 (1999). Although the Freitas I court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in Villegas. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the Freitas I court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” United States v. Pangburn, 983 F.2d 449, 453-55 (2d Cir. 1993).

In Simons, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
The Fourth Amendment does not mention notice, and the Supreme Court has stated that the constitution does not categorically proscribe covert entries, which necessarily involve a delay in notice. And insofar as the August search satisfied the requirements of the Fourth Amendment, *i.e.*, it was conducted pursuant to a warrant based on probable cause issued by a neutral and detached magistrate, we perceive no basis for concluding that the 45-day delay in notice rendered the search unconstitutional. Having concluded that the Rule 41(d) violation at issue here did not infringe on Simons' constitutional rights, we must now evaluate his argument that the violation was deliberate...

The Act, in section 213, stops short of the Justice Department proposal. Characterized as a codification of the Second Circuit decision, 147 *Cong.Rec.* H7197 (daily ed. Oct. 23, 2001), the Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C. 3103a. Its sneak and peek authorization reaches all federal search and seizure warrants where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (*e.g.*, risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (*e.g.*, jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, *i.e.*, in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation. The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

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129 “The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities,” *DoJ* at §353.

130 Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department’s initial proposal, the Department’s justification does not address the question.
constitutionally “reasonable,” that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

**Nationwide terrorism search warrants.** The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either “within or outside the district,” (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases. The provision may anticipate execution both in this country and overseas. The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage.

131 The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum. (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States.”

132 The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

133 *United States v. Barona*, 56 F.3d 1087, 1092 (9th Cir. 1995) (“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994) (“if American law enforcement officials substantially participated in the search or if the
law apparently contemplated extraterritorial execution, cf., F.R.Crim.P.41, *Advisory Committee Notes: 1990 Amendment* (discussing a proposal for extraterritorial execution that the Supreme Court rejected).  

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” F.R.Crim.P. 41, *Advisory Committee Notes: 1990 Amendment.* There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

**Terrorists' DNA.** The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards *per se.*  

Existing federal law allowed the Attorney General to collect samples from foreign officials conducting the search were actually acting as agents for their American counterparts’); *United States v. Maturo,* 982 F.2d 57, 61 (2d Cir. 1992)(“where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials” or “where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials”); *United States v. Mitro,* 880 F.2d 1480, 1482 (1st Cir. 1989)(“where American agents participated in the foreign search or the foreign officers acted as agents for their American counterparts”); *United States v. Mount,* 757 F.2d 1315, 1318 (D.C.Cir. 1985)(“if American officials or officers participated in some significant way”); *United States v. Marzano,* 537 F.2d 257, 270 (7th Cir. 1976)(declining to adopt the “joint venture” standards, but finding level of American participation in the case before it insignificant); *United States v. Morrow,* 537 F.2d 140, 139 (5th Cir. 1976)(“if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts”); each of the decisions also suggests that evidence secured in a manner which shocked the conscience of the court would be excluded.

134 The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, see, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), reprinted, 78 Cong.Rec. 4982-983 (1934)(“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.) (conferring judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

135 *Roe v. Marcotte,* 193 F.3d 72 (2d Cir. 1999); *Shaffer v. Saffle,* 148 F.3d 1180 (10th Cir. 1998); *Rise v. Oregon,* 59 F.3d 1556 (9th Cir. 1995); *Jones v. Murray,* 962 F.2d 302 (4th Cir. 1992).
The USA PATRIOT Act: A Legal Analysis

April 15, 2002

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Summary

The USA PATRIOT Act passed in the wake of the September 11 terrorist attacks. It flows from a consultation draft circulated by the Department of Justice, to which Congress made substantial modifications and additions. The stated purpose of the Act is to enable law enforcement officials to track down and punish those responsible for the attacks and to protect against any similar attacks.

The Act grants federal officials greater powers to trace and intercept terrorists’ communications both for law enforcement and foreign intelligence purposes. It reenforces federal anti-money laundering laws and regulations in an effort to deny terrorists the resources necessary for future attacks. It tightens our immigration laws to close our borders to foreign terrorists and to expel those among us. Finally, it creates a few new federal crimes, such as the one outlawing terrorists’ attacks on mass transit; increases the penalties for many others; and institutes several procedural changes, such as a longer statute of limitations for crimes of terrorism.

Critics have suggested that it may go too far. The authority to monitor e-mail traffic, to share grand jury information with intelligence and immigration officers, to confiscate property, and to impose new book-keeping requirements on financial institutions, are among the features troubling to some.

The Act itself responds to some of these reservations. Many of the wiretapping and foreign intelligence amendments sunset on December 31, 2005. The Act creates judicial safeguards for e-mail monitoring and grand jury disclosures; recognizes innocent owner defenses to forfeiture; and entrusts enhanced anti-money laundering powers to those regulatory authorities whose concerns include the well being of our financial institutions.

This report, stripped of its citations and footnotes, is available in an abbreviated form as The USA PATRIOT Act: A Sketch, CRS Rep.No. RS21203. In addition, much of the information contained here may also be found under a different arrangement in a report entitled, Terrorism: Section by Section Analysis of the USA PATRIOT Act, CRS Rep.No. RL31200 (Dec. 10, 2001). A wider array of terrorism-related analysis appears on the CRS terrorism electronic briefing book page.
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The USA PATRIOT Act: A Legal Analysis

Introduction

Congress passed the USA PATRIOT Act (the Act) in response to the terrorists’ attacks of September 11, 2001.1 The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to further close our borders to foreign terrorists and to detain and remove those within our borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it is not without safeguards, critics contend some of its provisions go too far. Although it grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough.


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1 P.L. 107-56, 115 Stat. 272 (2001); its full title is the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT).”

2 H.R. 2975 was introduced by Representative Sensenbrenner for himself and Representatives Conyers, Hyde, Coble, Goodlatte, Jenkins, Jackson-Lee, Cannon, Meehan, Graham, Bachus, Wexler, Hostettler, Keller, Issa, Hart, Flake, Schiff, Thomas, Goss, Rangel, Berman and Lofgren; S.1510 by Senator Daschle for himself and Senators Lott, Leahy, Hatch, Graham, Shelby and Sarbanes.

3 H.R. 3004 was introduced by Representative Oxley for himself and Representatives LaFalce, Leach, Maloney, Roukema, Bentsen, Hooley, Bereuter, Baker, Bachus, King, Kelly, Gillmore, Cantor, Riley, Latourette, Green (of Wisconsin), and Grucci; and reported out of the House Financial Services Committee with amendments on October 15, 2001, H.R.Rep.No. 107-250. H.R. 3004, as reported out, included Internet gambling amendments that were not included in H.R. 2975/H.R.3108.
Criminal Investigations: Tracking and Gathering Communications

A portion of the Act addresses issues suggested originally in a Department of Justice proposal circulated in mid-September. The first of its suggestions called for amendments to federal surveillance laws, laws which govern the capture and tracking of suspected terrorists’ communications within the United States. Federal law features a three tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications.

The tiers reflected the Supreme Court’s interpretation of the Fourth Amendment’s ban on unreasonable searches and seizures. The Amendment protects private conversations, *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967). It does not cloak information, even highly personal information, for which there is no individual justifiable expectation of privacy, such as telephone company records of calls made to and from an individual's home, *Smith v. Maryland*, 442 U.S. 735 (1979), or bank records of an individual's financial dealings, *United States v. Miller*, 425 U.S. 435 (1976).

Congress responded to *Berger* and *Katz*, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications, 18 U.S.C. 2511. At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious

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4 The Department’s proposal, dated September 20, 2001, came with a brief section by section analysis. Both the proposal (Draft) and analysis (DoJ) were printed as an appendix in *Administration's Draft Anti-Terrorism Act of 2001, Hearing Before the House Comm. on the Judiciary*, 107th Cong., 1st Sess. 54 (2001).


6 “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,” *U.S. Const. Amend. IV.*

7 Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
criminal cases. When approved by senior Justice Department officials, law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.

8 “The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of” one or more predicate offense, 18 U.S.C. 2516.

9 The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement), 1751 (presidential and presidential staff assassination, kidnapping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnaping, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or naturalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations, 18 U.S.C. 2518. The court notifies the parties to any conversations seized under the order after the order expires, 18 U.S.C. 2518(8).

Below Title III, the next tier of privacy protection covers some of those matters which the Supreme Court has described as beyond the reach of the Fourth Amendment protection – telephone records, e-mail held in third party storage, and the like, 18 U.S.C. 2701-2709 (Chapter 121). Here, the law permits law enforcement access, ordinarily pursuant to a warrant or court order or under a subpoena in some cases, but in connection with any criminal investigation and without the extraordinary levels of approval or constraint that mark a Title III interception, 18 U.S.C. 2703.

Least demanding and perhaps least intrusive of all is the procedure that governs court orders approving the government’s use of trap and trace devices and pen registers, a kind of secret “caller id”, which identify the source and destination of calls made to and from a particular telephone, 18 U.S.C. 3121-3127 (Chapter 206). The orders are available based on the government's certification, rather than a finding of the court, that the use of the device is likely to produce information relevant to the investigation of a crime, any crime, 18 U.S.C. 3123. The devices record no more than the identity of the participants in a telephone conversation, but neither the orders nor the results they produce need ever be revealed to the participants.

The Act modifies the procedures at each of the three levels. It:  

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offense involving counterfeiting punishable under 18 U.S.C. 471, 472, or 473; (e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States; (f) any offense including extortionate credit transactions under 18 U.S.C. 892, 893, or 894; (g) a violation of 31 U.S.C. 5322 (dealing with the reporting of currency transactions); (h) any felony violation of 18 U.S.C. 2511 and 2512 (interception and disclosure of certain communications and to certain intercepting devices); (i) any felony violation of 18 U.S.C. ch. 71 (obscenity); (j) 49 U.S.C. 60123(b) (destruction of a natural gas pipeline), 46502 (aircraft piracy); (k) 22 U.S.C. 2778 (Arms Export Control Act); (l) the location of any fugitive from justice from an offense described in this section; (m) a violation of 8 U.S.C. 1324, 1327, or 1328; (n) any felony violation of 18 U.S.C. 922, 924 (firearms); (o) any violation of 26 U.S.C. 5861 (firearms); (p) a felony violation of 18 U.S.C. 1028 (production of false identification documents), 1542 (false statements in passport applications), 1546 (fraud and misuse of visas, permits, and other documents) or a violation of 8 U.S.C. 1324, 1327, or 1328 (smuggling of aliens); (p) 229 (chemical weapons), 2332 (terrorist violence against Americans overseas), 2332a (weapons of mass destruction), 2332b (multinational terrorism), 2332d (financial transactions with countries supporting terrorism), 2339A (support of terrorist), 2332B (support of terrorist organizations); (r) any conspiracy to commit any of these, 18 U.S.C. 2516(1)(crimes added by the Act in italics). Other than telephone face to face conversations (i.e., electronic communications), the approval of senior Justice Department officials is not required and an order may be sought in any felony investigation, 18 U.S.C. 2516(3).

10 Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
• permits pen register and trap and trace orders for electronic communications (e.g., e-mail)

• authorizes nationwide execution of court orders for pen registers, trap and trace devices, and access to stored e-mail or communication records

• treats stored voice mail like stored e-mail (rather than like telephone conversations)

• permits authorities to intercept communications to and from a trespasser within a computer system (with the permission of the system’s owner)

• adds terrorist and computer crimes to Title III’s predicate offense list

• reenforces protection for those who help execute Title III, ch. 121, and ch. 206 orders

• encourages cooperation between law enforcement and foreign intelligence investigators

• establishes a claim against the U.S. for certain communications privacy violations by government personnel

• terminates the authority found in many of the these provisions and several of the foreign intelligence amendments with a sunset provision (Dec. 31, 2005).

Pen Registers and Trap and Trace Devices. In section 216, the Act allows court orders authorizing trap and trace devices and pen registers to be used to capture source and addressee information for computer conversations (e.g., e-mail) as well as telephone conversations, 18 U.S.C. 3121, 3123. In answer to objections that e-mail header information can be more revealing than a telephone number, it creates a detailed report to the court, 18 U.S.C. 3123(a)(3).¹¹

¹¹ “Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public the agency shall ensure that a record will be maintained which will identify – (i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of the such device.

“(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof),” section 216(b)(1).
The use of pen registers or trap and trace devices was limited at one time to the judicial district in which the order was issued, 18 U.S.C. 3123 (2000 ed.). Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States, 18 U.S.C. 3123(b)(1)(C), 3127(2).\textsuperscript{12}

**Communications Records and Stored E-Mail.** With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber, 18 U.S.C. 2703(a),(b). A warrant will also suffice to seize records describing telephone and other communications transactions without customer notice, 18 U.S.C. 2703(c). In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation, officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records, 18 U.S.C. 2703(b),(c). They can obtain a limited amount of record information (subscribers’ names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena, 18 U.S.C. 2703(c)(1)(C). There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial, 18 U.S.C. 2705.

In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider’s customer records, 18 U.S.C. 2703(c)(1)(C).\textsuperscript{13}

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.

\textsuperscript{12} The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” DoJ at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

\textsuperscript{13} Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user's true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” DoJ at §107.
Speaking of the law before amendment, Do J explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

The Act, in section 209, treats voice mail like e-mail, that is, subject to the warrant or court order procedure, rather than to the more demanding coverage of Title III once required, United States v. Smith, 155 F.3d 1050, 1055-56 (9th Cir. 1998).

Finally, the Act resolves a conflict between chapter 121 and the federal law governing cable companies. Government entities may have access to cable company customer records only under a court order following an adversary hearing if they can show that the records will evidence that the customer is or has engaged in criminal activity, 47 U.S.C. 511(h). When cable companies began offering telephone and other communications services the question arose whether the more demanding cable rules applied or whether law enforcement agencies were entitled to ex parte court orders under the no-notice procedures applicable to communications providers. The Act makes it clear that the cable rules apply when cable television viewing services are

14 Speaking of the law before amendment, Do J explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

15 See e.g., DoJ at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement’s access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

**Electronic Surveillance.** To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202. A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(i). Yet only the interloper's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.

**Criminal Investigators’ Access to Foreign Intelligence Information.** The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism. It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that “the purpose for the surveillance is to obtain foreign intelligence information,” 50 U.S.C. 1804(a)(7)(B) (2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps “the purpose” might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation

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16 18 U.S.C. 229 (chemical weapons), 2332 (terrorist acts of violence committed against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2332d (financial transactions with countries which support terrorists), 2339A (providing material support to terrorists), and 2339B (providing material support to terrorist organizations).

17 “Because service providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves as permitted under current law, they often have no way to exercise their rights to protect themselves from unauthorized attackers. Moreover, such attackers can target critical infrastructures and engage in cyberterrorism,” DoJ at §106. Elsewhere the Act defines “electronic surveillance” for purposes of the Foreign Intelligence Surveillance Act (FISA) to emphasize that the law enforcement authority for this intruder surveillance does not confer similar authority for purposes of foreign intelligence gathering, section 1003 (50 U.S.C. 1801(f)(2)).

18 For a general discussion of federal intelligence and law enforcement cooperation, see, Best, Intelligence and Law Enforcement: Countering Transnational Threats to the U.S., CRS REP.NO. RL30252 (Dec. 3, 2001).
Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment’s warrant clause. It is here that the “primary purpose” notion originated. In United States v. Truong Dinh Hung, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, “as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.” Subsequent case law, however, is not as clear as it might be: see e.g., United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984) (“FISA permits federal officials to obtain orders authorizing electronic surveillance ‘for the purpose of obtaining foreign intelligence information.’ The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying officials’s belief that the information sought is the type of foreign intelligence information described”); United States v. Pelton, 835 F.2d 1067, 1075-76 (4th Cir. 1987) (“We also reject Pelton’s claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial”); United States v. Sarkissian, 841 F.2d 959, 907-8 (9th Cir. 1988) (“Defendants rely on the primary purpose test articulated in United States v. Truong Dinh Hung. . . . One other court has applied the primary purpose test. Another court has rejected it . . . distinguishing Truong. A third court has declined to decide the issue. We also decline to decide the issue”); United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1991) (“Appellants attack the government’s surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance”).

20 “Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” DoJ at §153.
demanding standard than the “a purpose” threshold proposed by the Justice Department, but a clear departure from the original “the purpose” entry point. FISA once described a singular foreign intelligence focus prerequisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k), 1825(k).  

**Protective Measures.** The Act reinforces two kinds of safeguards, one set designed to prevent abuse and the other to protect those who assist the government. The sunset clause is perhaps the best known of the Act’s safeguards. Under the direction of section 224, many of the law enforcement and foreign intelligence authorities granted by the Act expire as of December 31, 2005. The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter

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21 “(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. (2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, *infra*, quoting, 50 U.S.C. 1801.

22 “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210[subpoenas for communications provider customer records], 211[access to cable company communication service records], 213[sneak and peek], 216[pen register and trap and trace device amendments], 221[trade sanctions], and 222[assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005. “(b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers' communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices). Variants of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees, but could not recover against the United States. Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its provisions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice's Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government's request until a court order authorizing access can be obtained. Another allows providers to disclose customer records to protect the provider's rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others. A third section, 23 24 25 26 27

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26 Prior law already granted service providers immunity for disclosure of customer records in compliance with a court access order, 18 U.S.C. 2703(f).
27 “Existing law contains no provision that allows providers of electronic communications service to disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies that threaten death or serious bodily injury. This section amends 18 U.S.C. §2702 to authorize such disclosures if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.

“Current law also contains an odd disconnect: a provider may disclose the contents of the customer's communications in order to protect its rights or property but the current statute does not expressly permit a provider to voluntarily disclose non-content records (such as a subscriber's login records). 18 U.S.C. 2702(b)(5). This problem substantially hinders the ability of providers to protect themselves from cyber-terrorists and criminals. Yet the right to disclose the contents of communications necessarily implies the less intrusive ability to disclose non-content records. In order to promote the protection of our nation's critical infrastructures, this section's amendments allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems,” DoJ at
Section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

**Foreign Intelligence Investigations**

Although both criminal investigations and foreign intelligence investigations are conducted in the United States, criminal investigations seek information about unlawful activity; foreign intelligence investigations seek information about other countries and their citizens. Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough.

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA), something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President's authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, United States v. United States District Court, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage

§110.

28 Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

29 Thus in the name of assisting in the execution of Title III, chapter 121, or chapter 206 order, the courts may not cite the Act as the basis for an order compelling a service provider to make system modifications or provide any other technical assistance not already required under 18 U.S.C. 2518(4), 2706, or 3124(c), see, H.R.Rep.No. 107-236, at 62-3 (2001) (emphasis added) (“This Act is not intended to affect obligations under Communications Assistance for Law Enforcement Act [which addresses law enforcement-beneficial system modifications and the compensation to be paid for the changes], nor does the act impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance”).

30 E.g., As amended by section 902 of the Act, “‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2)(language added by the Act in italics).

31 50 U.S.C. 1801 et seq.
lockers, 50 U.S.C. 1861-1863 (2000 ed.). Intelligence authorities gained narrow passages through other privacy barriers as well.\(^{32}\)

In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs.\(^{33}\) There were and still are extra


\(^{33}\) “As used in this subchapter: (a) ‘Foreign power’ means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

’(b) ‘Agent of a foreign power’ means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of a foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C).

’(c) ‘International terrorism’ means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnapping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

’(d) ‘Sabotage’ means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

’(e) ‘Foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans ("United States persons," i.e., citizens or permanent resident aliens). The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

- permits “roving” surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)
- increases the number of judges on the FISA court from 7 to 11
- allows application for a FISA surveillance or search order when gathering foreign intelligence is a significant reason for the application rather than the reason
- authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations
- sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses
- carries a sunset provision
- establishes a claim against the U.S. for certain communications privacy violations by government personnel
- expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to – (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States,” 50 U.S.C. 1801.

34 Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
FISA. FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases.\(^{35}\) It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

Search and Surveillance for Intelligence Purposes. Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, Draft at §151.\(^{36}\)

Section 901 of the Act address a concern raised during the 106th Congress relating to the availability of the FISA orders and the effective use of information gleaned from the execution of a FISA order.\(^{37}\) It vests the Director of Central

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\(^{36}\) See also, DoJ at §151, “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order’s minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed (50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

\(^{37}\) See e.g., S.Rep.No. 106-352, at 3, 6, 7 (2000)(“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application
process, as interpreted by the OIPR is administratively burdensome and, at times, extremely slow. Many applications undergo months of scrutiny before submission to the court because the OIPR prescribes standards and restrictions not imposed by the statute. In particular, the OIPR has been criticized for an overly restrictive interpretation of the FISA ‘currency’ requirement. This is the issue of how recent a subject’s activities must be to support a finding of probable cause that the subject is engaged in clandestine intelligence gathering activities. While existing law does not specifically address “past activities,” it does not preclude, and legislative history supports, the conclusion that past activities may be part of the totality of circumstances considered by the FISC in making a probable cause determination. By definition, information collected pursuant to a court order issued under the Foreign Intelligence Surveillance Act is foreign intelligence not law enforcement information. Accordingly, the Committee wants to clarify that the FISA ‘take’ can and must be shared by the Federal Bureau of Investigation with appropriate intelligence agencies. For the intelligence mission of the United States to be successful, there must be a cooperative and concerted effort among intelligence agencies. Any information collected by one agency under foreign intelligence authorities that could assist another agency in executing its lawful mission should be shared fully and promptly. Only then can the United States Government pursue aggressively important national security targets including, for example, counterterrorist and counternarcotics targets”); see also, 147 Cong.Rec. S799-803 (daily ed. Feb. 24, 2000)(remarks of Sens. Specter, Torricelli and Biden).

Pen Registers and Trap and Trace Devices for Intelligence Gathering. Section 214 grants the request of the Department of Justice by dropping requirements which limited FISA pen register and trap and trace device orders to facilities used by foreign agents or those engaged in international terrorist or clandestine intelligence activities, 50 U.S.C. 1842(c)(3)(2000 ed.). It is enough that the order is sought as part of an investigation to protect against international terrorism or clandestine intelligence activities and is not motivated solely by an American’s exercise of his or her First Amendment rights. Elsewhere (section 505), the Act drops a similar limitation for intelligence officials’ access to telephone records, 18 U.S.C.
Section 214 adjusts the language of the FISA pen register-trap and trace authority to permit its use to capture source and destination information relating to electronic communications (e.g., e-mail) as well as telephone communications, 50 U.S.C. 1842(d). The section makes it clear that requests for a FISA pen register-trap and trace order, like requests for other FISA orders, directed against Americans (U.S. persons) may not be based solely on activities protected by the First Amendment, 50 U.S.C. 1842, 1843.

**Third Party Cooperation and Tangible Evidence.** As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target’s activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.40

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39 Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise to be entitled to confidentiality. Section 505, in response to the Justice Department's suggestion, allows FBI field offices to make the requests, see DoJ at §157 (“At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports”).

40 When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court’s order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.’ This would enhance the FBI’s ability to monitor international terrorists and intelligence officers who are
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian.\footnote{41} The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities,\footnote{42} in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B);
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a);
- the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a);
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v;

\footnote{41} “The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigative contexts. The time and difficulty involved in getting such pleadings before the Court usually outweighs the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” DoJ at 152.


\footnote{42} Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
Access to Law Enforcement Information. Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community's access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, Draft at §103.  

H.R.Rep.No. 107-205, at 60-1 (2001)(“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

“The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

“Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual’s credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding--without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information”).

See also, DoJ at §103, “This section facilities the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, Draft at §354.\textsuperscript{45}

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, Draft at §154.\textsuperscript{46}

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion.\textsuperscript{47} It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions.”

\textsuperscript{45} See also, DoJ at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.” Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officers

\textsuperscript{46} See also, DoJ at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”

\textsuperscript{47} Blair v. United States, 250 U.S. 273, 281 (1919)(the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
affairs are conducted in private and outside the presence of the court. Only the attorney for the government, witnesses under examination, and a court reporter may attend its proceedings, F.R.Crim.P. 6(d). Matters occurring before the grand jury are secret and may be disclosed by the attending attorney for the government and those assisting the grand jury only in the performance of their duties; in presentation to a successor grand jury; or under court order for judicial proceedings, for inquiry into misconduct before the grand jury, or for state criminal proceedings, F.R.Crim.P. 6(e).

The Act, in section 203(a), allows disclosure of matters occurring before the grand jury to “any federal law enforcement, intelligence, protective, immigration, national defense, or national security” officer to assist in the performance of his official duties, F.R.Crim.P. 6(e)(3)(C)(i)(V).

Critics may protest that the change could lead to the use of the grand jury for intelligence gathering purposes, or less euphemistically, to spy on Americans. The proposal was never among those scheduled to sunset, but earlier versions of the section followed the path used for most other disclosures of grand jury material: prior

48 These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

49 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25 HARBORD JOURNAL OF LAW & PUBLIC POLICY 699, 719-20 (2002)(“There is a significant danger that the rule permitting disclosure will be treated as the de facto authorization of an expansion of the grand jury’s investigative role to encompass seeking material relevant only to matters of national security, national defense, immigration, and so forth. The grand jury’s awesome powers should not be unwittingly extended to a much wider range of issues. . . Since the grand jury operates in secret, there are no public checks on the scope of its investigations, and witnesses are not permitted to challenge its jurisdiction. Only the supervising court is in a position to keep the grand jury’s investigation within proper bounds. Requiring judicial approval of foreign intelligence and counterintelligence information disclosures would provide a natural check against the temptation to manipulate the grand jury to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6 (Nov. 2001)(“The grand jury secrecy rule is a rule of policy which has always had exceptions, and it has been frequently modified. The secrecy rule has no credible claim to constitutional stature”).
Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. ) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification. By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

**Increasing Institutional Capacity.** As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a

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52 Duncan v. Walker, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted) (“It is our duty to give effect, if possible, to every clause and word of a statute. United States v. Menasche, 348 U.S. 528, 538-539 (1955) (quoting Montclair v. Ramsdell, 107 U.S. 147, 152 (1883)); see also Williams v. Taylor, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); Market Co. v. Hoffman, 101 U.S. 112, 115 (1879)(As early as in Bacon's Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage. By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

53 Draft at §154, “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”
The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so,” S.Rep.No. 107-63, at 11 (2001).

Money Laundering

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture. The Act bolsters federal efforts in each area.

Regulation. Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.

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54 “The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.


56 See e.g., 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
Records and Reports. For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler’s checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to file SARs as well, reflecting Congress’ view that the information provided to the IRS may be valuable for other law enforcement purposes. This concern is likewise


58 H.R.Rep.No. 107-250, at 38-9 (2001)(“Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a ‘Safeguard Procedures Report’ which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement
reflected in section 357 which asks the Secretary of the Treasury to report on the Internal Revenue Service’s role in the administration of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311 et seq.), and what transfers of authority, if any, are appropriate.

Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action.

Section 355 expands the immunity to cover disclosures in authorities as the various reports mandated by the Bank Secrecy Act, which can typically be retrieved electronically from a database maintained by the Treasury Department. The differential access to the two kinds of reports is made anomalous by the fact that Form 8300 elicits much the same information that is required to be disclosed by the Bank Secrecy Act. For example, just as Form 8300 seeks the name, address, and social security number of a customer who engages in a cash transaction exceeding $10,000 with a trade or business, Currency Transaction Reports (CTRs) mandated by the Bank Secrecy Act require the same information to be reported on a cash transaction exceeding $10,000 between a financial institution and its customer.

59 “Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

“First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor from civil liability applies in arbitration, as well as judicial, proceedings. Second, it amends section 5318(g)(3) to clarify the safe harbor's coverage of voluntary disclosures (that is, those not covered by the SAR regulatory reporting requirement). The language in section 5318(g)(3)(A) providing that ‘any financial institution that *** makes a disclosure pursuant to *** any other authority *** shall not be liable to any person’ is not intended to avoid the application of the reporting and disclosure provisions of the Federal securities laws to any person, or to insulate any issuers from private rights of actions for disclosures made under the Federal securities laws.

“Subsection [351](b) amends section 5318(g)(2) of title 31—which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed—to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee's official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
employment references to other insured depository financial institutions provided disclosure is not done with malicious intent.\footnote{31 U.S.C. 1828(w).}

The Financial Crimes Enforcement Network (FinCEN), a component within the Treasury Department long responsible for these anti-money laundering reporting and record-keeping requirements, 31 C.F.R. pt. 103, was administratively created in 1990 to provide other government agencies with an “intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes,” 55 Fed.Reg. 18433 (May 2, 1990).

The Act, in section 361, makes FinCEN a creature of statute, a bureau within the Treasury Department, 31 U.S.C. 310. Section 362 charges it with the responsibility of establishing a highly secure network to allow financial institutions to file required reports electronically and to permit FinCEN to provide those institutions with alerts and other information concerning money laundering protective measures, 31 U.S.C. 310 note.

\textit{Special Measures.} In extraordinary circumstances involving international financial matters, the Act grants the Secretary of the Treasury, in consultation with other appropriate regulatory authorities, the power to issue regulations and orders involving additional required “special measures” and additional “due diligence” requirements to combat money laundering. The special measure authority, available under section 311, comes to life with the determination that particular institutions, jurisdictions, types of accounts, or types of transactions pose a primary money
These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

61 31 U.S.C. 5318A. The circumstances considered in the case of a suspect jurisdiction are: evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction’s banking regulation; the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

62 The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’ including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

“Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate
business transactions.

“Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

“Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

“The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

“The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

“The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

“The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information that it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

“The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

“The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed
**Due Diligence.** Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.\(^{63}\)

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\(^{63}\) See generally, H.R.Rep.No. 107-250, at 71-2 (“Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

“The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

“The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

“For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
**General Regulatory Matters.** The Act establishes several other regulatory mechanisms directed at the activities involving U.S. financial institutions and foreign individuals or institutions. Section 313, for instance, in another restriction on correspondent accounts for foreign financial institutions, prohibits U.S. financial institutions from maintaining correspondent accounts either directly or indirectly for foreign shell banks (banks with no physical place of business\(^{64}\)) which have no affiliation with any financial institution through which their banking activities are subject to regulatory supervision.\(^{65}\)

The Act, in section 325, empowers the Secretary of the Treasury to promulgate regulations to prevent financial institutions from allowing their customers to conceal their financial activities by taking advantage of the institutions’ concentration account practices.\(^ {66}\)

The Secretary of the Treasury is instructed in section 326 to issue regulations for financial institutions’ minimum new customer identification standards and record-
keeping and to recommend a means to effectively verify the identification of foreign customers.\footnote{31 U.S.C. 31 U.S.C. 5318(l); H.R.Rep.No. 107-250, at 62-3 (2001)(“Section [326](a) amends 31 U.S.C. 5318 by adding a new subsection governing the identification of account holders. Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a ‘street name’ or omnibus account in the broker-dealer's name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to ‘look through’ the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund's customers. Thus, the fund would not be required to ‘look through’ the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).}
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(10).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature.68

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combatting money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

**Reports to Congress.** Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

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exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.\textsuperscript{69}

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

**International Cooperation.** Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.\textsuperscript{70}

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (\textit{i.e.}, the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.


\textsuperscript{70} H.R.Rep.No. 107-250, at 67 (2001)(“This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury's progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

“The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime”).
**Crimes.** Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, smuggling, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
expands 18 U.S.C. 1956 to cover financial transactions conducted in foreign financial institutions.\footnote{71}

Section 329 makes it a federal crime to corruptly administer the money laundering regulatory scheme. Offenders are punishable by imprisonment for not more than 15 years and a fine of not more than three times the amount of the bribe.

Section 5326 of title 31 authorizes the Secretary of the Treasury to impose temporary, enhanced reporting requirements upon financial institutions in areas victimized by substantial money laundering activity (geographic targeting regulations and orders). Section 353 makes it clear that the civil sanctions, criminal penalties, and prohibitions on smurfing (structuring transactions to evade reporting requirements) apply to violations of the regulations and orders issued under 31 U.S.C. 5326.\footnote{72} It also extends the permissible length of the temporary geographical orders from 60 to 180 days.

Violations of the special measures and special due diligence requirements of sections 311 and 312 are subject to both civil and criminal penalties by virtue of section 363's amendments to 31 U.S.C. 5321(a) and 5322. The amendments authorize civil penalties and criminal fines of twice the amount of the transaction but not more than $1 million. Criminal offenders would be subject to a fine in the same amount.

\footnote{71} “[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

“The definition of ‘financial institution’ in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of ‘commercial bank’ or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad--say to a Mexican bank--and launders them through a series of financial transactions, the government conceivably could not rely on the definition of a ‘financial institution’ in 1956(c)(6) to establish that the transaction was a ‘financial transaction’ within the meaning of 1956(c)(4)(B) (defining a ‘financial transaction’ as a transaction involving the use of a ‘financial institution’), or that it was a ‘monetary transaction’ within the meaning of 1957(f) (defining ‘monetary transaction’ as, inter alia, a transaction that would be a ‘financial transaction’ under 1956(c)(4)(B)).

“Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launders the proceeds of one of the crimes set forth on a list of ‘specified unlawful activities.’ 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),” H.R.Rep.No. 107-250, at 38 (2000).

Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.  

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents. They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

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73 “The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scien
ter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business.

“Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.

“Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive,” H.R.Rep.No. 107-250, at 54 (2001).

74 “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).

18 U.S.C. 476 (taking impressions of tools used for obligations and securities) from 10 to 25 years;
18 U.S.C. 477 (possessing or selling impressions of tools used for obligations or securities) from 10 to 25 years;
18 U.S.C. 484 (connecting parts of different notes) from 5 to 10 years;
18 U.S.C. 493 (bonds and obligations of certain lending agencies) from 5 to 10 years;
18 U.S.C. 478 (foreign obligations or securities) from 5 to 20 years;
18 U.S.C. 479 (uttering counterfeit foreign obligations or securities) from 3 to 20 years;
18 U.S.C. 480 (possessing counterfeit foreign obligations or securities) from 1 to 20 years;
18 U.S.C. 481 (plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities) from 5 to 25 years;
18 U.S.C. 482 (foreign bank notes) from 2 to 20 years; and
18 U.S.C. 483 (uttering counterfeit foreign bank notes) from 1 to 20 years.

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

**Bulk Cash.** Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act’s bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting.  

The section appears to be the product of reactions to the Supreme Court’s decision in *United States v. Bajakian*, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court’s

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75 “For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).
"As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency – representing the proceeds of drug trafficking and other criminal offenses – is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad. . . .

Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United State without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute," H.R.Rep.No. 107-250 at 36-7 (2001).

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Section 5317 of title 31 once called for civil forfeiture of property traceable to a violation of 31 U.S.C. 5316 (reports on exporting or importing money instruments worth $10,000 or more). Section 372 of the Act recasts section 5317 to provide for civil and criminal forfeitures for violations of 31 U.S.C. 5316, of 31 U.S.C. 5313 (reports on domestic coins and currency transactions involving $10,000 or more) and of 31 U.S.C. 5324 (structuring transactions to evade reporting requirements (smurfing)).

**Extraterritorial Jurisdiction.** The Act makes 18 U.S.C. 1029, the federal statute condemning various crimes involving credit cards, PIN numbers and other access devices, applicable overseas if the card or device is issued by or controlled by an American bank or other entity and some article is held in or transported to or through the United States during the course of the offense, section 377. The change was part of the original Justice Department proposals. Justice explained that, “[financial crime] admits of no border, utilizing the integrated global financial network for ill purposes. This provision would apply the financial crimes prohibitions to conduct committed abroad, so long as the tools or proceeds of the crimes pass through or are in the United States,” DoJ at §408. The section, however, appears to limit the otherwise applicable extraterritorial jurisdiction implicit in section 1029, since federal courts would likely recognize extraterritorial jurisdiction over a violation of

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76 “As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency – representing the proceeds of drug trafficking and other criminal offenses – is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad. . . .

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under *either* circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.\(^{77}\)

**Venue.** Section 1004 relies on *dicta* in *United States v. Cabrales*, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering,\(^{78}\) in the state and district in which the monetary transaction takes place. The Supreme Court in *Cabrales* held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in *dicta*, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.\(^{79}\)

**Forfeiture.** Forfeiture is the government confiscation of property as a consequence of crime.\(^{80}\) The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 *et seq.* (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

**Constitutional Considerations.** The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 *et seq.*, which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the


\(^{78}\) “The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed,” *U.S.Const.* Art.III, §2, cl.3.

“[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,” *U.S.Const.* Amend. VI.

\(^{79}\) *See also*, *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnapping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.

jurisdiction of the United States, belonging to any foreign individual, foreign entity, or foreign country whom they determine to have planned, authorized, aided or engaged in an attack on the United States by a foreign country or foreign nationals. The section also permits the government to present secretly (ex parte and in camera) any classified information upon which the forfeiture was based should the decision be subject to judicial review. The Justice Department requested the section as a revival of the President's powers in times of unconventional wars.\(^{81}\) By virtue of section 316, property owners may initiate a challenge to a confiscation by filing a claim under the rules applicable in maritime confiscations. The section permits two defenses to forfeiture – that the property is not subject to confiscation under section 106 or that the claimant is entitled to the innocent owner defense of 18 U.S.C. 983(d).\(^{82}\) The characterization of the defenses as “affirmative defense” indicates that the claimant bears the burden of proof. The innocent owner defenses of 18 U.S.C. 983(d) are probably not available in cases under section 106, since that section is explicitly

\(^{81}\) “This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App.U.S.C. §5(b).

“This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress's war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

“The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2),” DoJ at §159.

\(^{82}\) “An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
The Justice Department also recommended enactment of an overlapping provision which ultimately passed as section 806 of the Act without any real discussion of the relationship of the two sections. Section 806 authorizes confiscation of all property, regardless of where it is found, of any individual, entity, or organization engaged in domestic or international terrorism (as defined in 18 U.S.C. 2331), against the United States, Americans or their property, 18 U.S.C.

83 18 U.S.C. 983(i)(2)(D).

84 “The exclusion of certain provisions of Federal law from the definition of the term ‘civil forfeiture statute’ in section 983(i) of title 18, United States Code, shall not be construed to deny an owner of property the right to contest the confiscation of assets of suspected international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C) subchapter II of chapter 5 of title 5, United States Code (commonly known as the ‘Administrative Procedure Act’).” Sec. 316(c)(1).

85 “Current law does not contain any authority tailored specifically to the confiscation of terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available current forfeiture laws require detailed tracing that is quite difficult for accounts coming through the banks of countries used by many terrorists.

“[This section increases the government’s ability to strike at terrorist organizations’ economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001,” DoJ, at §403. The House Report on H.R. 2975 which contained versions of both sections is no more explicit on the relation of the two sections.

86 “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
Section 806 as discussed below also calls for the more common confiscation of property derived from and or facilitating acts of domestic or international terrorism against the United States or its citizens. Confiscations under 806 may be challenged under the procedures of 18 U.S.C. 983, since they are not exempted there. To the extent that forfeiture under section 806 is based on international rather than domestic terrorism, claimants may also use the procedures of section 316.

Confiscation based solely on the fact that the property is owned by a criminal offender, rather than that it is derived from or facilitates some crime is fairly uncommon. It is the mark of common law forfeiture of estate. At common law, a felon forfeited all of his property. Most contemporary forfeiture statutes employ statutory forfeiture, a more familiar presence in American law, which consists of the confiscation of things whose possession is criminal, of the fruits of crime, and of the means of crime – untaxed whiskey, the drug dealer’s profits, and the rum runner’s ship.

Three characteristics set forfeiture of estate apart. The property is lost solely by reason of its ownership by a felon. All of a felon’s property is confiscated, not merely that which is related to the crime for which he is convicted. Finally, it occasions attainder which negates the felon’s right to hold property or for title to property to pass through him to his heirs. It was with this in mind, that the Framers declared that “no attainder of treason shall work corruption of blood or forfeiture exception during the life of the person attainted.” And for this reason, President Lincoln insisted that the confiscated real estate of Confederate supporters should revert their heirs at death.

87 Austin v. United States, 509 U.S. 602, 611-12 (1993) (“Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture . . . . Of England’s three kinds of forfeiture, only the third took hold in the United States”).


89 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal in personam proceedings following criminal conviction as a means of accomplishing confiscation.
Neither section 106 nor 806 require conviction of the terrorist property owner. Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers. The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners. Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them. The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate

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90 Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c) (“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act”).

91 Silesian American Corp. V. Clark, 332 U.S. 469 (1947); cf., Societe Internationale v. Rogers, 357 U.S. 197, 211 (1958) (“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).

92 Zittman v. McGrath, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’”).

any presumption of remedial purposes.\textsuperscript{94} The same has been said of the applicability of the ex post facto clause.\textsuperscript{95}

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO.\textsuperscript{96} If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

\textbf{Other Forfeiture Amendments.} In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.\textsuperscript{97}

\textsuperscript{94} United States v. Ursery, 518 U.S. 267, 278 (1996).

\textsuperscript{95} See e.g., United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.), 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994).

\textsuperscript{96} DoJ, at §403.

\textsuperscript{97} 18 U.S.C. 1956(b). Cf., H.R.Rep.No. 107-250, at 54-5 (2001)(“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas.\(^8\) Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted

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\(^8\) 18 U.S.C. 981(k). H.R.Rep.No. 107-250, at 57-8 (2001)(“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank's customers.

Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank's correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”).
defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation.\footnote{99} 

Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here.\footnote{100} Section 320 enlarges this provisions to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements.\footnote{101} This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.\footnote{102} 

\footnote{99} Cf., H.R.Rep.No. 107-250, at 58-9 (2001) (“Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of ‘substitute assets’ when the defendant has placed the property otherwise subject to forfeiture ‘beyond the jurisdiction of the court.’ Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction. “This section amends 21 U.S.C. 853 to make clear that a court in a criminal case may issue a repatriation order--either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. 853(e) to restrain property--so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both”).  

\footnote{100} 18 U.S.C. 981(a)(1)(B).  

\footnote{101} H.R.Rep.No. 107-250, at 56 (2001)("This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act").  

\footnote{102} H.R.Rep.No. 107-250, at 59-60 (2001)(“Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country. “Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
A fugitive may not challenge a federal forfeiture.\textsuperscript{103} Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in “order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.”

to contest the restraining order could do so on the ground that 28 U.S.C. 2467 was not properly applied to the particular case, but could not oppose the restraining order on any ground that could also be raised in the proceedings pending in a foreign court. This provision prevents a litigant from taking ‘two bites at the apple’ by raising objections to the basis for the forfeiture in the Federal court that he also raised, or is entitled to raise, in the foreign court where the forfeiture action is pending. It complements the existing provision in section 2467(e) providing that the Federal court is bound by the findings of fact of the foreign court, and may not look behind such findings in determining whether to enter an order enforcing a foreign forfeiture judgment.

“This section also amends 28 U.S.C. 2467 to make clear that it is not necessary to prove that the person asserting an interest in the property received actual notice of the forfeiture proceedings. As is the case with respect to forfeitures under U.S. law, it is sufficient if the foreign nation takes steps to provide notice, in accordance with the principles of due process. See Gonzalez v. United States, 1997 WL 278123 (S.D.N.Y. 1997) (‘the [G]overnment is not required to ensure actual receipt of notice that is properly mailed’); Albajon v. Gugliotta, 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant’s identifications, and mailed after claimant released from jail, is sufficient to satisfy due process, even if claimant never received notice); United States v. Schiavo, 897 F. Supp. 644, 648 49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; due process satisfied even if he did not receive the notice).

“Finally, 28 U.S.C. 2467 is amended to authorize the enforcement of a forfeiture judgment based on any foreign offense that would constitute an offense giving rise to a civil or criminal forfeiture of the same property if the offense had been committed in the United States. This is one of two safeguards that the statute contains against the enforcement of judgments that the United States does not consider appropriate for enforcement: if the judgment is based on an act that would not constitute a crime in the United States, such as removing assets from the reach of a repressive regime, it could not be enforced. In addition, section 2467 already provides that a foreign judgment may only be enforced by a Federal court at the request of the United States, and only after the Attorney General has certified that the judgment was obtained in accordance with the principles of due process. Thus, neither a foreign Government nor a foreign private party could enforce a foreign judgment on its own under this provision.”). Note that the safeguard to which the report refers is the range of foreign offenses that will support an enforceable confiscation order, \textit{i.e.}, drug offenses and crimes on the money laundering predicate offense list, and that the amendment narrows that safeguard by adding additional foreign offenses, \textit{i.e.}, any foreign equivalent of a federal crime which would support a confiscation order.

\textsuperscript{103} 28 U.S.C. 2466.
Alien Terrorists and Victims

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

Border Protection. The border protection provisions:

• authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401

• authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402

• remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404

• authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405

• authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.

• instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007

• direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418

• express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414

• add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415

• call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416

• limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
• instruct the Attorney General to report on the feasibility of using biometric scanners to help prevent terrorists and other foreign criminals from entering the country, section 1008\textsuperscript{104}

• authorize appropriations of $250,000 for the FBI to determine the feasibility of providing airlines with computer access to the names of suspected terrorists, section 1009

• authorize reciprocal sharing of the State Department’s visa lookout data and related information with other nations in order to prevent terrorism, drug trafficking, slave marketing, and gun running, section 413

**Detention and Removal.** Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity, 8 U.S.C. 1227 (a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(iv). Aliens may be inadmissible for any number of terrorism-related reasons, 8 U.S.C. 1182 (a)(3)(B). Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported.


Section 411 defines “terrorist organization” to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the Federal Register as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C.

\textsuperscript{104} As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).
Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).


An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in “premeditated, politically motivated violence perpetrated against noncombatant targets,” or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security or endanger some individual or the general public. The Attorney General's determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

**Victims.** The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

- permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421
- extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422

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105 “The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

106 “The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks.

“The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application.

“Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

“Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 31.

“Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.


107 “Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

“The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

“The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death),” H.R.Rep.No. 107-236, at 68 (2001).

108 “Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien’s 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien’s 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
• a denial of benefits of the Act to terrorists and their families, section 427

• authority for the Attorney General to establish evidentiary standards to implement the alien victim provisions of the Act, section 426.

Other Crimes, Penalties, & Procedures

New Crimes. The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department, the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offenses for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents, 18 U.S.C. 175b. Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.

109 “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . . .” DoJ at §305.

110 The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175(b)(2).

111 “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2)(“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.112

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D). The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

112 U.S. Const. Art.III, §2, cl.3 (“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . . .”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . .”); United States v. Cabrales, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from Cabrales when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnapping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999)(“By way of comparison, last Term in [Cabrales] we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).
The Justice Department sought the expansion along with the enlargement of the predicate offense list, "18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of `material support or resources' is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill ("Federal terrorism offenses")," DoJ at §304.


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115 “The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill (‘Federal terrorism offenses’) is used in identifying the relevant crimes,” DoJ, at §304.


- chemical weapons offenses, 18 U.S.C. 229;
- terrorist attacks on mass transportation, 18 U.S.C. 1993;
- sabotage of a nuclear facility, 42 U.S.C. 2284; and
- sabotage of interstate pipelines, 49 U.S.C. 60123(b).

And it adds expert advice or assistance to the types of assistance that may not be provided under section 2339A. This last addition may encounter the same First Amendment vagueness problems some courts have found in assistance which takes the form of “training” and “personnel,” Humanitarian Law Project v. Reno, 205 F.3d 1130, 1137-136 (9th Cir. 2000). Finally, the section announces that a prosecution for violation of section 2339A (support of terrorists) may be brought where the support is provided or where the predicate act of terrorism occurs. There may be some question whether the Constitution permits prosecution where the predicate act occurs.

Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.
New Penalties. The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. 3571(b),(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense. 117

The proposal, however, failed to identify the critical elements that would trigger the alternative. 118 Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

* for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

* for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

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117 “Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersedes lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,” DoJ, at §302.

118 “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense,” Draft at §302.
• for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;

• for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;

• for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;

• for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and

• for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism. 119 Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:

• arson committed within a federal enclave, 18 U.S.C. 81;
• killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);
• destruction of communications facilities, 18 U.S.C. 1362;
• destruction of property within a federal enclave, 18 U.S.C. 1363;
• causing a train wreck, 18 U.S.C. 1922;
• providing material support to a terrorist, 18 U.S.C. 2339A;
• torture committed overseas under color of law, 18 U.S.C. 2340A;
• sabotage of a nuclear facility, 42 U.S.C. 2284;

119 “The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §§846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

“This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.
• interfering with a flight crew within U.S. special aircraft jurisdiction, 49 U.S.C. 46504;
• carrying a weapon or explosive abroad an aircraft within U.S. special aircraft jurisdiction, 49 U.S.C. 46505; and
• sabotage of interstate gas pipeline facilities, 49 U.S.C. 60123.

When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years). The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission), a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

120 Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

121 “Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.

“This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders).\textsuperscript{122}

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

**Other Procedural Adjustments.** In other procedural adjustments designed to facilitate criminal investigations, the Act:

- increases the rewards for information in terrorism cases
- expands the Posse Comitatus Act exceptions
- authorizes “sneak and peek” search warrants
- permits nationwide and perhaps worldwide execution of warrants in terrorism cases
- eases government access to confidential information
- allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
- lengthens the statute of limitations applicable to crimes of terrorism
- clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
- adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B.\textsuperscript{123}

\textsuperscript{122} It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, e.g., damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

\textsuperscript{123} When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001)(remarks of Rep. Sensenbrenner); for general background, see, Doyle, *McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys*, CRS REP.NO. RL30060 (Dec. 14, 2001).
Rewards. The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L. 105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism.124

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

Posse Comitatus. The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.125

Delayed notification of a search (sneak and peek). Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take

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124 The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct threat assessments for federal agencies, and to reimburse federal agencies for the costs of detaining terrorist suspects overseas.

125 For a general discussion of the Posse Comitatus Act, see, Doyle, The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law, CRS Rep.No. 95-964 (June 1, 2000).
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, Richards v. Wisconsin, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, Wilson v. Arkansas, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, Dalia v. United States, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, cf., United States v. Miller, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, United States v. Freitas, 800 F.2d 1451, 1453 (9th Cir. 1986).126

126 The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in United States v. New York Telephone Co., 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth
The Second Circuit was less convinced and preferred to hold sneak and peek searches to the demands of Rule 41, *United States v. Pangburn*, 983 F.2d 449 (2d Cir. 1993). The Fourth Circuit was, if anything, less convinced. Moreover, the facts in the case demonstrate the potential impact of the issue on computer privacy, *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000).

Amendment, demands that surreptitious entries be closely circumscribed,” *United States v. Freitas (Freitas I)*, 800 F.2d 1451, 1455-456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, *United States v. Freitas (Freitas II)*, 856 F.2d 1425 (9th Cir. 1988).

127 “No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in *Dalia v. United States*, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in *Dalia*, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property. . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. *See United States v. New York Telephone Co.*, 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . .Although the *Freitas I* court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in *United States v. Villegas*, 899 F.2d 1324 (9th Cir. 1999). Although the *Freitas I* court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in *Villegas*. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the *Freitas I* court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” *United States v. Pangburn*, 983 F.2d 449, 453-55 (2d Cir. 1993).

128 In *Simons*, a search team entered Simons' office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
The Justice Department urged that the conflict be resolved with a uniform rule which permitted sneak and peek warrants under the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage.129

The Act, in section 213, stops short of the Justice Department proposal. Characterized as a codification of the Second Circuit decision, 147 Cong.Rec. H7197 (daily ed. Oct. 23, 2001), the Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C. 3103a. Its sneak and peek authorization reaches all federal search and seizure warrants where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (e.g., risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (e.g., jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, i.e., in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation.130 The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

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129 The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities,” DoJ at §353.

130 Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department’s initial proposal, the Department’s justification does not address the question.
constitutorally “reasonable,” that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

**Nationwide terrorism search warrants.** The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either “within or outside the district,” (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases. The provision may anticipate execution both in this country and overseas. The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage. Neither Rule 41 nor any other provision of federal

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131 The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

132 The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

133 *United States v. Barona*, 56 F.3d 1087, 1092 (9th Cir. 1995) (“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994) (“if American law enforcement officials substantially participated in the search or if the
law apparently contemplated extraterritorial execution, cf., F.R.Crim.P.41, Advisory Committee Notes: 1990 Amendment (discussing a proposal for extraterritorial execution that the Supreme Court rejected). 134

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” F.R.Crim.P. 41, Advisory Committee Notes: 1990 Amendment. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

**Terrorists’ DNA.** The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards per se. 135 Existing federal law allowed the Attorney General to collect samples from

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134 The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, see, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), reprinted, 78 Cong.Rec. 4982-983 (1934)(“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.)(conferring judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

135 Roe v. Marcotte, 193 F.3d 72 (2d Cir. 1999); Shaffer v. Saffle, 148 F.3d 1180 (10th Cir. 1998); Rise v. Oregon, 59 F.3d 1556 (9th Cir. 1995); Jones v. Murray, 962 F.2d 302 (4th Cir. 1992).
Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples form convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes,” DoJ at §353.


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137 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

138 “This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

“This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in
The Act takes less dramatic action in section 809. It eliminates the statute of limitations for any crime of terrorism that risks or results in a death or serious bodily injury, 18 U.S.C. 3286. In the absence of such a risk or result, all other terrorism offenses become subject to the eight year statute of limitations unless already covered by the ten year statute for explosives and arson offenses, 18 U.S.C. 3286.

Application of the statute of limitations rarely provokes a constitutional inquiry. Nevertheless, due process precludes prosecution when it can be shown that pre-indictment delay “caused substantial prejudice to [a defendant’s] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.”

Moreover, a judicial difference of opinion has appeared in those cases connection with the September 11, 2001 terrorist attacks. The constitutionality of such retroactive applications of changes in statutes of limitations is well-settled. See, e.g., United States v. Grimes, 142 F.3d 1342, 1350-51 (11th Cir. 1998); People v. Frazer, 982 P.2d 180 (Cal. 1999).

“Existing federal law (18 U.S.C. §3282) bars prosecuting most offenses after five years. 18 U.S.C. §3286, as currently formulated, extends the limitation period for prosecution for certain offenses that may be committed by terrorists – but only to eight years. While this is a limited improvement over the five-year limitation period for most federal offenses, it is patently inadequate in relation to the catastrophic human and social costs that frequently follow from such crimes as destruction of aircraft (18 U.S.C. §32), aircraft hijackings ([49] U.S.C. §§46502, 46504-06, attempted political assassinations (18 U.S.C. §§351, 1116, 1751), or hostage taking (18 U.S.C. §1203). These are not minor acts of misconduct which can properly be forgiven or forgotten merely because the perpetrator has avoided apprehension for some period of time. Anomalously, existing law provides longer limitation periods for such offenses as bank frauds and certain artwork thefts (18 U.S.C.§§3293-94) than it does for crimes characteristically committed by terrorists.

“In many American jurisdictions, the limitation periods for prosecution for serious offenses are more permissible than those found in federal law, including a number of states which have no limitation period for the prosecution of felonies generally. While this section does not go so far, it does eliminate the limitation period for prosecution of the major crimes that are most likely to be committed by terrorists (‘Federal terrorism offenses’), as specified in section 309 of this bill,” DoJ at 301.

As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 ( sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

Moreover, a judicial difference of opinion has appeared in those cases

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period. Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (Grimes, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (Frazer, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

Extraconstitutional. Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States or elsewhere. . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnapping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.

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141 United States v. De La Matta, 266 F.3d 1275, 1286 (11th Cir. 2001); United States v. Grimes, 142 F.3d 1342, 1351 (11th Cir. 1998); United States v. Morrow, 177 F.3d 272, 294 (5th Cir. 1999); Falter v. United States, 23 F.2d 420, 425-26 (2d Cir. 1928).


143 United States v. Layton, 855 F.2d 1388 (9th Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); United States v. Benitez, 741 F.2d 1312 (11th Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).
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Victims. Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11\(^{th}\) Victim Compensation Fund legislation before it passed the Act. Consequently, the Act’s victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 \textit{et seq.}, and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 \textit{et seq.}.

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:

\(^{144}\) Compare, United States v. Gatlin, 216 F.3d 207 (2d Cir. 2000); United States v. Laden, 92 F.Supp.2d 189 (S.D.N.Y. 2000); with, United States v. Corey, 232 F.3d 1166 (9th Cir. 2000); United States v. Erdos, 474 F.2d 157 (4\(^{th}\) Cir. 1973).
• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year) (42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d) (5)), section 621(d)

• waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

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• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

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• makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

• prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

• allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

• reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

• makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

• allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

• establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

Increasing Institutional Capacity. A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

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For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

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- $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816

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- $5 million for DEA police training in South and Central Asia, section 1007.

**Miscellaneous.** Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might to used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act, or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b), 807.146

145 I.e., Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).

146 For a general discussion of trade sanctions legislation, see, Jurenas, Exempting Food and Agriculture Products from U.S. Economic Sanctions: Status and Implementation, CRS ISSUE BRIEF IB100061.
Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples form convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes,” DoJ at §353.

For a general discussion, see, Fischer, DNA Identification: Applications and Issues, CRS REP.NO. RL30717 (Jan. 12, 2001).

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137 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

138 “This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

“This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in
The Act takes less dramatic action in section 809. It eliminates the statute of limitations for any crime of terrorism\(^\text{139}\) that risks or results in a death or serious bodily injury, 18 U.S.C. 3286. In the absence of such a risk or result, all other terrorism offenses become subject to the eight year statute of limitations unless already covered by the ten year statute for explosives and arson offenses, 18 U.S.C. 3286.

Application of the statute of limitations rarely provokes a constitutional inquiry. Nevertheless, due process precludes prosecution when it can be shown that pre-indictment delay “caused substantial prejudice to [a defendant’s] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.”\(^\text{140}\) Moreover, a judicial difference of opinion has appeared in those cases connection with the September 11, 2001 terrorist attacks. The constitutionality of such retroactive applications of changes in statutes of limitations is well-settled, See, e.g., United States v. Grimes, 142 F.3d 1342, 1350-51 (11th Cir. 1998); People v. Frazer, 982 P.2d 180 (Cal. 1999).

“Existing federal law (18 U.S.C. §3282) bars prosecuting most offenses after five years. 18 U.S.C. §3286, as currently formulated, extends the limitation period for prosecution for certain offenses that may be committed by terrorists – but only to eight years. While this is a limited improvement over the five-year limitation period for most federal offenses, it is patently inadequate in relation to the catastrophic human and social costs that frequently follow from such crimes as destruction of aircraft (18 U.S.C. §32), aircraft hijackings (18 U.S.C. §§46502, 46504-06), attempted political assassinations (18 U.S.C. §§351, 1116, 1751), or hostage taking (18 U.S.C. §1203). These are not minor acts of misconduct which can properly be forgiven or forgotten merely because the perpetrator has avoided apprehension for some period of time. Anomalously, existing law provides longer limitation periods for such offenses as bank frauds and certain artwork thefts (18 U.S.C.§§3293-94) than it does for crimes characteristically committed by terrorists.

“In many American jurisdictions, the limitation periods for prosecution for serious offenses are more permissible than those found in federal law, including a number of states which have no limitation period for the prosecution of felonies generally. While this section does not go so far, it does eliminate the limitation period for prosecution of the major crimes that are most likely to be committed by terrorists (‘Federal terrorism offenses’), as specified in section 309 of this bill,” DoJ at 301.

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139 As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 (sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period.\textsuperscript{141} Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.\textsuperscript{142}

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (\textit{Grimes}, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (\textit{Frazer}, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

\textbf{Extraterritoriality.} Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States . . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.\textsuperscript{143}

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnapping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.

\textsuperscript{141} \textit{United States v. De La Matta}, 266 F.3d 1275, 1286 (11th Cir. 2001); \textit{United States v. Grimes}, 142 F.3d 1342, 1351 (11th Cir. 1998); \textit{United States v. Morrow}, 177 F.3d 272, 294 (5th Cir. 1999); \textit{Falter v. United States}, 23 F.2d 420, 425-26 (2d Cir. 1928).

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The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might to used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act, or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b), 807.

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145 *I.e.*, Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).

FIG. 5d

[Diagram with labels and text]

H1: Under 35 U.S.C. Sec. 287, patent owners must mark...
H2: Patent issues: clear and continuous marking of patent...
H3: The Patent Act imposes a duty to mark on the...
H4: As the Supreme Court ruled in Wine Railway Appliance...

It appears that even the engineering manager, Mr. Johnson, was fully aware of the initial failure to mark at least three full months before any correction was made.

Toc: Mr. Johnson
From: Mr. Smith
Date: January 16, 1996

Dear Tom, I notice that our Alpha product doesn't display any patient information. Did you consider making the box?
FIG. 7b
Q91: Was any of (your product lines) sold after February 30, 1983 (i.e., the filing date of the '212 patent) without having the patent number 5,551,212 affixed thereto?

Q93: Was your Alpha product line sold after February 30, 1983 without having the patent number 5,551,212 affixed thereto?

A93: Well, I'm not sure if we ever fixed any numbers to any of our products. We considered it, but couldn't find a large enough area on the product to place any text at all?
Mr. Smith: Your Honor, I'd like to now move to have Defendant's Exhibit 22 entered into evidence.

Mr. Jones: Objection, Your Honor, this document clearly constitutes hearsay.

Judge Off: Objection sustained.
ATTORNEY TERMINAL HAVING OUTLINE PREPARATION CAPABILITIES FOR MANAGING TRIAL PROCEEDING

CROSS-REFERENCE TO RELATED APPLICATIONS (Claim Of Benefit Under 35 U.S.C. 120)

This application is a continuation of U.S. Ser. No. 08/073,809, filed on Jun. 7, 1993, now abandoned by Bennett et al., which is a continuation-in-part application of U.S. application Ser. No. 08/036,488, filed Mar. 24, 1993, by Bennett et al. now U.S. Pat. No. 5,369,704.

INCORPORATION BY REFERENCE

The descriptive matter of the above-referred to parent U.S. application Ser. No. 08/036,488, filed Mar. 24, 1993, by Bennett et al. is incorporated herein by reference in its entirety, and is made part of this application. Also incorporated herein by reference in their entirety and made part of this application are pending U.S. applications by Bennett et al.:

1) Ser. No. 08/066,948, filed May 24, 1993, entitled "Audio and Video Transcription System for Manipulating Real-Time Testimony"; and

BACKGROUND OF THE INVENTION

This invention relates to a down-line transcription system used by attorneys for reviewing real-time transcription during a proceeding such as a trial or deposition; and, more particularly, it relates to a method and apparatus for interactively preparing an outline for use during such a proceeding based on case evidence and case law which may be locally or remotely located.

As is well known, legal proceedings such as a deposition or trial involve the participation of, among others, an examining attorney who asks questions and a witness who must answer ("testify") while under oath. To prepare for such proceedings, the examining attorney must review the applicable case law and the related case evidence. The attorney also consults experts, clients and other associate attorneys regarding specific issues of law and fact as proves necessary. During his investigation process the attorney takes notes, and makes copies of documents and legal cases regarding everything at issue. Based on these materials, the attorney attempts to develop a strategy, constructs an outline of possible lines of inquiry, drafts potential questions for the witness and organizes relevant documentary evidence for use as exhibits for the proceeding. During the entire process, the examining attorney attempts to anticipate all of the legal issues that might arise.

The entire preparation process often proves to be very time consuming and cyclical in nature. Every important fact uncovered leads to a new case law search. Similarly, every new legal issue leads to a need for additional facts that are found by conducting a case evidence search or are found by directly examining a witness. Because of this, lead attorneys on a case must be organized and skilled at memory recall.

The defending attorney must also attempt to understand the factual and legal issues in the case via case law and case evidence searching and through conversations with the client, expert witnesses, other attorneys and, most importantly, the witness to be deposed. During the entire process, the defending attorney’s goal is to anticipate the strengths and weaknesses of the case and the factual evidence which may arise in the proceeding. The defending attorney must be well versed in all categories of the facts and law which might arise so as to be able to properly defend the witness. The defending attorney takes notes during his pre-investigation process to prepare the witness for the proceeding.

However, neither the examining attorney nor the defending attorney can anticipate everything. Typically, in the midst of a proceeding, the witness reveals something unexpected to one or both attorneys. The revelation could involve a new area of law which the attorneys know little if anything about. More often, the revelation suggests an unknown variant in a known category of law. The revelation also creates a need for additional documents for use during the proceeding to pursue the new issue. In all such situations, additional searching is needed. However, during the proceeding, because the attorneys do not have the luxury of time, outlining, legal researching, and factual evidence retrieval prove to be an impossible task.

Additionally, the examining attorney generally takes notes (1) on a legal pad of paper, (2) directly on copies of potentially relevant documents identified for use in the deposition, and (3) on Post-it® brand notes which are associated with the documents and other materials. During the proceeding, the attorney attempts to recreate the associations of the notes, the identified documents and draft questions with legal inquiries into the different categories of law. Because of disorganization, the attorney is often unable to use a great deal of the prepared information.

In complex litigation, the problems facing the attorneys are compounded. Because the preparation process becomes a very time consuming task, the lead examining (and defending) attorney delegates the task to an associate attorney on the case. The associate attorney, who often has lesser knowledge of the facts and law at issue, is faced with the task of retrieving the important case law and evidence which will be relevant in the upcoming proceeding. Because of lesser knowledge and inexperience, the associate attorney either over prepares or else complicates the matter by not culling out the appropriate law or facts. In addition, because the associate attorney must brief the lead attorney during a relatively short time period before the proceeding, the lead attorney cannot grasp all of what is attempted to be conveyed. Similarly, the associate attorney may convey a misconstrued understanding of the law and the evidence because of inexperience. Either way, the lead attorney often does not find out all he needs until the proceeding is underway.

In the midst of the proceeding, the examining attorney is also confronted with the problem of recalling the testimony of former witnesses regarding the same subject matter now being addressed. If recalled, the examining attorney may use the prior testimony to his advantage. Also, after the deposition, the attorney is faced with the problem of reorganizing the materials in some type of saveable form for later use when a similar witness is deposed.

Hence, it would be highly desirable to solve the foregoing variety of problems enumerated in preparing for legal proceedings such as a deposition or trial by guiding the attorney in the preparation process while associating all notes, documents and law into a workable
format which requires minimal attorney interaction during the proceeding.

It is therefore an object of the present invention to provide a method and apparatus having interactive outlining capabilities based on tailorable, default outlines that provide immediate access to current case law, pre-typed tailorable and default questions while providing for association of case and witness specific notes, testimony, and other case evidence.

It is another object of the present invention to provide a method and apparatus for interactively selecting a pre-typed outline based on categories or subcategories of law, by providing for interactive queries based on specific facts and law at issue in a given lawsuit.

It is another object of the present invention to provide a method and apparatus for interactively selecting a pre-typed outline based on categories or subcategories of law which contains tailored potential questions that may be further tailored for managing depositions, trial and case evidence, law and attorney work product.

SUMMARY OF THE INVENTION

These and other objects of the present invention are achieved in a transcription network having an outline used by attorney terminals for managing a lawsuit. The outline contains a plurality of categorization entries related to issues in a specific lawsuit. At least one of the plurality of categorization entries relates to a first data item of case law information. Similarly, the outline comprises a second data item of case evidence information relating to at least one of the plurality of categorization entries. Other objects are also achieved with the outline provides for the association of the first and second data items.

Objects are also achieved in a method for preparing to take the testimony of a witness including the steps of storing case evidence in a database, associating the evidence in the computer database with a deposition question or witness answer, and viewing this association. In another embodiment, associating the evidence includes associating the evidence in real time. In a further embodiment, case evidence includes testimony, pleadings, or documents, and the database includes either a local or remote database.

Other objects are achieved in a method used by an attorney terminal for a given lawsuit which comprises the steps of accessing an outline library that includes a number of outline areas related to witness testimony, and selectively using at least one of the outline areas for use in a given lawsuit.

In one embodiment, the method includes associating a plurality of preset examination questions with at least one outline area and storing preset examination questions in a database. In a further embodiment, the method further includes the step of tailoring the stored examination question so as to direct questions to a specific witness to be deposed. In yet a further embodiment, the method includes retrieving the stored examination questions during the examination of the witness in real time by addressing the stored outline areas to automatically retrieve associated questions.

Other objects and further aspects of the present invention will become apparent in view of the following detailed description and claims with reference to the accompanying drawings.

BRIEF DESCRIPTION OF THE DRAWINGS

FIG. 1 is a perspective view which illustrates an overall system configuration in which attorney terminals operate in Outline, Pretrial and Timeline Modes to manage a lawsuit according to the present invention.

FIG. 2 is a perspective view which illustrates an overall system configuration in which attorney terminals operate in Deposition and Trial Modes to manage a lawsuit according to the present invention.

FIG. 3 is a detailed perspective view illustrating an attorney terminal in an Outline Mode configuration as used by an attorney to prepare for a deposition or trial proceeding according to the present invention.

FIG. 4a is a diagram illustrating the hierarchical structure of the outline library according to the present invention which is interactively used by the attorney terminals to create a tailored outline for a given lawsuit.

FIG. 4b is a detailed diagram illustrating the types and groupings of information contained within each hierarchical category, subcategory, etc., of the outline library according to the present invention.

FIG. 4c is a diagram illustrating an exemplary pointer structure under the groupings in the tailored outline according to the present invention which provides access to and association information for each data item of the tailored outline.

FIG. 5a is a detailed perspective view illustrating an attorney terminal which provides a Roman numeric outline display of the categories and subcategories contained in a tailored outline according to the present invention.

FIGS. 5b-5f are detailed perspective views of the attorney terminal of FIG. 5a which further illustrate how an attorney may move through, create, modify or otherwise use the hierarchical structure of the tailored outline according to the present invention.

FIG. 6a is a detailed perspective view of an attorney terminal which graphically displays specific groupings of case law information under certain subcategories of the outline library.

FIG. 6b is a detailed perspective view of the attorney terminal of FIG. 6a which illustrates the use of an edit window to fully display, modify, or create case law grouping information such as a headnote which is directly associated with a subcategory of the outline library.

FIGS. 7a-7c are detailed perspective views of an attorney terminal operating in the outline mode which graphically displays groupings of draft questions under a marking subcategory in the outline library, wherein the draft questions are selected, modified or added for use in a deposition or trial proceeding.

FIG. 7d is a detailed perspective view of an attorney terminal operating in the deposition mode which illustrates the use of a draft question as the basis for an actual question asked during a deposition or trial proceeding.

FIG. 8 is a perspective view illustrating the selection of categories, subcategories, etc., to be used during an upcoming deposition or trial, wherein, in view of the witness's anticipated knowledge, only those areas of the tailored outline considered pertinent are selected for later access during the proceeding.

FIG. 9 is perspective view providing further detail of the system configuration of attorney terminals operating in the evidence mode according to the present invention.
DESCRIPTION OF THE PREFERRED EMBODIMENT

FIGS. 1 and 2 are perspective views which illustrate overall system configurations in which attorney terminals operate in various modes to manage a lawsuit according to the present invention. In particular, FIG. 1 is a perspective view of a system configuration in which a second chair attorney prepares for a deposition or trial proceeding using an attorney terminal 21 which operates in an Outline Mode, Pretrial Mode, Timeline Mode and other modes.

Upon initiation of a new lawsuit, an attorney (generally the second chair attorney on the case) uses the attorney terminal 21 in its Outline Mode to prepare for conducting the new lawsuit. First, the attorney gains access to an outline library 43, and interactively responds to a query regarding: 1) the issues of law from the Complaint of the new lawsuit; 2) the State and/or Federal law at issue; 3) the specific court involved; 4) the names of the parties; 5) the party represented; and 5) other specific factual information relevant given the law at issue. Thereafter, a second query interactively extracts information as to the Answer in the lawsuit, including all defenses and counterclaims at issue. A third query captures information regarding defenses to any counterclaims raised.

As an added advantage to the querying process, a plaintiff's attorney may access the outline library 43 to interactively construct the Complaint. The information provided to construct the Complaint provides all of the lawsuit information needed in the first query, and, therefore, does not need to be asked again.

Similarly, a defending attorney might access the outline library 43 and, after responding to the first query using the Complaint, the defending attorney might interactively construct the Answer in lieu of the second query. During the interaction, all possible legal defenses to the charges in the Complaint aid the defending attorney in drafting the Answer. To complete the Answer, the defending attorney may then add counterclaims, if any, and selectively choose those defenses which are appropriate for the current lawsuit. Similarly, a Reply to the counterclaims may be interactively prepared by the plaintiff's attorney. Moreover, headings, subheadings, and comments regarding each charge raised and all potential defenses thereto aid the attorneys in preparing the Complaint, Answer, or Reply.

From the queried information, the outline library 43 provides a tailored outline corresponding to the issues in the case for conducting and managing the lawsuit. Basically, the tailored outline provides a hierarchical structure for associating the law at issue, case evidence, and attorney work product so that the attorney can easily access information retrieved from a variety of sources. At the root of the hierarchical structure, the outline provides all of the major categories of law and fact at issue in the lawsuit. Branches of the hierarchical structure, i.e., subcategories, sub-subcategories, etc., provide further and further levels of legal/factual detail regarding the major categories or subcategories.

Through the hierarchical structure of the outline, the attorney can rapidly access a desired grouping of evidence, law and work product pertaining to a solitary legal or factual issue. However, access is not the only benefit. Additional benefits include ease of closing off an area of inquiry. By closing off a subcategory, all of the further levels below that subcategory (sub-subcategories, etc.) are closed off, rapidly minimizing the size of the working outline. Moreover, the mere listing of all the potential areas of law provides the attorney with a hierarchical checklist, reminding the attorney of what law might be at issue. Other benefits enhance the attorney's ability to prepare for a legal proceeding by providing: 1) virtually instant legal overviews (headnotes) of the suggested categories and subcategories of law without having to conduct a search; 3) immediate access to the burdens of proof required; 4) pre-typed legal search formulations for further legal inquiry via a case law library 63; 5) instant access to the seminal case regarding the categories or subcategories; 6) pre-typed potential questions to be asked based on the current case and witness; 7) pre-typed potential interrogatories and document requests relating to the categories or subcategories; 8) the ability to associate case evidence, work product (notes, pleadings or portions thereof), or related communications with the categories or subcategories; 9) sequential and interactive guidance of the attorney through the hierarchical categorizations of law based on the attorney's response; and 10) where beneficial, suggestions of evidentiary searches and other discovery tips such as, for example, pertinent local court discovery rules.

On an ongoing basis, while in the Outline Mode, the attorney terminal 21, such as might be used by a second chair attorney, utilizes the retrieved tailored outline to begin a second level of case specific tailoring governed by the discovery process. As further evidence is obtained through discovery, the attorney continues to pursue deeper levels of some categories at issue, while closing off others.

To aid in the discovery process, the Outline Mode helps formulates interrogatories, document requests, and questions for upcoming depositions. To formulate document requests and interrogatories, the attorney first analyzes the categories, subcategories, sub-subcategories, etc., to become familiar with the potential issues in the lawsuit through the headings provided, and begins to construct document requests and interrogatories from sample, partially-tailored interrogatories available at each level of hierarchy. Partial-tailoring automatically occurs upon retrieval of the tailored outline from the outline library 43 via the initial stage of querying by substituting specific lawsuit information where appropriate into the text of the sample document requests and interrogatories. Such tailoring minimizes the attorney's need for further modification. Upon completing the tailoring process within the hierarchical structure, the attorney terminal 21 extracts or "copies" all of the newly created document requests and interrogatories from the hierarchical structure and places them into draft discovery requests. After minimal further modification, the attorney is able to serve the requests on the opposing side.

The answers to the interrogatories are first placed into a case evidence library 91. From there, the attorney terminal 21, if so directed, automatically compares and updates the draft interrogatories in the tailored outline with those actually served, and then directly associates the received answers into the outline. In particular, the terminal 21 parses a text file of the served interrogatories into units of single interrogatories. Each of the served interrogatories are then compared to each draft interrogatory on an ordered word by word basis. The draft interrogatory providing the best match is dis-
played by the attorney terminal 21 along with the corre-
sponding served interrogatory and a matching percent-
age (based on the number of matching words). Thereaf-
ter, the attorney terminal 21 prompts the attorney for verification. If the attorney verifies the match, the ter-

minal 21 replaces the draft interrogatory with the served interrogatory, and associates the answer therewith. If the attorney does not detect a match, the attor-
ney terminal 21 can be directed to display the draft interrogatory offering next best match. This process can continue until verification is received. If at any point during the verification process, however, the attorney detects that the served interrogatory has been newly added or the tailoring outline, the attorney terminal 21 can be used to categorize that interrogatory within the appropriate hierarchical area(s) in the tai-
lored outline. Once a draft interrogatory has been up-
dated (or replaced) by a served interrogatory, it is taken out of consideration for further correspondence matching. Thus, the served interrogatories can be interac-
tively imported back into the hierarchical structure of the tailored outline. If, however, the attorney makes all modifications to the draft interrogatories directly within the tailored outline, the importation process occurs and is performed accurately to locate and associate the answers received.

After the importing process, the attorney is directed back through the hierarchical structure by the attorney terminal 21 to review the newly received interrogato-
ries. By doing so, the attorney may choose to close off additional categories or subcategories of inquiry, or pursue others. In many circumstances, supplemental interrogatories may be in order after reviewing the responses. In such circumstances, the attorney may draft new interrogatories, modify, or extract, the newly drafted requests for service. Moreover, any type of discovery request can be periodically drafted whenever the need arises. At any time, the attorney may extract a collection of the draft discovery requests for review, modification and service or use during a deposition or trial proceeding.

The attorney terminal 21 also automatically prepares draft document requests during a deposition or trial proceeding. For example, if during a deposition the examining attorney asks opposing counsel to produce documents which the witness has identified, the attor-
ney terminal 21, monitoring the transcribed text, detects the question to the opposing counsel, detects the use of the word "produce" concludes that a formal request needs to be made, and prepares a draft document request based on the interchange between the attorney and the opposing counsel.

If during the process of reviewing responses the attor-
ney recognizes that an unanticipated area of law might be at issue, the attorney merely gains access to the outline library 43, enters the unanticipated area of law, and the attorney's tailored outline is updated to include all of the categories and subcategories and related infor-
mation regarding the unanticipated area of law for re-

view.

Depending on the lawsuit budget and the number of items anticipated, the documents and things produced may be entered into the case evidence library in a var-

ty of ways. Where possible, all documents received are immediately scanned and converted to text via an optical character recognition (OCR) process. The scanned documents and the corresponding text are stored in the case evidence library 91. Summaries de-

scribing the "things" produced are also added to the library 91. In alternate situations, only summaries for all of the documents and things received are loaded into the case evidence library 91. In yet other situations, only summaries or scanning is used for documents and things identified as being significant.

The attorney interacts with the documents and things received for annotation and association into the hierar-
chical structure of the tailored outline. If the documents have been scanned, the attorney terminal 21 can be used to display all documents by Bates number for review by the attorney. If the corresponding text of the documents has been extracted, the attorney may search the corre-

sponding text to identify documents with key words or names, for example. Doing so minimizes the quantity of documents that an attorney needs to review for a specific purpose. Although all documents may be scanned and converted, in many lawsuits, only specific documents may be scanned and/or converted. Summaries might also be used either as an annotation to scanned documents, or as a stand-alone index to the actual documents via the Bates numbers.

As each document is reviewed, the attorney may choose to add textual annotations thereto, and may also choose to associate documents with a specific categori-

zation entry in the tailored outline. Furthermore, the attorney may choose to directly associate the document with a pre-typed or actual deposition question, a spe-
cific case law headnote, a treatise selection, or any other data stored within a given categorization entry.

To better automate the process of association, the attorney terminal 21 directs the attorney through the draft document requests in the hierarchical structure of the tailored outline. From the draft document requests, the attorney terminal 21 extracts, the attorney modifies and serves the document requests. In a process identical to that available for interrogatories, the attorney terminal 21 provides for interactive importation of the served document requests into the tailored outline. Thereafter, on a document request by document request basis, each Bates stamped document produced can be scanned and immediately associated with the corresponding served document request in the hierarchical structure of the tailored out-

line. Thus, to review all documents relating, for exam-
ple, to an oral contract, the attorney first selects the ter-

minal 21 to access the categorization entry corresponding to oral contracts within the tailored outline. Upon ac-

cessing the entry, all of the documents stored therein (or associated therewith) can be directly accessed. Docu-

ments and things can also receive multiple associations under multiple categorization entries as proves neces-
sary. This is accomplished using an associate/copy command sequence via the command line 33. Similarly, associate/move or associate/delete command sequen-
ces can be used to modify associations.

During the reviewing process, the attorney marks all significant documents, and may annotate the documents as needed with text or voice. In addition, during the process, additional discovery requests or unanticipated areas of law may come to light. The discovery requests may be drafted and associated with specific documents and/or annotations for later extraction for formal ser-
vice. Any unanticipated areas of law can be retrieved from the outline library 43 to supplement the tailorable outline.

The tailored outline also provides sample draft depo-
sition questions within each category or subcategory (i.e., each categorization entry) of its hierarchical struc-
ture. The attorney can mark those which might prove advantageous for potential modification and use during an upcoming deposition or trial. If so desired, additional questions might also be drafted within the hierarchical structure. To aid in this process and because of the diversity of the backgrounds of potential witnesses, different subcategory groupings of questions are provided for the different types of witnesses. For example, technical questions might be grouped for technical witnesses being deposed which might be ignored for a non-technical witness. Similarly, questions for expert witness extracting opinions might be appropriately grouped.

In addition, as described in more detail below, during a deposition while operating in the Deposition Mode, questions and answers are automatically associated with the appropriate categories and subcategories in the hierarchical structure, providing further groupings of potential questions. Specific questions used during prior depositions can therefore be selected and possibly refined for use in an upcoming deposition with a different witness.

Where appropriate, each category and subcategory of tailored outline provides instant access to headnotes, associated full text of seminal cases, and pre-typed search requests to supplement the attorney's understanding of the specific law at issue. The outline library 43 draws and updates such legal information via a case law library 63. At any time during the lawsuit, the attorney may compare and update the legal information contained in the tailored outline via a comparison process with the outline library 43 which is maintained as legally "current". Any differences detected are flagged and sequentially presented to the attorney via the terminal 21 for immediate consideration of possible impacts on the ongoing lawsuit. The tailored outline is thereafter updated to reflect the current state of the law.

Using the attorney terminal 21, the attorney can directly tap into further legal and evidentiary information of expert witnesses, associate attorneys and clients via communication over the link 23 with corresponding terminals 3, 4 and 5. For example, while contemplating a specific subcategory in the tailored outline, the attorney realizes that the client might possess needed factual information at issue. Instead of calling the client, the attorney types in a message, and associates therewith any information grouped within that subcategory as deemed necessary to clarify the request. Such information might include the specific discovery requests, documents, answers, etc., which raised the need for the information. The message and associated information is then forwarded to the client via the communication link 23 to the terminal 5. After reading the communication, the client responds via the link 23. Upon receipt of the response, the tailored outline automatically stores the client's response within the hierarchical category from which the request originated. In this way, further evidence or law can be collected to further tailor the outline.

Once discovery has been completed, the attorney uses the tailored outline to aid in the preparation of the pretrial order in a Pretrial Mode. First, in the Pretrial Mode, the terminal 21 automatically generates a list of all Exhibits and other documents or things which have been marked as significant. This list provides the attorney with a starting point for identifying a list of Exhibits for trial. Using the terminal 21, the attorney can immediately access all annotations and the subcategory or subcategories in which a particular Exhibit was associated. With such access, the attorney can readily determine whether the potential Exhibit should be removed from the list.

Similarly, designated deposition testimony may be easily identified while in the Pretrial Mode. Upon request, the terminal 21 automatically extracts all question and answer interchanges deemed during the deposition proceeding to be important, i.e., through marking. The terminal 21 displays all such important interchanges for review by the attorney to determine whether they might be useful at trial. All of the associated annotations to the interchanges are also available to aid in the determination.

The Pretrial Mode also provides for a draft set of jury instructions for the Pretrial Order. Specifically, operating from the tailored outline, the attorney terminal 21 automatically generates a set of draft jury instructions based on the categories and subcategories of law still at issue upon completion of the discovery process. Although the draft jury instructions are preferably stored within the hierarchical structure of the tailored outline, they may be interactively retrieved using the outline library 43.

The attorney terminal 21 also provides potential witness and expert witness lists while in the Pretrial Mode. All parties which have been deposed are immediately listed as potential candidates. Any party having been deposed which is removed from a list, automatically cues the terminal 21 to designate the deposition in a list of depositions, or portions thereof, to be read in at the trial. To further aid the attorney, the terminal 21 identifies those portions of the designated deposition transcripts which have been previously marked as significant as being the portions to be read into the record during the trial. The witness lists and designations, along with the other pretrial information generated, provide the attorney with a reasonable starting point when preparing the Pretrial Order.

At any time during the discovery process or thereafter, the attorney terminal 21 may also be used in a Timeline Mode. In the Timeline Mode, the terminal 21 automatically searches through the evidence referenced in the tailored outline to identify dates and times, and then places the references in a chronological order for attorney review. As a default, only the documents and things and portions of the depositions that have been marked as significant are considered for the search. However, the scope of the search can be broadened or narrowed to encompass other documents and the full transcripts of the proceedings.

The terminal 21 also provides for designation of a specific time frame searching restriction to limit the search to the time period of an important event, for example. Similarly, to limit the scope of a search, only a single subcategory or group of subcategories can be chosen so as to confine the search to the evidence associated with those subcategories. Lexical searching can be combined with time line searching to help focus the information retrieved.

Once a chronologically ordered time-line listing has been retrieved, the attorney terminal 21 provides for an interactive review of the evidence associated with each entry so that entries may be deleted or else summarized. Thereafter, the terminal 21 provides for the display and printout of the summarized remaining entries in a graphical time-line format.
FIG. 2 is perspective view of a system configuration in which first and second chair attorneys utilize the information obtained from the tailored outline in the Outline Mode to conduct a deposition or trial proceeding, while operating attorney terminals 19 and 21 in a Deposition or Trial Mode. In the illustrated configuration, a computer aided transcription ("CAT") system 11 provides real-time, down-line transcription for down-line review by the attorney terminals 19 and 21. As questioning is conducted, the attorney terminals 19 and 21 operate within the hierarchical structure of the tailored outline so as to retrieve the transcript (the Q & A's), storing it into the hierarchical structure as the proceeding is taking place. Operation within the hierarchical structure occurs naturally because the attorneys use the hierarchical structure of the tailored outline as the basis for conducting the questioning. Moving through the structure may either be managed by the first or second chair attorneys.

As will suggest itself, the Deposition Mode need not be used to automatically retrieve the transcript into the tailored outline. Instead, an attorney (or paralegal) may categorize the Q & A's ("questions and answers") after the deposition has ended. The attorney may also choose to only categorize those Q & A's believed to be significant. This post-proceeding categorization process takes place directly via interactive review of the transcript while moving through the hierarchical structure of the tailored outline. As an intermediate step, the attorney may manually mark-up the transcript, and have a paralegal perform the interactive post-proceeding categorization.

In one embodiment, deposition transcripts, annotations, scanned documents, etc., and other case evidence is stored in the case evidence library 91. The supplemental library 92 stores draft discovery, jury instructions, etc. Similarly, all case law, treatise selections, etc., are stored in the case law library 63. The outline library 43 stores the hierarchical structure of the tailored outline which provides pointers to and associations between the case law, case evidence and supplemental information stored in respective libraries 63, 91 and 92. These libraries may be in entirely separate databases, or in allocated portions of a single database. In an alternate embodiment, the tailored outline stores all of the case evidence, case law, and supplemental information directly into the hierarchical structure of the tailored outline.

Upon interacting with outline library 43, the attorney terminal 21 may extract and store the tailored outline locally. However, the tailored outline may be fully stored and maintained by the outline library 43, alleviating the need for local maintenance.

Specifically, at a trial or deposition, a stenographic recorder 13 converts key-strokes entered by a court reporter via a keyboard 15 into digital codes. The digital codes are intended to correspond to the words spoken at the deposition or trial. The stenographic recorder 13 communicates the key-stroke codes to the CAT system 11 via a link 17. Upon receipt, the CAT system 11 attempts to transcribe the key-stroke codes into the exact text of the words which were spoken to provide for a real-time textual display of the transcript. To do so, the CAT system 11 communicates with a number of libraries, dictionary, index and tables stored in a database 25. The CAT system 11 transmits the exact and, where necessary, phoneme text down-line to the attorney terminals 19 and 21 via a communication link 23 for real-time review. Further detail regarding code-to-text conversion process and the down-line attorney terminals can be found in the pending parent U.S. application Ser. No. 08/036,488, filed Mar. 24, 1993, which is incorporated herein by reference.

In addition to the textual transcript which is generated, the CAT system 11 also provides access to audio and video transcripts which may also be fully or selectively associated into the hierarchical structure of the tailored outline. The CAT system 11 utilizes a tape recorder 8 and a video camera 7 as a basis for creating the audio and video transcripts. Further detail regarding the creation and association of the audio and video transcripts can be found in pending U.S. application Ser. No. 08/066,948, filed May 24, 1993, entitled "Audio and Video Transcription System for Manipulating Real-Time Testimony", by Bennett et al., which is incorporated herein by reference.

If unanticipated areas of law arise at a deposition when terminals 19, 21 are in a Deposition Mode, the attorney terminals 19 or 21 may choose to update the tailored outline and access the law via the outline library 43, or may choose a direct search via the case law library 63. The advantages of the former option include the associated retrieval of not only headnotes and seminal cases, but also the pre-typed questions for immediate use during the proceeding. Similarly, the case evidence library 91 can be further searched during the proceeding as the need arises. Further detail regarding searching of the current transcript, case law library 63, and case evidence library 91 can be found in pending U.S. application Ser. No. 08/065,132, filed May 20, 1993, entitled "Down-Line Transcription System Having Context Sensitive Searching Capability", by Bennett et al., which is incorporated herein by reference.

While in the Deposition or Trial Mode, experts, other attorneys and clients may receive the transcripts down-line and/or may communicate to the attorney terminals 19 and 21 via the terminals 3, 4, and 5 via the link 23. During the proceeding while in the Deposition or Trial Modes, all such communications are directly associated into the hierarchical structure of the tailored outline as similarly occurs in the Outline Mode.

Referring to FIG. 3, in the Outline Mode, an outline window 41 is created which covers a substantial portion of a screen 27 of attorney terminals such as the terminal 21. The attorney may build an outline 39 entirely from scratch using a keyboard 29, a mouse 31, and a command line 33. Basically, the building process involves listing each legal (and sometimes factual) category at issue and subcategories thereof into a typical Roman numeric format of the outline 39. Thereafter, associated within the hierarchical structure of the categories, pre-typed questions can be added to prepare for a deposition or trial, legal research might be obtained from the case law library 63, specific documents might be scanned or summarized and associated therewith, etc., as described above.

Instead of starting completely from scratch, however, the attorney might begin the process by copying an outline or portions thereof from a similar lawsuit. By copying, the attorney can quickly and easily make modifications for the current lawsuit, while taking advantage of all of the legal information and work product contained therein.

In addition, the attorney can build the outline 39 as described above through interactive session(s) with the
13 outline library 43. The outline library 43 may be stored either remotely or locally.

Referring to FIG. 46, the outline library 43 is hierarchically structured by category 45, subcategory 47, sub-subcategory 49, and so on. Broad areas of law provide the category 45 entries. Each category 45 entry may be broken down into one or more subcategory 47 entries, each of which in turn are broken down into one or more sub-subcategory 49 entries, and so on. For example, the category 45 includes a patent law entry 51. The patent law entry 51 is further broken down to subcategory 47 entries of infringement 53, invalidity 55, laches 57, etc. The subcategory “invalidity” 55 is broken down into sub-subcategory 49 entries of “best mode” 59 and enablement 60. Under each sub-subcategory area may be one or more sub-sub-subcategories, and so on. In some cases, the categories used in the outline may be a reference to an area of evidentiary inquiry which is not an area of law. For example, the category 45 could contain an entry “Background” having subcategory 47 entries for each witness or companies involved. Sub-subcategory 49 entries could include “Educational History”, “Employment History”, “Company Origin”, etc.

Through the querying process between the attorney and the outline library 43, the attorney terminal 21 extracts a tailored outline for only those category, subcategory, etc. entries with indicated relevance in the particular lawsuit at issue. For example, in a lawsuit involving a patent count and an antitrust counterclaim, only the patent 51 and antitrust 50 entries in the category 45 would be included in the tailored outline. Moreover, in addition to selecting appropriate category 45 entries, the early query process also provides for automatic selection of the subcategory 47, sub-subcategory 49, etc., entries where possible.

Referring to FIG. 46, each entry in the outline library 43 contains a hierarchical framework of groupings of information for use by the attorney to manage a lawsuit. In particular, each category, subcategory, etc., entry, such as an entry 101, in the outline library 43 is hierarchically and directly associated with a relevance query grouping 103, a case law grouping 105, a discovery grouping 107, and a case evidence grouping 109. Where appropriate, the relevance query grouping 103 contains library pointers to a variety of textual queries stored in the supplemental library 92 that are used to determine whether a specific entry, the entry 101, is relevant in the case at issue.

The case law grouping 105 provides the attorney with a concise overview of the law at issue (i.e., the law listed in the entry 101). The case law grouping 105 consists of: 1) a headnote pointer structure 121, i.e., pointers to headnotes stored within the supplemental library 92 which provide an overview of the law at issue and identifying the associated burdens of proof; 2) a seminal case pointer structure 123, i.e., pointers to a seminal case or cases regarding the entry 101 which are stored within the case law library 63; 3) a selected treatise pointer structure 125, i.e., pointers to selected treatises regarding the entry 101 which are stored in the supplemental library 92; 4) a preset search structure 127, i.e., pointers to a list of search requests stored in the supplemental library 92 which are designed, for example, to retrieve the most recent relevant cases from the case law library 63 which relate to the entry 101; 5) a search context structure 129, i.e., a pointer or pointers to search context information stored within the supplemental library 92 which, for example, provides default log-in and library information for the case law library 63 to accelerate any searching conducted within the entry 101. If, however, the entry 101 happens to be an evidentiary entry, the entire case law grouping 105 may be empty. Where appropriate, prior to extracting the tailored outline from the outline library 43, the case law information provided by the case law grouping 105 receives specific tailoring to remove unnecessary details of case law which through the querying process prove to have no relevance in the specific lawsuit at issue.

Similarly, the discovery grouping 107 provides the attorney with a draft interrogatory pointer structure 141, a draft document requests pointer structure 143, and a draft question pointer structure 145 to access data items from the supplemental library 92 which the attorney may use to assist in the discovery process relating to the entry 101. Prior to extracting the tailored outline from the outline library 43, the draft discovery of the discovery grouping 107 receives specific tailoring by weaving the lawsuit specific information obtained through the querying process into draft discovery, and by removing discovery determined by the querying process to be irrelevant in the current lawsuit. Where beneficial, all of the draft discovery listings include tips and tactics regarding the discovery process of the entry 101.

The case evidence grouping 109 provides empty pointer structures to data items which the attorney adds to the case evidence library 91 over the entire duration of the lawsuit. Specifically, for served interrogatories and responses thereto which relate to the entry 101, an interrogatory pointer structure 161 is provided. For the questions and corresponding answers recorded during a deposition or trial relating to the entry 101, a Q&A pointer structure 163 is provided. Similarly, a document and things pointer structure 165 is provided for storing pointers to the produced documents and things relating to the entry 101. In addition, other pointer structures might also be included such as, for example, a work product pointer structure 167 (for pointing to annotations, notes, pleadings, etc.) and miscellaneous communications pointer structure 169 (for pointing to communications received from experts, other attorneys, clients and the so-called Artificial Intelligence routines of the attorney terminals).

Additional groupings such as a pretrial grouping 171 (which contains pointers to a set of jury instructions 173) may also be provided by the outline library 43. Moreover, other groupings might be added by the attorney manually. Groupings that the attorney decides are unnecessary may be easily removed from the tailored outline upon extraction from the online library 43 or at any time thereafter. If the attorney later determines that an unextracted or deleted grouping is needed, the tailored outline can be appropriately updated by interactively revisiting the outline library 43. Because many lawsuits span a year several years, the attorney may also periodically revisit the outline library 43 to update the groupings and data items thereunder. Of particular significance here involves updating the case law grouping 105. All of the specifics regarding the changes or additions made to the tailored outline can be reviewed interactively by the attorney as the update takes place, or after the update has been completed. The update review allows the attorney to consider the impact of the update changes and additions.
The outline library 43 also contains preset associations between the groupings of the various categorization entries where appropriate to assist the attorney in evaluating the tailored outline which has been extracted. For example, a specific draft interrogatory under one categorization entry might have preset associations with a headnote from the same entry, and with a treatise selection from a different categorization entry. In this way, the attorney can quickly display the legal basis behind the draft interrogatory. With the preset association framework provided by the outline library 43, the attorney need only create supplemental associations with specific case evidence, work product, etc., which comes to light during the lawsuit.

As previously articulated, although in the embodiment described in relation to FIG. 4b only structures of pointers to information are associated with a given categorization entry, in an alternate embodiment, instead of pointer structures, the actual information is stored within the hierarchical structure of the tailored outline. In addition, the pointer structures are merely linked-lists of pointers; however, various other data structures for associating pointers might also be used.

Once a tailored outline with its associated information groupings is extracted from the outline library 43, the attorney might further tailor the outline by: 1) manually adding a new category, subcategory, etc., entries; 2) adding to or modifying the contents of any of the groupings provided thereunder; 3) combining groupings or portions thereof; and 4) adding new groupings. Moreover, as previously stated, at anytime thereafter, the attorney may gain access to the outline library 43 to update or extract additional entries from the outline library 43 into the attorney's tailored outline.

Specifically, if the tailored outline is to be stored and maintained within the outline library 43, the extraction process involves the copying of the selected hierarchy of the categorization entries (along with associated information groupings), i.e., the tailored outline, into a working file stored within the outline library 43. Although not necessary, at any time thereafter, the attorney may choose to down-load the tailored outline, or portions thereof, for separate storage and maintenance. Alternatively, the extraction process might involve the direct down-loading of those portions of the outline library 43 selected as being part of the tailored outline. In such circumstances, permanent or intermediate storage and maintenance of the tailored outline within the outline library 43 would not be needed.

The attorney utilizes the tailored outline to begin filling the case evidence grouping 109 of each entry 101 in the tailored outline. For example, scanned documents are first directly stored into the case evidence library 91. Upon reviewing a given document, the attorney may identify an appropriate categorization entry 101, and store a pointer to that document in the document and things pointer structure 165.

During the filling process, the attorney marks evidence entered as significant, annotates, and makes specific associations where beneficial. For example, during a deposition, the attorney may annotate a given answer, or, while reviewing documents, the attorney might annotate a specific document. Annotations are stored in the case evidence library 91 and pointed to via the set of work product pointers 167.

Annotations are directly associated for example with a seminal case, an interrogatory, or any other unit of data within the entry 101 groupings. Associations may also be made between any such elements of information provided by the various groupings under the entry 101. For example, an association might be created between a document pointed to by the pointer structure 165 and a headnote from the pointers structure 121, or between a Q&A in one deposition with a Q&A from another deposition via the pointer structure 163.

FIG. 4c is a diagram providing an exemplary illustration of the pointer structures identified in FIG. 4b. Specifically, a pointer structure 175 (which is representative of any of the pointer structures of FIG. 4b) provides direct indexing of all data items within a specific grouping area, and indirect indexing of all associated data items. A pointer table 177 provides the basis for the indexing. The pointer table 177 contains entries for every data item contained within the specific grouping. For example, if the pointer structure 175 happened to be the headnote pointer structure 121 (FIG. 4b), each entry into the table 177 would correspond to a particular headnote associated with the categorization entry 101 (FIG. 4b).

Each entry in the table 177 consists of two fields: 1) a data item pointers field 179—each field entry for storing a pointer to a single data item, such as a data item 185, associated with the specific grouping; and 2) an association stack pointers field 181—each field entry storing a pointer to an association stack 189, such as an association stack 189. For example, if the pointer structure 175 happened to be the headnote pointer structure 121 (FIG. 4b), pointers to the text of each headnote would be stored in the data item pointers fields 179. A data item 185, i.e., in this example a single headnote, can be easily located via a pointer stored in an entry 183 of the fields 179. Similarly, to identify all associations made with the data item 185, a corresponding entry 187 provides a pointer to the association stack 189 which, in turn, provides a list of pointers each of which points to an associated data item. For example, a pointer entry 191 stores a pointer which points to a data item 193 which has been associated with the data item 185.

When a new data item is added under a given grouping, a new entry is added to the table 177. If no associations exist to the data item, the newly added association stack pointers field 181 contains no pointer to an association stack. When an association is made, a new association stack is created with a single entry which contains a pointer to the association, and the pointer to the association stack is placed in the newly added association stack pointers field 181. In addition, the same process occurs for the data item being associated. For example, although not shown, wherever the data item 193 is directly referenced, an association stack will be created (or added to) to include an association to the data item 185.

FIG. 5a is a detailed perspective view illustrating an attorney terminal which provides a Roman numeric display of the categories and subcategories contained in a tailored outline according to the present invention. As previously described, the tailored outline 39 might have: 1) originated in whole or in part from the outline library 43; 2) been copied from another lawsuit; or 3) created manually in whole or in part.

To move through the tailored outline 39 using the Roman numeric display, a single click (button selection) of the mouse 31 of a "Patent Law" category entry 201 causes a deeper level of the hierarchical structure, i.e., the subcategories A–I, to either appear if they are not currently being displayed, or disappear if they are being
displayed. In other words, the single clicking of the mouse 31 acts to expand or collapse a branch in the hierarchical structure of the tailored outline 39. Similarly, the attorney may expand or collapse any categorization level in the tailored outline 39. For example, referring to FIG. 5b, the attorney single clicks on the "Invaliity" subcategory entry 203, and the sub-subcategories 1-2 appear. Single clicking on the entry 203 a second time would likewise collapse the tailored outline back to the level shown in FIG. 5a.

While using the Roman numeric display, the information contained within any category, subcategory, etc., in the tailored outline 39 can be accessed by "double clicking" the mouse 31, i.e., two sequential button selections of the desired category, subcategory, etc. After double clicking, the screen 23 displays the underlying groupings of the selection as illustrated in FIG. 5c. FIG. 5c also illustrates the use of the single mouse clicking to expand the Case Law grouping to reveal the types of data A-E contained therein. By double clicking on any of the types of data A-E, a stack window 211, for summarily (one line per entry) displaying all of the items of the selected type of data, and an edit window 213, for fully displaying a selected item and providing full editing capability therefrom, are opened as is illustrated in FIG. 5d. In particular, upon selecting the "Headnote" type of data 205 (FIG. 5c), the stack window 211 displays a stacked listing of single sentence summaries of each headnote (HN), such as headnotes 221, 223, 225 and 227 in FIG. 5d, pointed to within the specifically selected categorization entry (i.e., category, subcategory, etc.).

Upon double clicking the mouse 31 a given entry in the stack window 211, the edit window 213 opens to display (and editing) of the full text of the headnote (FIG. 5d). Additional headnotes may be added via the command line 33 and the edit window 213. Headnotes might also be modified or deleted via the edit window 213. Headnotes determined to have particular significance might also be marked, annotated, or associated with any other data item or items within the tailored outline. All associations between data items stored in the libraries 63, 91 and 92 are actually associations between pointers to those data items. The tailored outline contains the pointer associations within the hierarchy of the pointer structures.

In downloading the tailored outline (or portions thereof) to the attorney terminals, the attorney has several choices. The attorney may choose to download only the pointers and structure of the tailored outline without the actual data items within the libraries 63, 91 and 92. Specific access to the actual data items stored in the libraries 63, 91 or 92 would be managed via the link 23. Alternatively, the attorney may choose to also download all of the case evidence library 91, and all of the related case law and supplemental data items from the libraries 63 and 92. Instead of downloading all data items, however, the attorney might only download the data items currently considered relevant, for example, in an upcoming deposition.

In order to delete from the hierarchical structure of the tailored outline 39, the attorney need only single click the mouse 31 to identify the categorization entry to be deleted, and then select a delete command from the command line 33. Deleting the categorization entry also causes all deeper levels in the hierarchical structure to be deleted. In other words, deleting a category results in the deletion of corresponding subcategories, sub-subcategories, sub-sub-subcategories, and so on. In this way, the attorney can quickly and easily close off all branches in the hierarchy of the tailored outline 39.

Instead of deleting an entire branch, however, the attorney might choose to only delete a specific grouping or one type of data contained therein. Following the same process as before, the attorney merely selects a group or a type of data and the delete command from the command line 33.

As previously described, at any time, the attorney may revisit the outline library 43 to add to the tailored outline 39. Manual additions might also be made. To do so, the attorney enters an outline edit mode via the command line 33, and then manually edits the displayed tailored outline as desired. By double clicking on a newly added categorization entry, a display such as is shown in FIG. 5e appears which provides access to the edit window 213 illustrated in FIG. 5d for adding specific data items under the types of data provided.

To aid the attorney in identifying whether a sub-level in the hierarchy exists for a given categorization entry, italics are used to illustrate a dead-end. For example, referring back to FIG. 5b, if the "Laches" entry labelled "C" had no further sub-levels of categorization thereunder, the entry would appear as "Laches", i.e., in italics. Similarly, to indicate that a categorization entry has no groupings of data thereunder, an underline is provided. Italics are also used to indicate that a grouping of data (FIG. 5c) has no data items thereunder, i.e., the pointer structures contain no entries. Both the italics and underline aid the attorney in parsing through, modifying or otherwise constructing the tailored outline 39.

Instead of using the interactive process, the attorney might request a printout of the entire outline or portion thereof, and redline the printout to eliminate or add to the tailored outline. The redlined version can be given to a paralegal or secretary who makes the modifications in the manner discussed above. Once the tailored outline has been completed, the entire contents of the tailored outline 39 can also be printed out in outline form for record keeping or to provide for manual access.

FIGS. 5e and 5f more clearly illustrate the association and annotation process. FIG. 5e provides a perspective view of an exemplary situation under which an attorney might desire to associate data items within the hierarchical structure of the tailored outline. Specifically, for example, during the review of scanned documents via the window 214, the attorney identifies a document 232 which tips off the attorney that the legal issue of marking might be involved. The attorney directs the attorney terminal 21 to display the marking headsheets, such as the headnote 221, in the window 211. This direction may occur through the Roman numeric outline as described above, or via a more graphical display mode illustrated and described in detail below.

After reviewing the headsheets, the attorney decides to generally associate the document 232 into the evidence grouping of the marking categorization entry, and to specifically associate the document 232 with the headnote 221. To accomplish this, the attorney merely selects an associate command 34 from the command line 33. Upon selecting the associate command 34, the association is indicated visually with an "@" character 222 placed in front of both the document 232 and the headnote 221. A pointer to the document is stored into the tailored outline (i.e., into the document and things pointer structure 165), and an association is made (as
described in relation to FIG. 4c) with both the document 232 and the headnote 221.

After associating two data items, if only one of the data items is currently being displayed, the other can easily be accessed and displayed. For example, when the attorney terminal 21 displays only the headnote 221, the attorney need only select a display association command (not shown) from the command line 33 to cause the associated document, in this situation the document 232, to be located and displayed. To view multiple associations, the window 211 displays a stack of all associated data items pointed to by a particular association stack, such as the association stack 189 (FIG. 4c). Through the window 211, the attorney may pick and choose those associated data items for full display by double clicking the mouse 31 on a selection.

FIG. 5 provides a perspective view of an exemplary situation under which the attorney might desire to annotate data items within the hierarchical structure of the tailored outline. As in the previous example, while reviewing scanned documents, the attorney encounters the document 232, and decides that a textual annotation is needed. The attorney adds the textual annotation via the window 234 by selecting an annotate command 36 from the command line 33. The window 234 appears and allows the attorney to type, store and directly associate the illustrated annotation. These annotations are made a note that is directly associated with a data item. Therefore, once created, all annotations are treated as any other data item having an association. In addition to textual data items, audio and video data items are also supported.

Although the Roman numeric display provided by the attorney terminals provides relatively simple access to all items of all of the types of data contained within the tailored outline 39, in many situations, a more selective graphical approach is preferred. FIGS. 6a, 6b, 7a and 7b illustrate the basic functionality of the graphical display of the tailored outline 39, which proves useful in situations where repeated access to specific groupings of data is common. FIG. 8 illustrates the use of selective marking of the outline library 43 of categorization entries and data contained therein. Selective marking provides for corresponding selective display of the outline library 43. Combining the graphical display with selective marking provides the attorney with easier access to the pertinent information within the tailored outline 39.

Specifically, FIG. 6a is a detailed perspective view of an attorney terminal which graphically displays specific groupings of case law information under certain subcategories of the outline library. In a graphical display mode, the attorney terminal screen is sectioned into three areas: 1) the command line 33, 2) a graphical display window 253, and 3) a stack window 254. The graphical display window 253 provides two levels of hierarchical display of categorization entries. For example, on an upper level 255, the category “Patent Law” is displayed. Below the “Patent Law” category, on a lower level 257, the subcategories “Invalidity”, “Laches”, “Ownership” and “Marking” are displayed.

To select other categorizations on the same level not currently displayed, slide bars 259 and 261 are provided. For example, to change to the Antitrust category (not shown), the attorney uses the slide bar 259 to step or scan through all of the categories available in the tailored outline 39 to identify the Antitrust category entry. As the slide bar 259 is moved, the block at the level 255 displays the name of each newly selected category. The categories are arranged in alphabetical order, aiding the attorney in locating the desired category. In addition, via double clicking on a slide bar button 260, a direct textual search for the desired categorization entry might also be made.

Similarly, the attorney moves the slide bar 261 to step or parse through an alphabetical listing of available subcategories at the lower level 257 (although an alphabetized subcategory display is not shown to aid in the labelling process of a Marking subcategory 263). A slide bar button 262 also provides direct textual categorization searching, via a double clicking of the left button of the mouse 31.

To move up and down through the hierarchical structure, the attorney merely selects and drops a block from one of the levels 255 or 257 to the other. The graphical display window 253 responds by stepping up or down through the hierarchy as directed. For example, if the attorney selects and drops the Invalidity subcategory to the upper level 255, the graphical window 253 would only display: 1) the Invalidity subcategory in place of the Patent Law category at the upper level 255; and 2) at the lower level 257, the sub-subcategories of “Best Mode”, “Enablement”, etc.

To display the groupings, types of data, or specific items contained by any categorization entry, as with the Roman numeric display, the attorney merely double clicks the mouse 31 on the desired block at either of the levels 255 or 257. Doing so causes that block to be displayed at the upper level 255, while the lower level 257 displays the groupings of data. Double clicking on a specific grouping causes that grouping to move to the upper level 255 while displaying the types of data at the lower level 257. Thereafter, double clicking on a specific type of data causes the stack window 254 to display the data items listed (i.e., pointed to) thereunder. Alternatively, to display groupings and items therein, a default configuration can be pre-selected via a display command 265 of the command line 33. Upon selecting the display command 265, a pull-down menu appears which provides for the pre-selection of the various groupings for display. Checking a grouping causes a side pull-down menu 267 to appear for pre-selection of the specific type of data to be displayed. Multiple groupings may be checked (pre-selected), and multiple types of data may also be checked from each checked grouping. Once pre-selection has been completed, upon clicking the right button of the mouse 31 to identify a particular categorization entry, the items of all of the pre-selected types of data from each pre-selected grouping of the categorization entry are displayed in the stack window 254.

For example, if an attorney pre-selects only the case law grouping and headnotes (“notes”), seminal cases (“cases”), treatise selections (“treatise”) and preset searches and search context (“searches”), and then selects the marking subcategory 263 with the right button of the mouse 31, the stack window 254 displays head notes 269 and 271, a treatise selection 273, and a seminal case 275.

Any of the entries in the stack window 254 can be selected, via a double click of the mouse 31, for full display in the edit window illustrated in FIG. 6b. As shown, the edit window 269 overlaps the stack window 254, but might instead overlap the graphical window 253 or both, depending on the circumstances, to provide for the display of other information. Similarly,
after a categorization selection has been made, the attorney will generally close or hide the graphical display window 253 to provide room for the display of other information.

The categorization entries available for display within the graphical display window 253 can be limited to only those entries marked as pertinent, as detailed below in reference to FIG. 8. Similarly, those groupings, types of data, and corresponding items which have been marked as pertinent can also be selectively displayed.

The pre-selection settings and the selectable pertinence marking not only provides for selective display of the tailored outline 39, but can also be used individually or in combination for limiting searching. In particular, upon selecting a search command from the command line 33, a default configuration may be made or modified which limits searching within the tailored outline 39 to areas which have been pre-selected. Similarly, a separate default configuration may also limit searching to those categorization entries, groupings, types of data, and items which have been marked as pertinent.

FIG. 7a is a detailed perspective view of an attorney terminal which graphically displays groupings of draft questions in the stack window 254 from the marking subcategory 263, for use in a deposition or trial proceeding. In preparing for a deposition or trial, although the Roman numeric display might be used, the attorney uses the graphical display window 253, stack window 254, and edit window 262 (FIG. 7b) to gather questions for use during an upcoming deposition.

The attorney first uses the graphical window 253 to locate the desired areas to be used based on the characteristics of the witness. An expert witness, for example, might be able to testify regarding the technical details of specific law or fact, while an eye witness might only offer a present sense impression regarding other factual issues relating to possibly other areas of law. FIG. 8, described below, further illustrates the process of limiting the categorization entries for a specific witness.

Once a categorization entry has been selected such as, for example, the marking subcategory 263, the attorney clicks the right button of the mouse 31, to display the default settings of the display command 265. In response, the stack window 254 displays the draft questions 281, 283, 285, and 287 associated with the subcategory marking 263 for potential use during the deposition or trial proceeding. As with all stack window 254 displays, additional entries in the stack (i.e., additional draft questions) can be accessed by a scrolling process.

By double clicking on a specific draft question such as the draft question 281, referring to FIG. 7b, an edit window appears for displaying the full text of the draft question. In this form, the attorney may modify the question if so desired via a variety of typical editing commands available through the command line 33. The command line 33 also provides for opening a clear edit window so that the attorney may draft a question from scratch. In addition, specific documents, case law, etc., may be directly associated with draft questions for reference during the deposition. Thus, the attorney utilizes the attorney terminal 31 in the outline mode to prepare for an upcoming deposition or trial proceeding.

Referring to FIG. 7c, during the deposition or trial proceeding, the attorney terminals are used in the deposition mode to recall the draft questions to aid the questioning process. To begin, the examining attorney merely selects a categorization entry for conducting questioning as previously described by locating and double clicking the mouse 31. For example, double clicking on the marking entry 263 causes the stack of draft questions to appear in the window 254. Thereafter, the attorney may use the draft questions and associations thereto in the questioning process.

Upon completing all of the questioning under a given categorization entry, the attorney merely locates and selects via the window 253 another categorization entry to display other draft questions related thereto. This process continues until all questioning regarding all categorization entries has been exhausted.

In addition to providing access to the corresponding draft questions, associations, case law and case evidence, the process of moving through the tailored outline while in the deposition mode also serves to automatically categorize all actual questions and answers asked during the proceeding. For example, all Q&A’s transcribed while under the marking categorization entry 263 are automatically added to the Q&A pointer structure 163 (FIGS. 4b and 4c).

The second chair attorney using the terminal 21 can also control the display of the terminal 19 used by the first chair attorney. For example, the second chair (associate) examining attorney can step through the hierarchical structure of the tailored outline instead of the first chair examining attorney while in the deposition mode. As categorization entries are selected, the draft Q&A’s can be displayed on both attorney terminals 19 and 21 under the control of the second chair attorney. Moreover, without controlling the first chair attorney’s display, the second chair attorney can also transmit specific draft Q&A’s as messages to the first chair examining attorney during the proceeding.

The examining attorney may also choose to only use the tailored outline for specific areas of the tailored outline, or for unanticipated areas of law that are uncovered and retrieved during the proceeding. As a result, in such circumstances, automatic categorization is not used. After the proceeding, the attorneys (or their paralegals) may then manually categorize all of the Q&A’s or only those Q&A’s considered significant.

FIG. 7d is a perspective diagram of the attorney terminal 19 operating in the deposition mode on a draft question retrieved from the tailored outline as illustrated in FIG. 7a. By double clicking on a retrieved draft question, the question 281, the edit window 282 enters an edit mode to display the full text of the question 281 as shown. In a transcription window 295, the terminal 19 displays a question 291 and a corresponding answer 293 which constitute real-time transcription received from the CAT system 11 (FIG. 2). As can be appreciated from the illustration, the examining attorney may use draft questions, such as the question 281, to directly formulate actual questions, such as the question 291, during the proceeding.

An attorney switches from the real-time transcription display (FIG. 7d) to the tailored outline display (FIG. 7a) as necessary to seek out and use draft questions during a deposition. The command line 33 provides for such switching between displays.

In addition, within the draft question, parenthesis are used to provide instructions to help the attorney understand a draft question. Brackets are used to indicate that further tailoring (modification) of the bracketed words might be in order. In addition, specific instructions or "tips" may be provided to instruct the user as to the formulation of a line of questioning.
Although not shown, the graphical display window also uses italics and underlining convention established with the Roman numeric display. Italics are used to indicate categorization dead-ends, while underlining indicates that underlying grouping items do not exist. In addition, when providing only a selective display of the information marked as pertinent, the italics and underlining convention applies only to the marked information in the tailored outline 39. For example, if items exist but none are marked as pertinent under a given subcategory, the subcategory will be displayed with an underline.

FIG. 8 is a perspective view illustrating the selection of categories, subcategories, etc., to be used during an upcoming deposition or trial, wherein, in view of the witness's anticipated knowledge, only those areas of the tailored outline considered pertinent are selected for later access during the proceeding. To select a section of the tailored outline 39 for inclusion in the deposition or trial proceeding, the attorney selects a pertinent mode from the command line 33, and scrolls through categorization entries to mark the desired entries via a single clicking of the mouse 31. Single clicking also causes the sub-categorization levels to appear if they exist for a more specific selection. Moreover, single clicking the categorization entry a second time causes the sub-categorization levels to disappear from the display, and causes the categorization entry to be unmarked as not being pertinent if no sub-categorization entry thereunder has been marked.

Double clicking of the mouse 31 acts to provide access to the underlying groupings as described in relation to FIG. 5c above. These too may be marked as pertinent, as can the underlying types of data and actual data items. However, if the groupings, types of data, and data items listed contain no pertinent marking, all will be considered marked as pertinent if the corresponding categorization entry is marked.

For example, the attorney may believe that because the deponent was not working at the plaintiff's company until a date after the assignment document was executed, the deponent will probably have no knowledge of an assignment. The attorney may then choose not to select “ownership” for selective display in the tailored outline for this particular witness. It may also be that the attorney has elected not to challenge ownership and therefore the ownership area is not included.

After selection, a bar background of a contrast color is placed around the selected categorization entry such as entries 301, 303, 305 and 307. If the attorney changes his mind, a selection may be un-selected by placing the cursor over the selection and again single clicking the mouse 31.

In an identical process, all of the information contained within any selected category, subcategory, etc., can be further screened to simplify the use of the tailored outline for a given witness during the deposition or trial proceeding. For example, specific draft questions can be selected, while the other discovery groupings might be ignored.

Thus, only those categorization entries and underlying data items anticipated to be relevant for a given witness are marked as pertinent for selective display and possibly selective searching during the deposition or trial proceeding. The pertinence marking is saved in a configuration file under the witnesses last name for later loading during the deposition.

The pertinence marking process is also automatically applied while in the Pretrial Mode to enumerate the documents and things, and the deposition designations to be used at trial. In particular, concurrent with the generation of the draft Exhibit and deposition designations lists, a pretrial configuration is generated which provides for selective display and searching of only those items selected in the Pretrial Mode. The pretrial configuration may be directly used at trial or might be loaded as a starting point in the continued narrowing of the tailored outline 39 for trial. Similarly, an attorney might desire to have specific pertinence selections stored for personal use outside of the trial or deposition context.

After the attorney has generated a witness specific pertinence marking configuration, the attorney can begin (or continue) to review and associate the pertinent evidence and pertinent case law with the pertinent draft questions. Questions might also have been selected as pertinent from previous depositions for reuse. Conflicting answers to reused questions can then immediately be pointed out by the attorney on the transcript record, forcing the witness to change his testimony or say that the previous witness was wrong. In either case, the veracity of one of the witnesses becomes a beneficial issue.

Typically, the attorney will have a paralegal prepare a witness kit which is merely a file and index of a copy of all documents which were authored by or addressed to the deponent. The attorney will review the documents in the witness kit for potential deposition exhibits as well as for formulating potential questions to add to the outline 39. If such documents have been scanned into the tailored outline 39, the witness kit review may take place fully on the attorney terminal. Therein, the attorney’s notes or annotations can be directly made and reviewed to the scanned image. Associating a scanned document image to a specific question or questions may provide the attorney with direct reference to the basis for the inquiry, for example. Similarly, documents, annotations, questions, case law, etc., might be associated with a communication from another terminal: 1) as illustrated in FIG. 2, to help guide the first chair attorney using the terminal 19 in conducting the questioning; or 2) as illustrated in FIG. 1, to help clarify the requests for information or receipts thereof.

Furthermore, if during the attorney’s review of the documentary evidence, he wishes to review case law to understand the import of a certain document, the attorney may use the tailored outline 39 to retrieve the law.

FIG. 9 is a perspective view providing further detail of the system configuration of attorney terminals operating in the Evidence Mode according to the present invention. In a trial or deposition proceeding, attorney terminals automatically track the status of the entry of Exhibits into the record.

Specifically, during a proceeding while in the Evidence Mode, the attorney terminal displays Exhibit entry information 321 in the stack window 254 while displaying the ongoing transcribed text of the proceeding in the transcription window 295. Each entry in the stack window 254 includes an indication of the exhibit number, date, time, and description of the results of the attempted entry.

When an attorney uses the term “Exhibit” during a deposition or at trial, the use of the word triggers an analysis of the status of that Exhibit number’s use in the lawsuit, for example, as occurs in response to a tran-
scribed statement 331 from a moving attorney. If the use of an Exhibit is detected, the attorney terminal compares the Exhibit number to a list of Exhibits already entered into the record. This list is contained in the chronologically ordered listing displayed in the stack window 321. If the Exhibit number already exists, the attorney terminal 21 considers the use acceptable and continues the monitoring process. If, however, as illustrated, the Exhibit number does not exist, the attorney terminal 21 further analyzes the context of the usage to determine whether a proper attempt has been made to enter the Exhibit into the record, and, if so, whether objections were stated, and whether the attempt was successful.

To determine whether a proper attempt to enter the Exhibit has occurred, the attorney terminal analyzes the unit of speech containing the usage of the new Exhibit number, i.e., most likely the current question being asked, to determine whether the attorney is attempting to enter the Exhibit into the record. In FIG. 9, the unit of speech is the transcribed statement 331. Specifically, the determination is made based on the presence of key terms such as "mark" for a deposition proceeding and "move" for trial. If the use of the term "Exhibit" is determined to be for an attempted entry into the record, the terminal 21 updates the Exhibit list and displays a message to the attorney indicating that a new Exhibit has been added, for example, as illustrated by a new entry 337. If the determination is incorrect, the message acts as a warning to the attorney that an improper attempted entry of the Exhibit has been made. Similarly, if the determination is made that the new Exhibit has been improperly used, i.e., without proper entry, the attorney terminal 21 displays a warning message to that effect.

Upon determining that a proper attempt to enter an Exhibit has been made, the terminal 21 automatically evaluates the subsequent units of speech, i.e., transcribed speech units 333 and 335, to identify any related objections and, if so and at trial, to identify the judge's ruling. Upon identifying any objections raised, the attorney terminal 21 adds the objections to the new entry, entry 337, in the Exhibit list. If the judge makes a ruling, as is illustrated by the unit 335, that ruling is associated with the Exhibit list. The Exhibit list contained within the stack window 254 also automatically, directly associates the corresponding exchanges between the parties and the judge, i.e., the units 331, 333 and 335, for later review. Upon double clicking on any of the exhibit list entries, as with any stack window 254 entry, an edit window (not shown) is used to provide for modifying the entry if necessary. In addition, upon clicking the right button of the mouse 31, the transcription window 295 automatically displays the associated corresponding exchanges.

In addition, it is also contemplated that the tailored outline 39 may directly store all lawsuit information including case evidence, case law and work product. However, as FIGS. 4b and 4c illustrate, the tailored outline 39 merely points to the separate lawsuit information. The tailored outline 39 and lawsuit information can be stored locally (within the attorney terminal), remotely (at possibly a dial-up location), or distributed between the two. Storage remotely carries the advantage of creating a common access point for use by all of the attorneys on the lawsuit. A remote, common access point provides for easier back-up and maintenance than that required in a distributed system. One drawback, however, is that the access may sometimes be slow or unavailable because of faulty or nonexistent communication links. To accommodate such situations, the attorney terminals may use the pertinence selection process to extract for local storage portions of the remotely stored tailored outline 39 before going to a deposition. Upon returning, the newly added information in the extracted local portion of the tailored outline 39 is automatically extracted into the remote tailored outline 39 to bring it up-to-date.

In addition, as generally illustrated by FIGS. 7a-c, any data items contained within the tailored outline can be used inside or outside of a legal proceeding. For example, by selecting a preset search request with the corresponding search context from the pointer structures 127 and 129, in a similar process as described in FIGS. 7a-c, a search request may be executed immediately or after minor modification to perform either a boolean or natural language search on the case law library 63. Similarly, draft jury instructions might be accessed, displayed, modified, and printed for preparing a Pretrial Order.

During a proceeding, should a particular categorization entry not be contained in the selected tailored outline 39, the attorney may use an attorney terminal to access the outline library 43 to retrieve generic Q's, law, etc., during a deposition. For example, if during the deposition the examining attorney asks:

Q78. Now what makes you think that my client copied your invention?

A78. Your client stole my product out of my engineering department.

The examining attorney immediately searches his brain for the law of slander and libel. What does he need to prove? He may or may not know. The questioning continues:

Q79. Did you tell anyone about this?

A79. Yes, I told my sales force.

Q80. Did you tell your independent sales reps about this?

A80. Yes.

The examining attorney decides that he desires more testimony on this issue in the next 5 minutes before the witness' counsel, the defending attorney, walks the witness outside for counseling regarding the law.

While the first chair struggles for questions, the second chair attorney may use the terminal 21 to quickly access the categorization entries in the outline library 43 regarding the law of slander and libel. Instant access is provided to case law information, i.e., the types of data contained under the case law grouping and to associated draft questions which may have been at least partially tailored to the lawsuit at issue. Thereafter, the second chair attorney may send the draft questions and case law information in whole or in part to the first chair examining attorney along the link 23 (FIG. 2). In addition, although not as desirable, the first chair attorney may manage direct access to the outline library 43 himself without assistance from the second chair attorney 29.

Although the second chair attorney is illustrated as being physically located at the legal proceeding in FIG. 2, the second chair attorney might also be remotely located. Similarly, any of the other attorneys, paralegals, experts, or clients might also step in to assist the attorney(s) during the deposition, these individuals being either locally or remotely located.
Moreover, it is obvious that the embodiments of the present invention described hereinafore are merely illustrative and that other modifications and adaptations may be made without departing from the scope of the appended claims.

We claim:

1. A transcription system used to convert words spoken during a transcription proceeding to a textual form for real time display and categorization comprising:
   transcription means for producing, in real time, transcript signals representative of spoken words;
   outliner means providing for the creation and modification of an outline of categories which relate to the transcription proceeding;
   selection means for displaying during the transcription proceeding a selected category from the outline of categories; and
   association means for automatically classifying in real time all transcript signals produced by said transcription means as belonging to the category currently selected and displayed.

2. The transcription system of claim 1 wherein the selection means also provides for the automatic display of previously categorized information upon selection of a category from the outline of categories.

3. The transcription system of claim 1 further comprising:
   a communication network for receiving communications; and

4. The transcription system of claim 1 wherein the selection means also provides for the automatic display of previously categorized draft questions upon selection of a category from the outline of categories.

5. A transcription system used to convert words spoken during a transcription proceeding to a textual form for real time display comprising:
   transcription means for producing, in real time, transcript signals representative of spoken words;
   a communication network for receiving communications;
   outliner means providing for the creation and modification of an outline of categories which relate to the transcription proceeding;
   selection means for automatically displaying of one category of previously categorized information from the outline of categories; and
   association means for automatically classifying in real time each communication received via said communication network as belonging to the category currently selected and being displayed.

6. The transcription system of claim 5 wherein said association means also automatically classifies in real time all transcript signals produced by said transcription means as belonging to the category currently selected and displayed.
The USA PATRIOT Act: A Legal Analysis

April 15, 2002

Charles Doyle
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The USA PATRIOT Act: A Legal Analysis

Summary

The USA PATRIOT Act passed in the wake of the September 11 terrorist attacks. It flows from a consultation draft circulated by the Department of Justice, to which Congress made substantial modifications and additions. The stated purpose of the Act is to enable law enforcement officials to track down and punish those responsible for the attacks and to protect against any similar attacks.

The Act grants federal officials greater powers to trace and intercept terrorists’ communications both for law enforcement and foreign intelligence purposes. It reenforces federal anti-money laundering laws and regulations in an effort to deny terrorists the resources necessary for future attacks. It tightens our immigration laws to close our borders to foreign terrorists and to expel those among us. Finally, it creates a few new federal crimes, such as the one outlawing terrorists’ attacks on mass transit; increases the penalties for many others; and institutes several procedural changes, such as a longer statute of limitations for crimes of terrorism.

Critics have suggested that it may go too far. The authority to monitor e-mail traffic, to share grand jury information with intelligence and immigration officers, to confiscate property, and to impose new book-keeping requirements on financial institutions, are among the features troubling to some.

The Act itself responds to some of these reservations. Many of the wiretapping and foreign intelligence amendments sunset on December 31, 2005. The Act creates judicial safeguards for e-mail monitoring and grand jury disclosures; recognizes innocent owner defenses to forfeiture; and entrusts enhanced anti-money laundering powers to those regulatory authorities whose concerns include the well being of our financial institutions.

This report, stripped of its citations and footnotes, is available in an abbreviated form as The USA PATRIOT Act: A Sketch, CRS Rep.No. RS21203. In addition, much of the information contained here may also be found under a different arrangement in a report entitled, Terrorism: Section by Section Analysis of the USA PATRIOT Act, CRS Rep.No. RL31200 (Dec. 10, 2001). A wider array of terrorism-related analysis appears on the CRS terrorism electronic briefing book page.
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The USA PATRIOT Act: A Legal Analysis

Introduction

Congress passed the USA PATRIOT Act (the Act) in response to the terrorists’ attacks of September 11, 2001.\(^1\) The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to further close our borders to foreign terrorists and to detain and remove those within our borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it is not without safeguards, critics contend some of its provisions go too far. Although it grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough.


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1 P.L. 107-56, 115 Stat. 272 (2001); its full title is the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT).”

2 H.R. 2975 was introduced by Representative Sensenbrenner for himself and Representatives Conyers, Hyde, Coble, Goodlatte, Jenkins, Jackson-Lee, Cannon, Meehan, Graham, Bachus, Wexler, Hostettler, Keller, Issa, Hart, Flake, Schiff, Thomas, Goss, Rangel, Berman and Lofgren; S.1510 by Senator Daschle for himself and Senators Lott, Leahy, Hatch, Graham, Shelby and Sarbanes.

3 H.R. 3004 was introduced by Representative Oxley for himself and Represenatives LaFalce, Leach, Maloney, Roukema, Bentsen, Hooley, Bereuter, Baker, Bachus, King, Kelly, Gillmore, Cantor, Riley, Latourette, Green (of Wisconsin), and Grucci; and reported out of the House Financial Services Committee with amendments on October 15, 2001, H.R.Rep.No. 107-250. H.R. 3004, as reported out, included Internet gambling amendments that were not included in H.R. 2975/H.R.3108.
The Department’s proposal, dated September 20, 2001, came with a brief section by section analysis. Both the proposal (Draft) and analysis (DoJ) were printed as an appendix in Administration's Draft Anti-Terrorism Act of 2001, Hearing Before the House Comm. on the Judiciary, 107th Cong., 1st Sess. 54 (2001).

Criminal Investigations: Tracking and Gathering Communications

A portion of the Act addresses issues suggested originally in a Department of Justice proposal circulated in mid-September. The first of its suggestions called for amendments to federal surveillance laws, laws which govern the capture and tracking of suspected terrorists’ communications within the United States. Federal law features a three tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications.

The tiers reflected the Supreme Court’s interpretation of the Fourth Amendment’s ban on unreasonable searches and seizures. The Amendment protects private conversations, Berger v. New York, 388 U.S. 41 (1967); Katz v. United States, 389 U.S. 347 (1967). It does not cloak information, even highly personal information, for which there is no individual justifiable expectation of privacy, such as telephone company records of calls made to and from an individual's home, Smith v. Maryland, 442 U.S. 735 (1979), or bank records of an individual's financial dealings, United States v. Miller, 425 U.S. 435 (1976).

Congress responded to Berger and Katz, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications, 18 U.S.C. 2511. At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious

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4 The Department’s proposal, dated September 20, 2001, came with a brief section by section analysis. Both the proposal (Draft) and analysis (DoJ) were printed as an appendix in Administration's Draft Anti-Terrorism Act of 2001, Hearing Before the House Comm. on the Judiciary, 107th Cong., 1st Sess. 54 (2001).


6 “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,” U.S. Const. Amend. IV.

7 Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of one or more predicate offense, 18 U.S.C. 2516.

The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement), 1751 (presidential and presidential staff assassination, kidnapping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnapings, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or naturalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations, 18 U.S.C. 2518. The court notifies the parties to any conversations seized under the order after the order expires, 18 U.S.C. 2518(8).

Below Title III, the next tier of privacy protection covers some of those matters which the Supreme Court has described as beyond the reach of the Fourth Amendment protection – telephone records, e-mail held in third party storage, and the like, 18 U.S.C. 2701-2709 (Chapter 121). Here, the law permits law enforcement access, ordinarily pursuant to a warrant or court order or under a subpoena in some cases, but in connection with any criminal investigation and without the extraordinary levels of approval or constraint that mark a Title III interception, 18 U.S.C. 2703.

Least demanding and perhaps least intrusive of all is the procedure that governs court orders approving the government’s use of trap and trace devices and pen registers, a kind of secret “caller id”, which identify the source and destination of calls made to and from a particular telephone, 18 U.S.C. 3121-3127 (Chapter 206). The orders are available based on the government’s certification, rather than a finding of the court, that the use of the device is likely to produce information relevant to the investigation of a crime, any crime, 18 U.S.C. 3123. The devices record no more than the identity of the participants in a telephone conversation, but neither the orders nor the results they produce need ever be revealed to the participants.

The Act modifies the procedures at each of the three levels. It:

offense involving counterfeiting punishable under 18 U.S.C. 471, 472, or 473; (e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States; (f) any offense including extortionate credit transactions under 18 U.S.C. 892, 893, or 894; (g) a violation of 31 U.S.C. 5322 (dealing with the reporting of currency transactions); (h) any felony violation of 18 U.S.C. 2511 and 2512 (interception and disclosure of certain communications and to certain intercepting devices); (i) any felony violation of 18 U.S.C. ch. 71 (obscenity); (j) 49 U.S.C. 60123(b) (destruction of a natural gas pipeline), 46502 (aircraft piracy); (k) 22 U.S.C. 2778 (Arms Export Control Act); (l) the location of any fugitive from justice from an offense described in this section; (m) a violation of 8 U.S.C. 1324, 1327, or 1328; (n) any felony violation of 18 U.S.C. 922, 924 (firearms); (o) any violation of 26 U.S.C. 5861 (firearms); (p) a felony violation of 18 U.S.C. 1028 (production of false identification documents), 1542 (false statements in passport applications), 1546 (fraud and misuse of visas, permits, and other documents) or a violation of 8 U.S.C. 1324, 1327, or 1328 (smuggling of aliens); (p) 229 (chemical weapons), 2332 (terrorist violence against Americans overseas), 2332a (weapons of mass destruction), 2332b (multinational terrorism), 2332d (financial transactions with countries supporting terrorism), 2339A (support of terrorist), 2332B (support of terrorist organizations); (r) any conspiracy to commit any of these, 18 U.S.C. 2516(1) (crimes added by the Act in italics). Other than telephone face to face conversations (i.e., electronic communications), the approval of senior Justice Department officials is not required and an order may be sought in any felony investigation, 18 U.S.C. 2516(3).

Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
• permits pen register and trap and trace orders for electronic communications (e.g., e-mail)

• authorizes nationwide execution of court orders for pen registers, trap and trace devices, and access to stored e-mail or communication records

• treats stored voice mail like stored e-mail (rather than like telephone conversations)

• permits authorities to intercept communications to and from a trespasser within a computer system (with the permission of the system’s owner)

• adds terrorist and computer crimes to Title III’s predicate offense list

• reenforces protection for those who help execute Title III, ch. 121, and ch. 206 orders

• encourages cooperation between law enforcement and foreign intelligence investigators

• establishes a claim against the U.S. for certain communications privacy violations by government personnel

• terminates the authority found in many of the these provisions and several of the foreign intelligence amendments with a sunset provision (Dec. 31, 2005).

Pen Registers and Trap and Trace Devices. In section 216, the Act allows court orders authorizing trap and trace devices and pen registers to be used to capture source and addressee information for computer conversations (e.g., e-mail) as well as telephone conversations, 18 U.S.C. 3121, 3123. In answer to objections that e-mail header information can be more revealing than a telephone number, it creates a detailed report to the court, 18 U.S.C. 3123(a)(3).11

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11 "Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public the agency shall ensure that a record will be maintained which will identify – (i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of the such device.

"(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof)," section 216(b)(1).
The use of pen registers or trap and trace devices was limited at one time to the judicial district in which the order was issued, 18 U.S.C. 3123 (2000 ed.). Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States, 18 U.S.C. 3123(b)(1)(C), 3127(2).12

Communications Records and Stored E-Mail. With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber, 18 U.S.C. 2703(a),(b). A warrant will also suffice to seize records describing telephone and other communications transactions without customer notice, 18 U.S.C. 2703(c). In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation, officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records, 18 U.S.C. 2703(b),(c). They can obtain a limited amount of record information (subscribers’ names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena, 18 U.S.C. 2703(c)(1)(C). There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial, 18 U.S.C. 2705.

In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider’s customer records, 18 U.S.C. 2703(c)(1)(C).13

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.

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12 The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” DoJ at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

13 Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user's true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” DoJ at §107.
Previously, only a federal court in the district in which the e-mail was stored could issue the order. Under section 220, federal courts in the district where an offense under investigation occurred may issue orders applicable “without geographic limitation,” 18 U.S.C. 2703.14

The Act, in section 209, treats voice mail like e-mail, that is, subject to the warrant or court order procedure, rather than to the more demanding coverage of Title III once required, United States v. Smith, 155 F.3d 1050, 1055-56 (9th Cir. 1998).

Finally, the Act resolves a conflict between chapter 121 and the federal law governing cable companies. Government entities may have access to cable company customer records only under a court order following an adversary hearing if they can show that the records will evidence that the customer is or has engaged in criminal activity, 47 U.S.C. 511(h). When cable companies began offering telephone and other communications services the question arose whether the more demanding cable rules applied or whether law enforcement agencies were entitled to ex parte court orders under the no-notice procedures applicable to communications providers.15 The Act makes it clear that the cable rules apply when cable television viewing services are

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14 Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

15 See e.g., DoJ at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement’s access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

**Electronic Surveillance.** To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202. A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(i). Yet only the interloper's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.

**Criminal Investigators' Access to Foreign Intelligence Information.** The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism. It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that “the purpose for the surveillance is to obtain foreign intelligence information,” 50 U.S.C. 1804(a)(7)(B)(2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps “the purpose” might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation

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16 18 U.S.C. 229 (chemical weapons), 2332(terrorist acts of violence committed against Americans overseas), 2332a(use of weapons of mass destruction), 2332b acts of terrorism transcending national boundaries), 2332d(financial transactions with countries which support terrorists), 2339A(providing material support to terrorists), and 2339B(providing material support to terrorist organizations).

17 “Because service providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves as permitted under current law, they often have no way to exercise their rights to protect themselves from unauthorized attackers. Moreover, such attackers can target critical infrastructures and engage in cyberterrorism,” DoJ at §106. Elsewhere the Act defines “electronic surveillance” for purposes of the Foreign Intelligence Surveillance Act (FISA) to emphasize that the law enforcement authority for this intruder surveillance does not confer similar authority for purposes of foreign intelligence gathering, section 1003 (50 U.S.C. 1801(f)(2)).

18 For a general discussion of federal intelligence and law enforcement cooperation, see, Best, Intelligence and Law Enforcement: Countering Transnational Threats to the U.S., CRS REP.NO. RL30252 (Dec. 3, 2001).
public officials were required to either end surveillance or secure an order under Title III.\textsuperscript{19}

The Justice Department sought FISA surveillance and physical search authority on the basis of “a” foreign intelligence purpose.\textsuperscript{20} Section 218 of the Act insists that foreign intelligence gathering be a “significant purpose” for the request for the FISA surveillance or physical search order, 50 U.S.C. 1804(a)(7)(B), 1823(a)(7)(B), a more
demanding standard than the “a purpose” threshold proposed by the Justice Department, but a clear departure from the original “the purpose” entry point. FISA once described a singular foreign intelligence focus prerequisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k), 1825(k).21

Protective Measures. The Act reenforces two kinds of safeguards, one set designed to prevent abuse and the other to protect those who assist the government. The sunset clause is perhaps the best known of the Act’s safeguards. Under the direction of section 224, many of the law enforcement and foreign intelligence authorities granted by the Act expire as of December 31, 2005.22 The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter

21 “(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. (2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, infra, quoting, 50 U.S.C. 1801.

22 “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210[ subpoenas for communications provider customer records], 211[ access to cable company communication service records], 213[ sneak and peek], 216[pen register and trap and trace device amendments], 221[ trade sanctions], and 222[assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005. “(b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers' communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices). Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees, but could not recover against the United States. Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice's Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government's request until a court order authorizing access can be obtained. Another allows providers to disclose customer records to protect the provider's rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others. A third section,

26 Prior law already granted service providers immunity for disclosure of customer records in compliance with a court access order, 18 U.S.C. 2703(f).
27 “Existing law contains no provision that allows providers of electronic communications service to disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies that threaten death or serious bodily injury. This section amends 18 U.S.C. §2702 to authorize such disclosures if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.

“Current law also contains an odd disconnect: a provider may disclose the contents of the customer's communications in order to protect its rights or property but the current statute does not expressly permit a provider to voluntarily disclose non-content records (such as a subscriber's login records). 18 U.S.C. 2702(b)(5). This problem substantially hinders the ability of providers to protect themselves from cyber-terrorists and criminals. Yet the right to disclose the contents of communications necessarily implies the less intrusive ability to disclose non-content records. In order to promote the protection of our nation's critical infrastructures, this section's amendments allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems,” DoJ at
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

**Foreign Intelligence Investigations**

Although both criminal investigations and foreign intelligence investigations are conducted in the United States, criminal investigations seek information about unlawful activity; foreign intelligence investigations seek information about other countries and their citizens. Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough.

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA), something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President's authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, United States v. United States District Court, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage

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28 Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

29 Thus in the name of assisting in the execution of Title III, chapter 121, or chapter 206 order, the courts may not cite the Act as the basis for an order compelling a service provider to make system modifications or provide any other technical assistance not already required under 18 U.S.C. 2518(4), 2706, or 3124(c), see, H.R.Rep.No. 107-236, at 62-3 (2001) (emphasis added) (“This Act is not intended to affect obligations under Communications Assistance for Law Enforcement Act [which addresses law enforcement-beneficial system modifications and the compensation to be paid for the changes], nor does the act impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance”).

30 E.g., As amended by section 902 of the Act, “‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2)(language added by the Act in italics).

31 50 U.S.C. 1801 et seq.
In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs. There were and still are extra lockers, 50 U.S.C. 1861-1863 (2000 ed.). Intelligence authorities gained narrow passages through other privacy barriers as well.32


33 “As used in this subchapter: (a) ‘Foreign power’ means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

“(b) ‘Agent of a foreign power’ means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of a foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C).

“(c) ‘International terrorism’ means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnaping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

“(d) ‘Sabotage’ means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

“(e) ‘Foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans ("United States persons,” i.e., citizens or permanent resident aliens). The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

• permits “roving” surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)

• increases the number of judges on the FISA court from 7 to 11

• allows application for a FISA surveillance or search order when gathering foreign intelligence is a significant reason for the application rather than the reason

• authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations

• sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses

• carries a sunset provision

• establishes a claim against the U.S. for certain communications privacy violations by government personnel

• expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to – (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States,” 50 U.S.C. 1801.

34 Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
**FISA.** FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases.\(^{35}\) It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

**Search and Surveillance for Intelligence Purposes.** Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, Draft at §151.\(^{36}\)

Section 901 of the Act address a concern raised during the 106th Congress relating to the availability of the FISA orders and the effective use of information gleaned from the execution of a FISA order.\(^{37}\) It vests the Director of Central

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\(^{36}\) See also, DoJ at §151, “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order’s minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed (50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

\(^{37}\) See e.g., S.Rep.No. 106-352, at 3, 6, 7 (2000)(“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application
Intelligence with the responsibility to formulate requirements and priorities for the use of FISA to collect foreign intelligence information. He is also charged with the responsibility of assisting the Attorney General in the efficient and effective dissemination of FISA generated information (50 U.S.C. 403-3(c)).

**Pen Registers and Trap and Trace Devices for Intelligence Gathering.** Section 214 grants the request of the Department of Justice by dropping requirements which limited FISA pen register and trap and trace device orders to facilities used by foreign agents or those engaged in international terrorist or clandestine intelligence activities, 50 U.S.C. 1842(c)(3)(2000 ed.). It is enough that the order is sought as part of an investigation to protect against international terrorism or clandestine intelligence activities and is not motivated solely by an American’s exercise of his or her First Amendment rights. Elsewhere (section 505), the Act drops a similar limitation for intelligence officials’ access to telephone records, 18 U.S.C. 3127.

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38 “When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevance, an additional factual showing that the communications device has been used to contact an ‘agent of a foreign power’ engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the ‘agent of a foreign power’ prong from the predication, and thus makes the FISA authority more closely track the criminal authority,” DoJ at §155.
Section 214 adjusts the language of the FISA pen register-trap and trace authority to permit its use to capture source and destination information relating to electronic communications (e.g., e-mail) as well as telephone communications, 50 U.S.C. 1842(d). The section makes it clear that requests for a FISA pen register-trap and trace order, like requests for other FISA orders, directed against Americans (U.S. persons) may not be based solely on activities protected by the First Amendment, 50 U.S.C. 1842, 1843.

Third Party Cooperation and Tangible Evidence. As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target's activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.

Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise to be entitled to confidentiality. Section 505, in response to the Justice Department's suggestion, allows FBI field offices to make the requests, see DoJ at §157 (“At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports’.

When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court’s order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.’ This would enhance the FBI’s ability to monitor international terrorists and intelligence officers who are
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian. The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities, in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B);
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a);
- the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a);
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v;

trained to thwart surveillance by rapidly changing hotel accommodations, cell phones, Internet accounts, etc., just prior to important meetings or communications. Under the current law, the government would have to return to the FISA Court for an order that named the new carrier, landlord, etc., before effecting surveillance. Under the proposed amendment, the FBI could simply present the newly discovered carrier, landlord, custodian or other person with a generic order issued by the Court and could then effect FISA coverage as soon as technically feasible,” DoJ at 152.


41 “The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigative contexts. The time and difficulty involved in getting such pleadings before the Court usually outweighs the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” DoJ at §156.

42 Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.\footnote{H.R.Rep.No. 107-205, at 60-1 (2001)(“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

“The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

“Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual's credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding--without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information”).

\footnote{See also, DoJ at §103, “This section facilities the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the...}
wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions.”

Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, Draft at §354.45

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, Draft at §154.46

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion.47 It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its

45 See also, DoJ at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.” Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officers

46 See also, DoJ at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”

47 Blair v. United States, 250 U.S. 273, 281 (1919) (the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

The Act, in section 203(a), allows disclosure of matters occurring before the grand jury to “any federal law enforcement, intelligence, protective, immigration, national defense, or national security” officer to assist in the performance of his official duties, F.R.Crim.P. 6(e)(3)(C)(iv).48

Critics may protest that the change could lead to the use of the grand jury for intelligence gathering purposes, or less euphemistically, to spy on Americans.49 The proposal was never among those scheduled to sunset, but earlier versions of the section followed the path used for most other disclosures of grand jury material: prior

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48 These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

49 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25 HARVARD JOURNAL OF LAW & PUBLIC POLICY 699, 719-20 (2002)(“There is a significant danger that the rule permitting disclosure will be treated as the de facto authorization of an expansion of the grand jury’s investigative role to encompass seeking material relevant only to matters of national security, national defense, immigration, and so forth. The grand jury’s awesome powers should not be unwittingly extended to a much wider range of issues. . . Since the grand jury operates in secret, there are no public checks on the scope of its investigations, and witnesses are not permitted to challenge its jurisdiction. Only the supervising court is in a position to keep the grand jury’s investigation within proper bounds. Requiring judicial approval of foreign intelligence and counterintelligence information disclosures would provide a natural check against the temptation to manipulate the grand jury to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6 (Nov. 2001)(“The grand jury secrecy rule is a rule of policy which has always had exceptions, and it has been frequently modified. The secrecy rule has no credible claim to constitutional stature”).
Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

Law enforcement officials may share Title III information with the intelligence community under the same conditions, section 203(b), although the grand jury and Title III sharing provisions differ in at least three important respects. The court need not be notified of Title III disclosures. On the other hand, the authority for sharing Title III information expires on December 31, 2005, section 224, and agencies and their personnel guilty of intentional improper disclosures may be subject to a claim for damages and disciplinary action, 18 U.S.C. 2520.

The third subsection of section 203 remains something of an enigma. It speaks in much the same language as its counterparts. It allows law enforcement officials to share information with the intelligence community, “notwithstanding any other provisions of law,” section 203(d). It either swallows the other subsections, or supplements them. Several factors argue for its classification as a supplement. Congress is unlikely to have crafted subsections (a), (b) and (c) only to completely

50 Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

51 “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person’s official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification. By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

**Increasing Institutional Capacity.** As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a

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52 *Duncan v. Walker*, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted) (“It is our duty to give effect, if possible, to every clause and word of a statute. *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)); see also *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879) (As early as in Bacon's Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

53 Draft at §154, “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”
computerized translation capability to be used in foreign intelligence gathering.\textsuperscript{54} Section 907 instructs the Director of the Central Intelligence, in consultation with the Director of the FBI, to report on the creation of a National Virtual Translation Center. The report is to include information concerning staffing, allocation of resources, compatibility with comparable systems to be used for law enforcement purposes, and features which permit its efficient and secure use by all of the intelligence agencies.

### Money Laundering

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture.\textsuperscript{55} The Act bolsters federal efforts in each area.

**Regulation.** Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.\textsuperscript{56}

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\textsuperscript{54} “The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

“The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so,” S.Rep.No. 107-63, at 11 (2001).

\textsuperscript{55} For a brief overview, see, Murphy, *Money Laundering: Current Law and Proposals*, CRS REP.NO. RS21032 (DEC. 21, 2001).

\textsuperscript{56} See e.g., 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
Records and Reports. For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler’s checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to file SARs as well,57 reflecting Congress’ view that the information provided the IRS may be valuable for other law enforcement purposes.58 This concern is likewise

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58 H.R.Rep.No. 107-250, at 38-9 (2001)(“Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

“Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a ‘Safeguard Procedures Report’ which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

“While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement
reflected in section 357 which asks the Secretary of the Treasury to report on the Internal Revenue Service’s role in the administration of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311 et seq.), and what transfers of authority, if any, are appropriate.

Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action.59 Section 355 expands the immunity to cover disclosures in authorities as the various reports mandated by the Bank Secrecy Act, which can typically be retrieved electronically from a database maintained by the Treasury Department. The differential access to the two kinds of reports is made anomalous by the fact that Form 8300 elicits much the same information that is required to be disclosed by the Bank Secrecy Act. For example, just as Form 8300 seeks the name, address, and social security number of a customer who engages in a cash transaction exceeding $10,000 with a trade or business, Currency Transaction Reports (CTRs) mandated by the Bank Secrecy Act require the same information to be reported on a cash transaction exceeding $10,000 between a financial institution and its customer”).

59 “Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

“First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor from civil liability applies in arbitration, as well as judicial, proceedings. Second, it amends section 5318(g)(3) to clarify the safe harbor’s coverage of voluntary disclosures (that is, those not covered by the SAR regulatory reporting requirement). The language in section 5318(g)(3)(A) providing that ‘any financial institution that *** makes a disclosure pursuant to *** any other authority *** shall not be liable to any person’ is not intended to avoid the application of the reporting and disclosure provisions of the Federal securities laws to any person, or to insulate any issuers from private rights of actions for disclosures made under the Federal securities laws.

“Subsection [351](b) amends section 5318(g)(2) of title 31—which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed—to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee’s official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
employment references to other insured depository financial institutions provided disclosure is not done with malicious intent.\textsuperscript{60}

The Financial Crimes Enforcement Network (FinCEN), a component within the Treasury Department long responsible for these anti-money laundering reporting and record-keeping requirements, 31 C.F.R. pt. 103, was administratively created in 1990 to provide other government agencies with an “intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes,” \textit{55 Fed.Reg.} 18433 (May 2, 1990).

The Act, in section 361, makes FinCEN a creature of statute, a bureau within the Treasury Department, 31 U.S.C. 310. Section 362 charges it with the responsibility of establishing a highly secure network to allow financial institutions to file required reports electronically and to permit FinCEN to provide those institutions with alerts and other information concerning money laundering protective measures, 31 U.S.C. 310 note.

\textbf{Special Measures.} In extraordinary circumstances involving international financial matters, the Act grants the Secretary of the Treasury, in consultation with other appropriate regulatory authorities, the power to issue regulations and orders involving additional required “special measures” and additional “due diligence” requirements to combat money laundering. The special measure authority, available under section 311, comes to life with the determination that particular institutions, jurisdictions, types of accounts, or types of transactions pose a primary money

\textsuperscript{60} 31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 67 (2001).
These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

31 U.S.C. 5318A. The circumstances considered in the case of a suspect jurisdiction are: evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction’s banking regulation; the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’ including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

‘Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate
business transactions.

“Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

“Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

“The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

“The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

“The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

“The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent’ account for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information that it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

“The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

“The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed
Due Diligence. Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.

by regulation, order, or otherwise as permitted by law. However, if the Secretary proceeds by issuing an order, the order must be accompanied by a notice of proposed rulemaking relating to the imposition of the special measure, and may not remain in effect for more than 120 days, except pursuant to a regulation prescribed on or before the end of the 120-day period. The fifth special measure may be imposed only by regulation,” H.R.Rep.No. 107-250, at 68-9.

See generally, H.R.Rep.No. 107-250, at 71-2 (“Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

“The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

“The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

“For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
General Regulatory Matters. The Act establishes several other regulatory mechanisms directed at the activities involving U.S. financial institutions and foreign individuals or institutions. Section 313, for instance, in another restriction on correspondent accounts for foreign financial institutions, prohibits U.S. financial institutions from maintaining correspondent accounts either directly or indirectly for foreign shell banks (banks with no physical place of business) which have no affiliation with any financial institution through which their banking activities are subject to regulatory supervision.

The Act, in section 325, empowers the Secretary of the Treasury to promulgate regulations to prevent financial institutions from allowing their customers to conceal their financial activities by taking advantage of the institutions’ concentration account practices.

The Secretary of the Treasury is instructed in section 326 to issue regulations for financial institutions’ minimum new customer identification standards and record-
keeping and to recommend a means to effectively verify the identification of foreign customers.\(^67\)

\(^67\) 31 U.S.C. 5318(l); H.R.Rep.No. 107-250, at 62-3 (2001)(“Section [326](a) amends 31 U.S.C. 5318 by adding a new subsection governing the identification of account holders. Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a ‘street name’ or omnibus account in the broker-dealer's name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to ‘look through’ the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund's customers. Thus, the fund would not be required to ‘look through’ the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature.

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

**Reports to Congress.** Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

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"Paragraph (6) requires that Treasury's regulations prescribed under paragraph (1) become effective within one year after enactment of this bill").

exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.69

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

**International Cooperation.** Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.70

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (i.e., the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.

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70 H.R.Rep.No. 107-250, at 67 (2001)(“This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury's progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

“The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime”).
**Crimes.** Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, smuggling, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
Section 329 makes it a federal crime to corruptly administer the money laundering regulatory scheme. Offenders are punishable by imprisonment for not more than 15 years and a fine of not more than three times the amount of the bribe.

Section 5326 of title 31 authorizes the Secretary of the Treasury to impose temporary, enhanced reporting requirements upon financial institutions in areas victimized by substantial money laundering activity (geographic targeting regulations and orders). Section 353 makes it clear that the civil sanctions, criminal penalties, and prohibitions on smurfing (structuring transactions to evade reporting requirements) apply to violations of the regulations and orders issued under 31 U.S.C. 5326. It also extends the permissible length of the temporary geographical orders from 60 to 180 days.

Violations of the special measures and special due diligence requirements of sections 311 and 312 are subject to both civil and criminal penalties by virtue of section 363's amendments to 31 U.S.C. 5321(a) and 5322. The amendments authorize civil penalties and criminal fines of twice the amount of the transaction but not more than $1 million. Criminal offenders would be subject to a fine in the same amount.

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71 “[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

“The definition of ‘financial institution’ in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of ‘commercial bank’ or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad--say to a Mexican bank--and launders them through a series of financial transactions, the government conceivably could not rely on the definition of a ‘financial institution’ in 1956(c)(6) to establish that the transaction was a ‘financial transaction’ within the meaning of 1956(c)(4)(B) (defining a ‘financial transaction’ as a transaction involving the use of a ‘financial institution’), or that it was a ‘monetary transaction’ within the meaning of 1957(f) (defining ‘monetary transaction’ as, inter alia, a transaction that would be a ‘financial transaction’ under 1956(c)(4)(B)).

“Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launders the proceeds of one of the crimes set forth on a list of ‘specified unlawful activities.’ 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),” H.R.Rep.No. 107-250, at 38 (2000).

Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.  

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents. They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

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73 The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business.

“Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.

“Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive,” H.R.Rep.No. 107-250, at 54 (2001).

74 “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
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- 18 U.S.C. 476 (taking impressions of tools used for obligations and securities) from 10 to 25 years;
- 18 U.S.C. 477 (possessing or selling impressions of tools used for obligations or securities) from 10 to 25 years;
- 18 U.S.C. 484 (connecting parts of different notes) from 5 to 10 years;
- 18 U.S.C. 493 (bonds and obligations of certain lending agencies) from 5 to 10 years;
- 18 U.S.C. 478 (foreign obligations or securities) from 5 to 20 years;
- 18 U.S.C. 479 (uttering counterfeit foreign obligations or securities) from 3 to 20 years;
- 18 U.S.C. 480 (possessing counterfeit foreign obligations or securities) from 1 to 20 years;
- 18 U.S.C. 481 (plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities) from 5 to 25 years;
- 18 U.S.C. 482 (foreign bank notes) from 2 to 20 years; and
- 18 U.S.C. 483 (uttering counterfeit foreign bank notes) from 1 to 20 years.

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

**Bulk Cash.** Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act’s bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting.\(^75\)

The section appears to be the product of reactions to the Supreme Court’s decision in *United States v. Bajakian*, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court’s

\(^75\) “For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).
As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency – representing the proceeds of drug trafficking and other criminal offenses – is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad.

Section 5316 of title 31 makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United States without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute,” H.R.Rep.No. 107-250 at 36-7 (2001).

Extraterritorial Jurisdiction. The Act makes 18 U.S.C. 1029, the federal statute condemning various crimes involving credit cards, PIN numbers and other access devices, applicable overseas if the card or device is issued by or controlled by an American bank or other entity and some article is held in or transported to or through the United States during the course of the offense, section 377. The change was part of the original Justice Department proposals. Justice explained that, “[financial crime] admits of no border, utilizing the integrated global financial network for ill purposes. This provision would apply the financial crimes prohibitions to conduct committed abroad, so long as the tools or proceeds of the crimes pass through or are in the United States,” DoJ at §408. The section, however, appears to limit the otherwise applicable extraterritorial jurisdiction implicit in section 1029, since federal courts would likely recognize extraterritorial jurisdiction over a violation.

Examination of forfeiture in false reporting cases under the Constitution's Excessive Fines Clause.

Section 5317 of title 31 once called for civil forfeiture of property traceable to a violation of 31 U.S.C. 5316 (reports on exporting or importing money instruments worth $10,000 or more). Section 372 of the Act recasts section 5317 to provide for civil and criminal forfeitures for violations of 31 U.S.C. 5316, of 31 U.S.C. 5313 (reports on domestic coins and currency transactions involving $10,000 or more) and of 31 U.S.C. 5324 (structuring transactions to evade reporting requirements (smurfing)).
under *either* circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.  

**Venue.** Section 1004 relies on *dicta* in *United States v. Cabrales*, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering, in the state and district in which the monetary transaction takes place. The Supreme Court in *Cabrales* held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in *dicta*, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.

**Forfeiture.** Forfeiture is the government confiscation of property as a consequence of crime. The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 et seq. (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

**Constitutional Considerations.** The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 et seq., which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the

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78 “The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed,” *U.S.Const.* Art.III, §2, cl.3.  

“[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,” *U.S.Const.* Amend. VI.

79 *See also, United States v. Rodriguez-Moreno*, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnaping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.

80 For general background information, see, Doyle, *Crime and Forfeiture*, CRS REP.NO. 97-139A (Oct. 11, 2000).
This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App.U.S.C. §5(b).

This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress's war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2),” DoJ at §159.

An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).

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excepted from the coverage of 18 U.S.C. 983. The challenge proceedings permit the court to admit evidence, such as hearsay evidence, that would not otherwise be admissible under the Federal Rules of Evidence if the evidence is reliable and if national security might be imperiled should dictates of the Federal Rules be followed, §316(b). The section recognizes the rights of claimants to proceed alternatively under the Constitution or the Administrative Procedure Act.

The Justice Department also recommended enactment of an overlapping provision which ultimately passed as section 806 of the Act without any real discussion of the relationship of the two sections. Section 806 authorizes confiscation of all property, regardless of where it is found, of any individual, entity, or organization engaged in domestic or international terrorism (as defined in 18 U.S.C. 2331), against the United States, Americans or their property, 18 U.S.C.

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83 18 U.S.C. 983(i)(2)(D).

84 "The exclusion of certain provisions of Federal law from the definition of the term ‘civil forfeiture statute’ in section 983(i) of title 18, United States Code, shall not be construed to deny an owner of property the right to contest the confiscation of assets of suspected international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C) subchapter II of chapter 5 of title 5, United States Code (commonly known as the ‘Administrative Procedure Act’)." Sec. 316(c)(1).

85 "Current law does not contain any authority tailored specifically to the confiscation of terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available current forfeiture laws require detailed tracing that is quite difficult for accounts coming through the banks of countries used by many terrorists.

‘This section increases the government’s ability to strike at terrorist organizations’ economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001,” DoJ, at §403. The House Report on H.R. 2975 which contained versions of both sections is no more explicit on the relation of the two sections.

86 “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
981(a)(1)(G). Section 806 as discussed below also calls for the more common confiscation of property derived from and or facilitating acts of domestic or international terrorism against the United States or its citizens. Confiscations under 806 may be challenged under the procedures of 18 U.S.C. 983, since they are not exempted there. To the extent that forfeiture under section 806 is based on international rather than domestic terrorism, claimants may also use the procedures of section 316.

Confiscation based solely on the fact that the property is owned by a criminal offender, rather than that it is derived from or facilitates some crime is fairly uncommon. It is the mark of common law forfeiture of estate. At common law, a felon forfeited all of his property. Most contemporary forfeiture statutes employ statutory forfeiture, a more familiar presence in American law, which consists of the confiscation of things whose possession is criminal, of the fruits of crime, and of the means of crime – untaxed whiskey, the drug dealer’s profits, and the rum runner’s ship.

Three characteristics set forfeiture of estate apart. The property is lost solely by reason of its ownership by a felon. All of a felon’s property is confiscated, not merely that which is related to the crime for which he is convicted. Finally, it occasions attainder which negates the felon’s right to hold property or for title to property to pass through him to his heirs. It was with this in mind, that the Framers declared that “no attainder of treason shall work corruption of blood or forfeiture exception during the life of the person attainted.” And for this reason, President Lincoln insisted that the confiscated real estate of Confederate supporters should revert their heirs at death.

87 Austin v. United States, 509 U.S. 602, 611-12 (1993)(“Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture . . . . Of England’s three kinds of forfeiture, only the third took hold in the United States”).


89 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal in personam proceedings following criminal conviction as a means of accomplishing confiscation.
Neither section 106 nor 806 require conviction of the terrorist property owner.\textsuperscript{90} Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers.\textsuperscript{91} The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners.\textsuperscript{92} Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them.\textsuperscript{93} The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate

\textsuperscript{90} Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c)(“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act”).

\textsuperscript{91} Silesian American Corp. V. Clark, 332 U.S. 469 (1947); cf., Societe Internationale v. Rogers, 357 U.S. 197, 211 (1958)(“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).

\textsuperscript{92} Zittman v. McGrath, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’”).

any presumption of remedial purposes.\textsuperscript{94} The same has been said of the applicability of the ex post facto clause.\textsuperscript{95}

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO.\textsuperscript{96} If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

**Other Forfeiture Amendments.** In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.\textsuperscript{97}

\textsuperscript{94} United States v. Ursery, 518 U.S. 267, 278 (1996).

\textsuperscript{95} See e.g., United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.), 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994).

\textsuperscript{96} DoJ, at §403.

\textsuperscript{97} 18 U.S.C. 1956(b). Cf., H.R.Rep.No. 107-250, at 54-5 (2001)(“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas. Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted

American Bank, 191 F.3d 30 (1st Cir. 1999).

“The second provision, modeled on 18 U.S.C. 1345(b), gives the district court the power to restrain property, issue seizure warrants, or take other action necessary to ensure that a defendant in an action covered by the statute does not dissipate the assets that would be needed to satisfy a judgment.

“This section also authorizes a court, on the motion of the Government or a State or Federal regulator, to appoint a receiver to gather and protect assets needed to satisfy a judgment under sections 1956 and 957, and the forfeiture provisions in sections 981 and 982. This authority is intended to apply in three circumstances: (1) when there is a judgment in a criminal case, including an order of restitution, following a conviction for a violation of section 1956 or 1957; (2) when there is a judgment in a civil case under section 1956(b) assessing a penalty for a violation of either section 1956 or 1957; and (3) when there is a civil forfeiture judgment under section 981 or a criminal forfeiture judgment, including a personal money judgment, under section 982.

“The amendment also makes section 1956(b) applicable to violations of section 1957. It applies to conduct occurring before the effective date of the Act”).

18 U.S.C. 981(k). H.R.Rep.No. 107-250, at 57-8 (2001)(“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank's customers.

“Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank's correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

“The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”).
defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation.\footnote{100}

Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here.\footnote{101} Section 320 enlarges this provisions to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements.\footnote{102} This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.\footnote{103}

\footnote{99} Cf., H.R.Rep.No. 107-250, at 58-9 (2001) ("Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of 'substitute assets' when the defendant has placed the property otherwise subject to forfeiture 'beyond the jurisdiction of the court.' Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

"This section amends 21 U.S.C. 853 to make clear that a court in a criminal case may issue a repatriation order--either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. 853(e) to restrain property--so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both").

\footnote{100} 18 U.S.C. 981(a)(1)(B).

\footnote{101} H.R.Rep.No. 107-250, at 56 (2001)("This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act").

\footnote{102} H.R.Rep.No. 107-250, at 59-60 (2001)("Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country.

"Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
A fugitive may not challenge a federal forfeiture. Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in “order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.”

to contest the restraining order could do so on the ground that 28 U.S.C. 2467 was not properly applied to the particular case, but could not oppose the restraining order on any ground that could also be raised in the proceedings pending in a foreign court. This provision prevents a litigant from taking ‘two bites at the apple’ by raising objections to the basis for the forfeiture in the Federal court that he also raised, or is entitled to raise, in the foreign court where the forfeiture action is pending. It complements the existing provision in section 2467(e) providing that the Federal court is bound by the findings of fact of the foreign court, and may not look behind such findings in determining whether to enter an order enforcing a foreign forfeiture judgment.

“This section also amends 28 U.S.C. 2467 to make clear that it is not necessary to prove that the person asserting an interest in the property received actual notice of the forfeiture proceedings. As is the case with respect to forfeitures under U.S. law, it is sufficient if the foreign nation takes steps to provide notice, in accordance with the principles of due process. See Gonzalez v. United States, 1997 WL 278123 (S.D.N.Y. 1997) (‘the [G]overnment is not required to ensure actual receipt of notice that is properly mailed’); Albajon v. Gugliotta , 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant's identifications, and mailed after claimant released from jail, is sufficient to satisfy due process, even if claimant never received notice); United States v. Schiavo , 897 F. Supp. 644, 648 49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; due process satisfied even if he did not receive the notice).

“Finally, 28 U.S.C. 2467 is amended to authorize the enforcement of a forfeiture judgment based on any foreign offense that would constitute an offense giving rise to a civil or criminal forfeiture of the same property if the offense had been committed in the United States. This is one of two safeguards that the statute contains against the enforcement of judgments that the United States does not consider appropriate for enforcement: if the judgment is based on an act that would not constitute a crime in the United States, such as removing assets from the reach of a repressive regime, it could not be enforced. In addition, section 2467 already provides that a foreign judgment may only be enforced by a Federal court at the request of the United States, and only after the Attorney General has certified that the judgment was obtained in accordance with the principles of due process. Thus, neither a foreign Government nor a foreign private party could enforce a foreign judgment on its own under this provision.”). Note that the safeguard to which the report refers is the range of foreign offenses that will support an enforceable confiscation order, i.e., drug offenses and crimes on the money laundering predicate offense list, and that the amendment narrows that safeguard by adding additional foreign offenses, i.e., any foreign equivalent of a federal crime which would support a confiscation order.

Alien Terrorists and Victims

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

Border Protection. The border protection provisions:

• authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401

• authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402

• remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404

• authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405

• authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.

• instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007

• direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418

• express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414

• add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415

• call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416

• limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
• instruct the Attorney General to report on the feasibility of using biometric scanners to help prevent terrorists and other foreign criminals from entering the country, section 1008

• authorize appropriations of $250,000 for the FBI to determine the feasibility of providing airlines with computer access to the names of suspected terrorists, section 1009

• authorize reciprocal sharing of the State Department’s visa lookout data and related information with other nations in order to prevent terrorism, drug trafficking, slave marketing, and gun running, section 413

Detention and Removal. Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity, 8 U.S.C. 1227 (a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(iv). Aliens may be inadmissible for any number of terrorism-related reasons, 8 U.S.C. 1182 (a)(3)(B). Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported.


Section 411 defines “terrorist organization” to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the Federal Register as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C.

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104 As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).
Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).


An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in “premeditated, politically motivated violence perpetrated against noncombatant targets,” or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security or endanger some individual or the general public. The Attorney General's determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

Victims. The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

- permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421
- extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422

105 “The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

106 “The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks.

“The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application.

“Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

“Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 31.

“Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.


107 “Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

“The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

“The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death),” H.R.Rep.No. 107-236, at 68 (2001).”

108 “Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien’s 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien’s 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
• a denial of benefits of the Act to terrorists and their families, section 427

• authority for the Attorney General to establish evidentiary standards to implement the alien victim provisions of the Act, section 426.

Other Crimes, Penalties, & Procedures

New Crimes. The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department, the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offenses for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents, 18 U.S.C. 175b. Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.

109 “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . . .” DoJ at §305.

110 The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

111 “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2) (“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.\(^{112}\)

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D). The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

\(^{112}\) U.S. Const. Art.III, §2, cl.3 (“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . .”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . .”); United States v. Cabrales, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from Cabrales when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnaping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999)(“By way of comparison, last Term in [Cabrales] we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).
The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of ‘material support or resources’ is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’),” DoJ, at §304.

Finally, the section announces that a prosecution for violation of section 2339A (support of terrorists) may be brought where the support is provided or where the predicate act of terrorism occurs. There may be some question whether the Constitution permits prosecution where the predicate act occurs.

Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.


113 The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of ‘material support or resources’ is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’),” DoJ at 306.


115 “The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill (‘Federal terrorism offenses’) is used in identifying the relevant crimes,” DoJ, at §304.


• chemical weapons offenses, 18 U.S.C. 229;
• terrorist attacks on mass transportation, 18 U.S.C. 1993;
• sabotage of a nuclear facility, 42 U.S.C. 2284; and
• sabotage of interstate pipelines, 49 U.S.C. 60123(b).

And it adds expert advice or assistance to the types of assistance that may not be provided under section 2339A. This last addition may encounter the same First Amendment vagueness problems some courts have found in assistance which takes the form of “training” and “personnel,” Humanitarian Law Project v. Reno, 205 F.3d 1130, 1137-136 (9th Cir. 2000). Finally, the section announces that a prosecution for violation of section 2339A (support of terrorists) may be brought where the support is provided or where the predicate act of terrorism occurs. There may be some question whether the Constitution permits prosecution where the predicate act occurs.
New Penalties. The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. 3571(b),(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense. 117

The proposal, however, failed to identify the critical elements that would trigger the alternative. 118 Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

• for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

• for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

117 Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersedes lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,” DoJ, at §302.

118 A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense,” Draft at §302.
• for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;

• for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;

• for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;

• for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and

• for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism.\footnote{The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §§846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists. “This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.} Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:

• arson committed within a federal enclave, 18 U.S.C. 81;
• killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);
• destruction of communications facilities, 18 U.S.C. 1362;
• destruction of property within a federal enclave, 18 U.S.C. 1363;
• causing a train wreck, 18 U.S.C. 1922;
• providing material support to a terrorist, 18 U.S.C. 2339A;
• torture committed overseas under color of law, 18 U.S.C. 2340A;
• sabotage of a nuclear facility, 42 U.S.C. 2284;
When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years).

The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission), a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

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120 Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

121 “Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.

“This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders).122

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

Other Procedural Adjustments. In other procedural adjustments designed to facilitate criminal investigations, the Act:

• increases the rewards for information in terrorism cases
• expands the Posse Comitatus Act exceptions
• authorizes “sneak and peek” search warrants
• permits nationwide and perhaps worldwide execution of warrants in terrorism cases
• eases government access to confidential information
• allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
• lengthens the statute of limitations applicable to crimes of terrorism
• clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
• adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B.123

122 It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, e.g., damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

123 When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001)(remarks of Rep. Sensenbrenner); for general background, see, Doyle, McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys, CRS REP.NO. RL30060 (Dec. 14, 2001).
Rewards. The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L.105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism.124

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

Posse Comitatus. The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.125

Delayed notification of a search (sneak and peek). Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take

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124 The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct threat assessments for federal agencies, and to reimburse federal agencies for the costs of detaining terrorist suspects overseas.

125 For a general discussion of the Posse Comitatus Act, see, Doyle, The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law, CRS REP.NO. 95-964 (June 1, 2000).
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, Richards v. Wisconsin, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, Wilson v. Arkansas, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, Dalia v. United States, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, cf., United States v. Miller, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, United States v. Freitas, 800 F.2d 1451, 1453 (9th Cir. 1986).126

126 The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in United States v. New York Telephone Co., 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth
The Second Circuit was less convinced and preferred to hold sneak and peek searches to the demands of Rule 41, United States v. Pangburn, 983 F.2d 449 (2d Cir. 1993). The Fourth Circuit was, if anything, less convinced. Moreover, the facts in the case demonstrate the potential impact of the issue on computer privacy, United States v. Simons, 206 F.3d 392 (4th Cir. 2000).

Amendment, demands that surreptitious entries be closely circumscribed,” United States v. Freitas (Freitas I), 800 F.2d 1451, 1455-456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, United States v. Freitas (Freitas II), 856 F.2d 1425 (9th Cir. 1988).

“ ‘No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in Dalia v. United States, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in Dalia, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property. . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. See United States v. New York Telephone Co., 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . . Although the Freitas I court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in United States v. Villegas, 899 F.2d 1324 (1999). Although the Freitas I court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in Villegas. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the Freitas I court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” United States v. Pangburn, 983 F.2d 449, 453-55 (2d Cir. 1993).

In Simons, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
The Justice Department urged that the conflict be resolved with a uniform rule which permitted sneak and peek warrants under the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage.\footnote{129}

The Act, in section 213, stops short of the Justice Department proposal. Characterized as a codification of the Second Circuit decision, \textit{147 Cong.Rec. H7197} (daily ed. Oct. 23, 2001), the Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C. 3103a. Its sneak and peek authorization reaches all federal search and seizure warrants where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (\textit{e.g.}, risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (\textit{e.g.}, jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, \textit{i.e.}, in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation.\footnote{130} The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

\footnote{129}“The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities,” \textit{DoJ} at §353.

\footnote{130}Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department’s initial proposal, the Department’s justification does not address the question.
constitutionally “reasonable,” that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

**Nationwide terrorism search warrants.** The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either “within or outside the district,” (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases. The provision may anticipate execution both in this country and overseas. The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage. Neither Rule 41 nor any other provision of federal

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131 The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

132 The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

133 *United States v. Barona*, 56 F.3d 1087, 1092 (9th Cir. 1995)(“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994)(“if American law enforcement officials substantially participated in the search or if the
law apparently contemplated extraterritorial execution, *cf.* F.R.Crim.P.41, *Advisory Committee Notes: 1990 Amendment* (discussing a proposal for extraterritorial execution that the Supreme Court rejected).\(^\text{134}\)

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” F.R.Crim.P. 41, *Advisory Committee Notes: 1990 Amendment*. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

**Terrorists’ DNA.** The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards *per se*.\(^\text{135}\) Existing federal law allowed the Attorney General to collect samples from foreign officials conducting the search were actually acting as agents for their American counterparts’); *United States v. Maturo*, 982 F.2d 57, 61 (2d Cir. 1992) (“where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials” or “where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials”); *United States v. Miro*, 880 F.2d 1480, 1482 (1st Cir. 1989) (“where American agents participated in the foreign search or the foreign officers acted as agents for their American counterparts”); *United States v. Mount*, 757 F.2d 1315, 1318 (D.C.Cir. 1985) (“if American officials or officers participated in some significant way”); *United States v. Marzano*, 537 F.2d 257, 270 (7th Cir. 1976) (declining to adopt the “joint venture” standards, but finding level of American participation in the case before it insignificant); *United States v. Morrow*, 537 F.2d 120, 139 (5th Cir. 1976) (“if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts”); each of the decisions also suggests that evidence secured in a manner which shocked the conscience of the court would be excluded.

\(^{134}\) The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, see, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), reprinted, 78 Cong.Rec. 4982-983 (1934) (“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.) (conferring judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

\(^{135}\) *Roe v. Marcotte*, 193 F.3d 72 (2d Cir. 1999); *Shaffer v. Saffle*, 148 F.3d 1180 (10th Cir. 1998); *Rise v. Oregon*, 59 F.3d 1556 (9th Cir. 1995); *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992).
Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples form convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes,” DoJ at §353.

For a general discussion, see, Fischer, DNA Identification: Applications and Issues, CRS REP.NO. RL30717 (Jan. 12, 2001).

Access to Educational Records. Finally, the Act calls for an ex parte court order procedure under which senior Justice Department officials may seek authorization to collect educational records relevant to an investigation or prosecution of a crime of terrorism, section 507 (as an exception to the confidentiality requirements of the General Education Provisions Act, 20 U.S.C. 1232g), section 508 (as an exception to the confidentiality requirements of the National Education Statistics Act, 20 U.S.C. 9007).

Statute of Limitations. Prosecution for murder in violation of federal law may be initiated at any time, 18 U.S.C. 3281. A five year statute of limitations applied for most other federal crimes before passage of the Act, with a few exceptions. Among the relevant exceptions were an eight year statute of limitations for several terrorist offenses, 18 U.S.C. 3286, and a ten year statute of limitations for a few arson and explosives offenses, 18 U.S.C. 3295. The Justice Department recommended the elimination of a statute of limitations in terrorism cases.138

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137 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

138 “This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

“This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in
The Act takes less dramatic action in section 809. It eliminates the statute of limitations for any crime of terrorism\[^{139}\] that risks or results in a death or serious bodily injury, 18 U.S.C. 3286. In the absence of such a risk or result, all other terrorism offenses become subject to the eight year statute of limitations unless already covered by the ten year statute for explosives and arson offenses, 18 U.S.C. 3286.

Application of the statute of limitations rarely provokes a constitutional inquiry. Nevertheless, due process precludes prosecution when it can be shown that pre-indictment delay “caused substantial prejudice to [a defendant’s] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.”\[^{140}\] Moreover, a judicial difference of opinion has appeared in those cases

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\[^{139}\] As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(i)–(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 (sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period.\textsuperscript{141} Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.\textsuperscript{142}

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (\textit{Grimes}, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (\textit{Frazer}, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

\textbf{Extraterritoriality.} Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States or elsewhere. . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.\textsuperscript{143}

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnapping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.

\textsuperscript{141} \textit{United States v. De La Matta}, 266 F.3d 1275, 1286 (11\textsuperscript{th} Cir. 2001); \textit{United States v. Grimes}, 142 F.3d 1342, 1351 (11\textsuperscript{th} Cir. 1998); \textit{United States v. Morrow}, 177 F.3d 272, 294 (5\textsuperscript{th} Cir. 1999); \textit{Falter v. United States}, 23 F.2d 420, 425-26 (2d Cir. 1928).

\textsuperscript{142} \textit{People v. Frazer}, 24 Cal.4th 737, 759, 982 P.2d 180, 1294, 88 Cal.Rptr.2d 312, 327 (1999).

\textsuperscript{143} \textit{United States v. Layton}, 855 F.2d 1388 (9\textsuperscript{th} Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); \textit{United States v. Benítez}, 741 F.2d 1312 (11\textsuperscript{th} Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.\footnote{\textit{Compare, United States v. Gatlin}, 216 F.3d 207 (2d Cir. 2000); \textit{United States v. Laden}, 92 F.Supp.2d 189 (S.D.N.Y. 2000); \textit{with, United States v. Corey}, 232 F.3d 1166 (9th Cir. 2000); \textit{United States v. Erdos}, 474 F.2d 157 (4th Cir. 1973).}

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

Victims. Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11th Victim Compensation Fund legislation before it passed the Act. Consequently, the Act’s victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 \textit{et seq.}, and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 \textit{et seq.}

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:
• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year)(42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d) (5)), section 621(d)

• waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

• eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
• makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

• prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

• allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

• reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

• makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

• allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

• establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

Increasing Institutional Capacity. A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

- $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)

- necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)

- $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)

- $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816

- $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701

- $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)

- $5 million for DEA police training in South and Central Asia, section 1007.

**Miscellaneous.** Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might be used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
The USA PATRIOT Act: A Legal Analysis

April 15, 2002

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Summary

The USA PATRIOT Act passed in the wake of the September 11 terrorist attacks. It flows from a consultation draft circulated by the Department of Justice, to which Congress made substantial modifications and additions. The stated purpose of the Act is to enable law enforcement officials to track down and punish those responsible for the attacks and to protect against any similar attacks.

The Act grants federal officials greater powers to trace and intercept terrorists’ communications both for law enforcement and foreign intelligence purposes. It reenforces federal anti-money laundering laws and regulations in an effort to deny terrorists the resources necessary for future attacks. It tightens our immigration laws to close our borders to foreign terrorists and to expel those among us. Finally, it creates a few new federal crimes, such as the one outlawing terrorists’ attacks on mass transit; increases the penalties for many others; and institutes several procedural changes, such as a longer statute of limitations for crimes of terrorism.

Critics have suggested that it may go too far. The authority to monitor e-mail traffic, to share grand jury information with intelligence and immigration officers, to confiscate property, and to impose new book-keeping requirements on financial institutions, are among the features troubling to some.

The Act itself responds to some of these reservations. Many of the wiretapping and foreign intelligence amendments sunset on December 31, 2005. The Act creates judicial safeguards for e-mail monitoring and grand jury disclosures; recognizes innocent owner defenses to forfeiture; and entrusts enhanced anti-money laundering powers to those regulatory authorities whose concerns include the well being of our financial institutions.

This report, stripped of its citations and footnotes, is available in an abbreviated form as The USA PATRIOT Act: A Sketch, CRS Rep.No. RS21203. In addition, much of the information contained here may also be found under a different arrangement in a report entitled, Terrorism: Section by Section Analysis of the USA PATRIOT Act, CRS Rep.No. RL31200 (Dec. 10, 2001). A wider array of terrorism-related analysis appears on the CRS terrorism electronic briefing book page.
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The USA PATRIOT Act: A Legal Analysis

Introduction

Congress passed the USA PATRIOT Act (the Act) in response to the terrorists’ attacks of September 11, 2001. The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to further close our borders to foreign terrorists and to detain and remove those within our borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it is not without safeguards, critics contend some of its provisions go too far. Although it grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough.


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1 P.L. 107-56, 115 Stat. 272 (2001); its full title is the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT).”

2 H.R. 2975 was introduced by Representative Sensenbrenner for himself and Representatives Conyers, Hyde, Coble, Goodlatte, Jenkins, Jackson-Lee, Cannon, Meehan, Graham, Bachus, Wexler, Hostettler, Keller, Issa, Hart, Flake, Schiff, Thomas, Goss, Rangel, Berman and Lofgren; S.1510 by Senator Daschle for himself and Senators Lott, Leahy, Hatch, Graham, Shelby and Sarbanes.

3 H.R. 3004 was introduced by Representative Oxley for himself and Representatives LaFalce, Leach, Maloney, Roukema, Bentsen, Hooley, Bereuter, Baker, Bachus, King, Kelly, Gillmore, Cantor, Riley, Latourette, Green (of Wisconsin), and Grucci; and reported out of the House Financial Services Committee with amendments on October 15, 2001, H.R.Rep.No. 107-250. H.R. 3004, as reported out, included Internet gambling amendments that were not included in H.R. 2975/H.R.3108.
ed. Oct. 24, 2001), and H.R. 3162 was sent to the President who signed it on October 26, 2001.

**Criminal Investigations: Tracking and Gathering Communications**

A portion of the Act addresses issues suggested originally in a Department of Justice proposal circulated in mid-September. The first of its suggestions called for amendments to federal surveillance laws, laws which govern the capture and tracking of suspected terrorists’ communications within the United States. Federal law features a three-tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications.5

The tiers reflected the Supreme Court’s interpretation of the Fourth Amendment’s ban on unreasonable searches and seizures.6 The Amendment protects private conversations, *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967). It does not cloak information, even highly personal information, for which there is no individual justifiable expectation of privacy, such as telephone company records of calls made to and from an individual’s home, *Smith v. Maryland*, 442 U.S. 735 (1979), or bank records of an individual’s financial dealings, *United States v. Miller*, 425 U.S. 435 (1976).

Congress responded to *Berger* and *Katz*, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications, 18 U.S.C. 2511.7 At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious

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4 The Department’s proposal, dated September 20, 2001, came with a brief section by section analysis. Both the proposal (Draft) and analysis (DoJ) were printed as an appendix in *Administration's Draft Anti-Terrorism Act of 2001, Hearing Before the House Comm. on the Judiciary*, 107th Cong., 1st Sess. 54 (2001).


6 “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,” *U.S. Const.* Amend. IV.

7 Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
criminal cases. When approved by senior Justice Department officials, law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.

8 “The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of” one or more predicate offense, 18 U.S.C. 2516.

9 The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement). 1751 (presidential and presidential staff assassination, kidnapping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnaping, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or naturalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations, 18 U.S.C. 2518. The court notifies the parties to any conversations seized under the order after the order expires, 18 U.S.C. 2518(8).

Below Title III, the next tier of privacy protection covers some of those matters which the Supreme Court has described as beyond the reach of the Fourth Amendment protection – telephone records, e-mail held in third party storage, and the like, 18 U.S.C. 2701-2709 (Chapter 121). Here, the law permits law enforcement access, ordinarily pursuant to a warrant or court order or under a subpoena in some cases, but in connection with any criminal investigation and without the extraordinary levels of approval or constraint that mark a Title III interception, 18 U.S.C. 2703.

Least demanding and perhaps least intrusive of all is the procedure that governs court orders approving the government’s use of trap and trace devices and pen registers, a kind of secret “caller id”, which identify the source and destination of calls made to and from a particular telephone, 18 U.S.C. 3121-3127 (Chapter 206). The orders are available based on the government's certification, rather than a finding of the court, that the use of the device is likely to produce information relevant to the investigation of a crime, any crime, 18 U.S.C. 3123. The devices record no more than the identity of the participants in a telephone conversation, but neither the orders nor the results they produce need ever be revealed to the participants.

The Act modifies the procedures at each of the three levels. It:

offense involving counterfeiting punishable under 18 U.S.C. 471, 472, or 473; (e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States; (f) any offense including extortionate credit transactions under 18 U.S.C. 892, 893, or 894; (g) a violation of 31 U.S.C. 5322 (dealing with the reporting of currency transactions); (h) any felony violation of 18 U.S.C. 2511 and 2512 (interception and disclosure of certain communications and to certain intercepting devices); (i) any felony violation of 18 U.S.C. ch. 71 (obscenity); (j) 49 U.S.C. 60123(b) (destruction of a natural gas pipeline), 46502 (aircraft piracy); (k) 22 U.S.C. 2778 (Arms Export Control Act); (l) the location of any fugitive from justice from an offense described in this section; (m) a violation of 8 U.S.C. 1324, 1327, or 1328; (n) any felony violation of 18 U.S.C. 922, 924 (firearms); (o) any violation of 26 U.S.C. 5861 (firearms); (p) a felony violation of 18 U.S.C. 1028 (production of false identification documents), 1542 (false statements in passport applications), 1546 (fraud and misuse of visas, permits, and other documents) or a violation of 8 U.S.C. 1324, 1327, or 1328 (smuggling of aliens); (p) 229 (chemical weapons), 2332 (terrorist violence against Americans overseas), 2332a (weapons of mass destruction), 2332b (multinational terrorism), 2332d (financial transactions with countries supporting terrorism), 2339A (support of terrorist), 2332B (support of terrorist organizations); (r) any conspiracy to commit any of these, 18 U.S.C. 2516(1)(crimes added by the Act in italics). Other than telephone face to face conversations (i.e., electronic communications), the approval of senior Justice Department officials is not required and an order may be sought in any felony investigation, 18 U.S.C. 2516(3).

10 Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
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- permits pen register and trap and trace orders for electronic communications (e.g., e-mail)

- authorizes nationwide execution of court orders for pen registers, trap and trace devices, and access to stored e-mail or communication records

- treats stored voice mail like stored e-mail (rather than like telephone conversations)

- permits authorities to intercept communications to and from a trespasser within a computer system (with the permission of the system’s owner)

- adds terrorist and computer crimes to Title III’s predicate offense list

- reenforces protection for those who help execute Title III, ch. 121, and ch. 206 orders

- encourages cooperation between law enforcement and foreign intelligence investigators

- establishes a claim against the U.S. for certain communications privacy violations by government personnel

- terminates the authority found in many of the these provisions and several of the foreign intelligence amendments with a sunset provision (Dec. 31, 2005).

**Pen Registers and Trap and Trace Devices.** In section 216, the Act allows court orders authorizing trap and trace devices and pen registers to be used to capture source and addressee information for computer conversations (e.g., e-mail) as well as telephone conversations, 18 U.S.C. 3121, 3123. In answer to objections that e-mail header information can be more revealing than a telephone number, it creates a detailed report to the court, 18 U.S.C. 3123(a)(3).  

11 “Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public the agency shall ensure that a record will be maintained which will identify – (i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of the such device.

“(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof),” section 216(b)(1).
The use of pen registers or trap and trace devices was limited at one time to the judicial district in which the order was issued, 18 U.S.C. 3123 (2000 ed.). Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States, 18 U.S.C. 3123(b)(1)(C), 3127(2). \(^\text{12}\)

**Communications Records and Stored E-Mail.** With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber, 18 U.S.C. 2703(a),(b). A warrant will also suffice to seize records describing telephone and other communications transactions without customer notice, 18 U.S.C. 2703(c). In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation, officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records, 18 U.S.C. 2703(b),(c). They can obtain a limited amount of record information (subscribers’ names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena, 18 U.S.C. 2703(c)(1)(C). There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial, 18 U.S.C. 2705.

In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider’s customer records, 18 U.S.C. 2703(c)(1)(C). \(^\text{13}\)

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.

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\(^{12}\) The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” DoJ at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

\(^{13}\) Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user's true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” DoJ at §107.
Previously, only a federal court in the district in which the e-mail was stored could issue the order. Under section 220, federal courts in the district where an offense under investigation occurred may issue orders applicable “without geographic limitation,” 18 U.S.C. 2703.\(^{14}\)

The Act, in section 209, treats voice mail like e-mail, that is, subject to the warrant or court order procedure, rather than to the more demanding coverage of Title III once required, *United States v. Smith*, 155 F.3d 1050, 1055-56 (9th Cir. 1998).

Finally, the Act resolves a conflict between chapter 121 and the federal law governing cable companies. Government entities may have access to cable company customer records only under a court order following an adversary hearing if they can show that the records will evidence that the customer is or has engaged in criminal activity, 47 U.S.C. 511(h). When cable companies began offering telephone and other communications services the question arose whether the more demanding cable rules applied or whether law enforcement agencies were entitled to ex parte court orders under the no-notice procedures applicable to communications providers.\(^{15}\) The Act makes it clear that the cable rules apply when cable television viewing services are

\(^{14}\) Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

\(^{15}\) See e.g., DoJ at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (“Cable Act”) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement’s access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

**Electronic Surveillance.** To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202. A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(i). Yet only the interloper's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.

**Criminal Investigators' Access to Foreign Intelligence Information.** The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism. It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that “the purpose for the surveillance is to obtain foreign intelligence information,” 50 U.S.C. 1804(a)(7)(B)(2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps “the purpose” might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation

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16 18 U.S.C. 229 (chemical weapons), 2332 (terrorist acts of violence committed against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2332d (financial transactions with countries which support terrorists), 2339A (providing material support to terrorists), and 2339B (providing material support to terrorist organizations).

17 “Because service providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves as permitted under current law, they often have no way to exercise their rights to protect themselves from unauthorized attackers. Moreover, such attackers can target critical infrastructures and engage in cyberterrorism,” DoJ at §106. Elsewhere the Act defines “electronic surveillance” for purposes of the Foreign Intelligence Surveillance Act (FISA) to emphasize that the law enforcement authority for this intruder surveillance does not confer similar authority for purposes of foreign intelligence gathering, section 1003 (50 U.S.C. 1801(f)(2)).

18 For a general discussion of federal intelligence and law enforcement cooperation, see, Best, Intelligence and Law Enforcement: Countering Transnational Threats to the U.S., CRS REP.NO. RL30252 (Dec. 3, 2001).
Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment's warrant clause. It is here that the “primary purpose” notion originated. In United States v. Truong Dinh Hung, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, “as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.” Subsequent case law, however, is not as clear as it might be: see e.g., United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984)(“FISA permits federal officials to obtain orders authorizing electronic surveillance ‘for the purpose of obtaining foreign intelligence information.’ The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying officials’ belief that the information sought is the type of foreign intelligence information described”); United States v. Pelton, 835 F.2d 1067, 1075-76 (4th Cir. 1987)(“We also reject Pelton’s claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial”); United States v. Sarkissian, 841 F.2d 959, 907-8 (9th Cir. 1988)(“Defendants rely on the primary purpose test articulated in United States v. Truong Dinh Hung. . . . One other court has applied the primary purpose test. Another court has rejected it . . . distinguishing Truong. A third court has declined to decide the issue. We also decline to decide the issue”); United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1991)(“Appellants attack the government's surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance”).

20 “Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” DoJ at §153.
demanding standard than the “a purpose” threshold proposed by the Justice Department, but a clear departure from the original “the purpose” entry point. FISA once described a singular foreign intelligence focus prerequisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k), 1825(k).

Protective Measures. The Act reenforces two kinds of safeguards, one set designed to prevent abuse and the other to protect those who assist the government.

The sunset clause is perhaps the best known of the Act’s safeguards. Under the direction of section 224, many of the law enforcement and foreign intelligence authorities granted by the Act expire as of December 31, 2005. The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter

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21 “(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. (2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, infra, quoting, 50 U.S.C. 1801.

22 “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210[subpoenas for communications provider customer records], 211[access to cable company communication service records], 213[sneak and peek], 216[pen register and trap and trace device amendments], 221[trade sanctions], and 222[assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005. “(b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers' communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices).\textsuperscript{23} Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees,\textsuperscript{24} but could not recover against the United States.\textsuperscript{25} Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice's Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government's request until a court order authorizing access can be obtained.\textsuperscript{26} Another allows providers to disclose customer records to protect the provider's rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others.\textsuperscript{27} A third section,

\footnotesize{\textsuperscript{23} 18 U.S.C. 2511, 2701, and 3121 (2000 ed.), respectively.  
26 Prior law already granted service providers immunity for disclosure of customer records in compliance with a court access order, 18 U.S.C. 2703(f). 
27 “Existing law contains no provision that allows providers of electronic communications service to disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies that threaten death or serious bodily injury. This section amends 18 U.S.C. §2702 to authorize such disclosures if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay. 

“Current law also contains an odd disconnect: a provider may disclose the contents of the customer's communications in order to protect its rights or property but the current statute does not expressly permit a provider to voluntarily disclose non-content records (such as a subscriber's login records). 18 U.S.C. 2702(b)(5). This problem substantially hinders the ability of providers to protect themselves from cyber-terrorists and criminals. Yet the right to disclose the contents of communications necessarily implies the less intrusive ability to disclose non-content records. In order to promote the protection of our nation's critical infrastructures, this section's amendments allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems,” DoJ at}
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

**Foreign Intelligence Investigations**

Although both criminal investigations and foreign intelligence investigations are conducted in the United States, criminal investigations seek information about unlawful activity; foreign intelligence investigations seek information about other countries and their citizens. Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough.

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA), something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President's authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, *United States v. United States District Court*, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage

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28 Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

29 Thus in the name of assisting in the execution of Title III, chapter 121, or chapter 206 order, the courts may not cite the Act as the basis for an order compelling a service provider to make system modifications or provide any other technical assistance not already required under 18 U.S.C. 2518(4), 2706, or 3124(c), see, H.R.Rep.No. 107-236, at 62-3 (2001) (emphasis added) (“This Act is not intended to affect obligations under Communications Assistance for Law Enforcement Act [which addresses law enforcement-beneficial system modifications and the compensation to be paid for the changes], nor does the act impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance”).

30 *E.g.*, As amended by section 902 of the Act, “‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2)(language added by the Act in italics).

31 50 U.S.C. 1801 *et seq.*
In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs. There were and still are extra


33 “As used in this subchapter: (a) ‘Foreign power’ means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

“(b) ‘Agent of a foreign power’ means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C).

“(c) ‘International terrorism’ means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnapping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

“(d) ‘Sabotage’ means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

“(e) ‘Foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans (“United States persons,” i.e., citizens or permanent resident aliens). The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

- permits “roving” surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)
- increases the number of judges on the FISA court from 7 to 11
- allows application for a FISA surveillance or search order when gathering foreign intelligence is a significant reason for the application rather than the reason
- authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations
- sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses
- carries a sunset provision
- establishes a claim against the U.S. for certain communications privacy violations by government personnel
- expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to – (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States,” 50 U.S.C. 1801.

34 Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
FISA. FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases. It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

Search and Surveillance for Intelligence Purposes. Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, Draft at §151.

Section 901 of the Act address a concern raised during the 106th Congress relating to the availability of the FISA orders and the effective use of information gleaned from the execution of a FISA order. It vests the Director of Central

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36 See also, DoJ at §151, “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order’s minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed (50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

37 See e.g., S.Rep.No. 106-352, at 3, 6, 7 (2000)(“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application
Intelligence with the responsibility to formulate requirements and priorities for the use of FISA to collect foreign intelligence information. He is also charged with the responsibility of assisting the Attorney General in the efficient and effective dissemination of FISA generated information (50 U.S.C. 403-3(c)).

**Pen Registers and Trap and Trace Devices for Intelligence Gathering.** Section 214 grants the request of the Department of Justice by dropping requirements which limited FISA pen register and trap and trace device orders to facilities used by foreign agents or those engaged in international terrorist or clandestine intelligence activities, 50 U.S.C. 1842(c)(3)(2000 ed.).

It is enough that the order is sought as part of an investigation to protect against international terrorism or clandestine intelligence activities and is not motivated solely by an American’s exercise of his or her First Amendment rights. Elsewhere (section 505), the Act drops a similar limitation for intelligence officials’ access to telephone records, 18 U.S.C.

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38 “When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevance, an additional factual showing that the communications device has been used to contact an ‘agent of a foreign power’ engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the ‘agent of a foreign power’ prong from the predication, and thus makes the FISA authority more closely track the criminal authority,” DoJ at §155.
Section 214 adjusts the language of the FISA pen register-trap and trace authority to permit its use to capture source and destination information relating to electronic communications (e.g., e-mail) as well as telephone communications, 50 U.S.C. 1842(d). The section makes it clear that requests for a FISA pen register-trap and trace order, like requests for other FISA orders, directed against Americans (U.S. persons) may not be based solely on activities protected by the First Amendment, 50 U.S.C. 1842, 1843.

**Third Party Cooperation and Tangible Evidence.** As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target's activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.

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39 Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise to be entitled to confidentiality. Section 505, in response to the Justice Department's suggestion, allows FBI field offices to make the requests, see DoJ at §157 (“At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports”).

40 When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court's order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.” This would enhance the FBI's ability to monitor international terrorists and intelligence officers who are
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian. The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities, in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B);
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a);
- the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a);
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v;

trained to thwart surveillance by rapidly changing hotel accommodations, cell phones, Internet accounts, etc., just prior to important meetings or communications. Under the current law, the government would have to return to the FISA Court for an order that named the new carrier, landlord, etc., before effecting surveillance. Under the proposed amendment, the FBI could simply present the newly discovered carrier, landlord, custodian or other person with a generic order issued by the Court and could then effect FISA coverage as soon as technically feasible.” DoJ at 152.


41 “The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigative contexts. The time and difficulty involved in getting such pleadings before the Court usually outweighs the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” DoJ at §156.

42 Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.\textsuperscript{43}

**Access to Law Enforcement Information.** Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community’s access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official,\textit{Draft} at §103.\textsuperscript{44}

\begin{itemize}
\item \textsuperscript{43} H.R.Rep.No. 107-205, at 60-1 (2001)(“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

“The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

“Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual’s credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding--without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information”).

\item \textsuperscript{44} See also, DoJ at §103, “This section facilities the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, Draft at §354.45

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, Draft at §154.46

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indicted the guilty; and to refuse to indicted the innocent. Its probes may begin without probable cause or any other threshold of suspicion.47 It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions.”

45 See also, DoJ at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.” Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officers

46 See also, DoJ at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”

47 Blair v. United States, 250 U.S. 273, 281 (1919)(the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

Critics may protest that the change could lead to the use of the grand jury for intelligence gathering purposes, or less euphemistically, to spy on Americans. The proposal was never among those scheduled to sunset, but earlier versions of the section followed the path used for most other disclosures of grand jury material: prior affairs are conducted in private and outside the presence of the court. Only the attorney for the government, witnesses under examination, and a court reporter may attend its proceedings, F.R.Crim.P. 6(d). Matters occurring before the grand jury are secret and may be disclosed by the attending attorney for the government and those assisting the grand jury only in the performance of their duties; in presentation to a successor grand jury; or under court order for judicial proceedings, for inquiry into misconduct before the grand jury, or for state criminal proceedings, F.R.Crim.P. 6(e).

The Act, in section 203(a), allows disclosure of matters occurring before the grand jury to “any federal law enforcement, intelligence, protective, immigration, national defense, or national security” officer to assist in the performance of his official duties, F.R.Crim.P. 6(e)(3)(C)(i)(V). 48

48 These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

49 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25 Harvard Journal of Law & Public Policy 699, 719-20 (2002)(“There is a significant danger that the rule permitting disclosure will be treated as the de facto authorization of an expansion of the grand jury’s investigative role to encompass seeking material relevant only to matters of national security, national defense, immigration, and so forth. The grand jury’s awesome powers should not be unwittingly extended to a much wider range of issues. . . Since the grand jury operates in secret, there are no public checks on the scope of its investigations, and witnesses are not permitted to challenge its jurisdiction. Only the supervising court is in a position to keep the grand jury’s investigation within proper bounds. Requiring judicial approval of foreign intelligence and counterintelligence information disclosures would provide a natural check against the temptation to manipulate the grand jury to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6 (Nov. 2001)(“The grand jury secrecy rule is a rule of policy which has always had exceptions, and it has been frequently modified. The secrecy rule has no credible claim to constitutional stature”).
Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

Law enforcement officials may share Title III information with the intelligence community under the same conditions, section 203(b), although the grand jury and Title III sharing provisions differ in at least three important respects. The court need not be notified of Title III disclosures. On the other hand, the authority for sharing Title III information expires on December 31, 2005, section 224, and agencies and their personnel guilty of intentional improper disclosures may be subject to a claim for damages and disciplinary action, 18 U.S.C. 2520.

The third subsection of section 203 remains something of an enigma. It speaks in much the same language as its counterparts. It allows law enforcement officials to share information with the intelligence community, “notwithstanding any other provisions of law,” section 203(d). It either swallows the other subsections, or supplements them. Several factors argue for its classification as a supplement. Congress is unlikely to have crafted subsections (a), (b) and (c) only to completely

50 Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

51 “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person’s official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification.\textsuperscript{52} By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.\textsuperscript{53}

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

**Increasing Institutional Capacity.** As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a

\textsuperscript{52} *Duncan v. Walker*, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted) (“It is our duty to give effect, if possible, to every clause and word of a statute. United States v. Menasche, 348 U.S. 528, 538-539 (1955) (quoting Montclair v. Ramsdell, 107 U.S. 147, 152 (1883)); see also *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879) (As early as in Bacon's Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage in any setting. *Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687, 698 (1995); see also *Ratzlaf v. United States*, 510 U.S. 135, 140 (1994)").

It is not possible to conclude that Congress intended the universal subsection (d) to apply until sunset and the grand jury and Title III subsections (a), (b), and (c) to operate thereafter, because the Title III subsection expires at the same time as the universal subsection.

\textsuperscript{53} Draft at §154, “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”
computerized translation capability to be used in foreign intelligence gathering. Section 907 instructs the Director of the Central Intelligence, in consultation with the Director of the FBI, to report on the creation of a National Virtual Translation Center. The report is to include information concerning staffing, allocation of resources, compatibility with comparable systems to be used for law enforcement purposes, and features which permit its efficient and secure use by all of the intelligence agencies.

**Money Laundering**

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture. The Act bolsters federal efforts in each area.

**Regulation.** Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.

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54 “The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

“The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so,” S.Rep.No. 107-63, at 11 (2001).


56 See e.g., 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
Records and Reports. For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department's Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler's checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to files SARs as well,57 reflecting Congress’ view that the information provided the IRS may be valuable for other law enforcement purposes.58 This concern is likewise

58 H.R.Rep.No. 107-250, at 38-9 (2001)(“Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

“Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a ‘Safeguard Procedures Report’ which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

“While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement
reflected in section 357 which asks the Secretary of the Treasury to report on the Internal Revenue Service's role in the administration of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311 et seq.), and what transfers of authority, if any, are appropriate.

Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action. 59 Section 355 expands the immunity to cover disclosures in

59 “Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

“First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor from civil liability applies in arbitration, as well as judicial, proceedings. Second, it amends section 5318(g)(3) to clarify the safe harbor's coverage of voluntary disclosures (that is, those not covered by the SAR regulatory reporting requirement). The language in section 5318(g)(3)(A) providing that ‘any financial institution that *** makes a disclosure pursuant to *** any other authority *** shall not be liable to any person’ is not intended to avoid the application of the reporting and disclosure provisions of the Federal securities laws to any person, or to insulate any issuers from private rights of actions for disclosures made under the Federal securities laws.

“Subsection [351](b) amends section 5318(g)(2) of title 31—which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed—to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee's official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
employment references to other insured depository financial institutions provided disclosure is not done with malicious intent.\textsuperscript{60}

The Financial Crimes Enforcement Network (FinCEN), a component within the Treasury Department long responsible for these anti-money laundering reporting and record-keeping requirements, 31 C.F.R. pt. 103, was administratively created in 1990 to provide other government agencies with an “intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes,” 55 Fed.Reg. 18433 (May 2, 1990).

The Act, in section 361, makes FinCEN a creature of statute, a bureau within the Treasury Department, 31 U.S.C. 310. Section 362 charges it with the responsibility of establishing a highly secure network to allow financial institutions to file required reports electronically and to permit FinCEN to provide those institutions with alerts and other information concerning money laundering protective measures, 31 U.S.C. 310 note.

**Special Measures.** In extraordinary circumstances involving international financial matters, the Act grants the Secretary of the Treasury, in consultation with other appropriate regulatory authorities, the power to issue regulations and orders involving additional required “special measures” and additional “due diligence” requirements to combat money laundering. The special measure authority, available under section 311, comes to life with the determination that particular institutions, jurisdictions, types of accounts, or types of transactions pose a primary money laundering threat.

\textsuperscript{60} 31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 67 (2001).
laundry concern. These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

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31 U.S.C. 5318A. The circumstances considered in the case of a suspect jurisdiction are: evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction’s banking regulation; the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’ including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate
business transactions.

“Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

“Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

“The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

“The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

“The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

“The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent’ account for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information that it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

“The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

“The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed
Due Diligence. Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.63

63 See generally, H.R.Rep.No. 107-250, at 71-2 (“Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

“The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

“The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

“For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
**General Regulatory Matters.** The Act establishes several other regulatory mechanisms directed at the activities involving U.S. financial institutions and foreign individuals or institutions. Section 313, for instance, in another restriction on correspondent accounts for foreign financial institutions, prohibits U.S. financial institutions from maintaining correspondent accounts either directly or indirectly for foreign shell banks (banks with no physical place of business\(^\text{64}\) which have no affiliation with any financial institution through which their banking activities are subject to regulatory supervision.\(^\text{65}\)

The Act, in section 325, empowers the Secretary of the Treasury to promulgate regulations to prevent financial institutions from allowing their customers to conceal their financial activities by taking advantage of the institutions’ concentration account practices.\(^\text{66}\)

The Secretary of the Treasury is instructed in section 326 to issue regulations for financial institutions’ minimum new customer identification standards and record-
keeping and to recommend a means to effectively verify the identification of foreign customers.\(^6^7\)

\(^6^7\) 31 U.S.C. 5318(l); H.R.Rep.No. 107-250, at 62-3 (2001)(“Section [326](a) amends 31 U.S.C. 5318 by adding a new subsection governing the identification of account holders. Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a ‘street name’ or omnibus account in the broker-dealer’s name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to ‘look through’ the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund’s customers. Thus, the fund would not be required to ‘look through’ the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

“Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature.\(^ {68} \)

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

**Reports to Congress.** Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

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exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.\textsuperscript{69}

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

**International Cooperation.** Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.\textsuperscript{70}

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (\textit{i.e.}, the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.


\textsuperscript{70} H.R.Rep.No. 107-250, at 67 (2001)(“This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury's progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

“The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime”).
**Crimes.** Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, smuggling, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
“[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

“The definition of ‘financial institution’ in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of ‘commercial bank’ or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad—say to a Mexican bank—and launderers them through a series of financial transactions, the government conceivably could not rely on the definition of a ‘financial institution’ in 1956(c)(6) to establish that the transaction was a ‘financial transaction’ within the meaning of 1956(c)(4)(B) (defining a ‘financial transaction’ as a transaction involving the use of a ‘financial institution’), or that it was a ‘monetary transaction’ within the meaning of 1957(f) (defining ‘monetary transaction’ as, inter alia, a transaction that would be a ‘financial transaction’ under 1956(c)(4)(B)).

“Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launderers the proceeds of one of the crimes set forth on a list of ‘specified unlawful activities.’ 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),” H.R.Rep.No. 107-250, at 38 (2000).


Section 329 makes it a federal crime to corruptly administer the money laundering regulatory scheme. Offenders are punishable by imprisonment for not more than 15 years and a fine of not more than three times the amount of the bribe.

Section 5326 of title 31 authorizes the Secretary of the Treasury to impose temporary, enhanced reporting requirements upon financial institutions in areas victimized by substantial money laundering activity (geographic targeting regulations and orders). Section 353 makes it clear that the civil sanctions, criminal penalties, and prohibitions on smurfing (structuring transactions to evade reporting requirements) apply to violations of the regulations and orders issued under 31 U.S.C. 5326. It also extends the permissible length of the temporary geographical orders from 60 to 180 days.

Violations of the special measures and special due diligence requirements of sections 311 and 312 are subject to both civil and criminal penalties by virtue of section 363’s amendments to 31 U.S.C. 5321(a) and 5322. The amendments authorize civil penalties and criminal fines of twice the amount of the transaction but not more than $1 million. Criminal offenders would be subject to a fine in the same amount.
Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.73

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents.74 They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

73 “The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business.

“Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.

“Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive,” H.R.Rep.No. 107-250, at 54 (2001).

74 “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).


• 18 U.S.C. 476 (taking impressions of tools used for obligations and securities) from 10 to 25 years;
• 18 U.S.C. 477 (possessing or selling impressions of tools used for obligations or securities) from 10 to 25 years;
• 18 U.S.C. 484 (connecting parts of different notes) from 5 to 10 years;
• 18 U.S.C. 493 (bonds and obligations of certain lending agencies) from 5 to 10 years;
• 18 U.S.C. 478 (foreign obligations or securities) from 5 to 20 years;
• 18 U.S.C. 479 (uttering counterfeit foreign obligations or securities) from 3 to 20 years;
• 18 U.S.C. 480 (possessing counterfeit foreign obligations or securities) from 1 to 20 years;
• 18 U.S.C. 481 (plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities) from 5 to 25 years;
• 18 U.S.C. 482 (foreign bank notes) from 2 to 20 years; and
• 18 U.S.C. 483 (uttering counterfeit foreign bank notes) from 1 to 20 years.

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

Bulk Cash. Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act’s bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting.75

The section appears to be the product of reactions to the Supreme Court’s decision in United States v. Bajakian, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court’s

75 “For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).
As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency – representing the proceeds of drug trafficking and other criminal offenses – is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad.

Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United State without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

“Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute,” H.R.Rep.No. 107-250 at 36-7 (2001).
under *either* circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.\(^77\)

**Venue.** Section 1004 relies on *dicta* in *United States v. Cabrales*, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering,\(^78\) in the state and district in which the monetary transaction takes place. The Supreme Court in *Cabrales* held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in *dicta*, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.\(^79\)

**Forfeiture.** Forfeiture is the government confiscation of property as a consequence of crime.\(^80\) The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 *et seq.* (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

**Constitutional Considerations.** The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 *et seq.*, which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the


\(^78\) “[T]he trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed,” *U.S.Const.* Art.III, §2, cl.3.

“[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,” *U.S.Const.* Amend. VI.

\(^79\) See also, *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnaping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.

\(^80\) For general background information, see, Doyle, *Crime and Forfeiture*, CRS REP.NO. 97-139A (Oct. 11, 2000).
This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App.U.S.C. §5(b).

This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress's war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2),” DoJ at §159.

An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
excepted from the coverage of 18 U.S.C. 983. The challenge proceedings permit the court to admit evidence, such as hearsay evidence, that would not otherwise be admissible under the Federal Rules of Evidence if the evidence is reliable and if national security might be imperiled should dictates of the Federal Rules be followed, §316(b). The section recognizes the rights of claimants to proceed alternatively under the Constitution or the Administrative Procedure Act.

The Justice Department also recommended enactment of an overlapping provision which ultimately passed as section 806 of the Act without any real discussion of the relationship of the two sections. Section 806 authorizes confiscation of all property, regardless of where it is found, of any individual, entity, or organization engaged in domestic or international terrorism (as defined in 18 U.S.C. 2331), against the United States, Americans or their property, 18 U.S.C.

83 18 U.S.C. 983(i)(2)(D).

84 “The exclusion of certain provisions of Federal law from the definition of the term ‘civil forfeiture statute’ in section 983(i) of title 18, United States Code, shall not be construed to deny an owner of property the right to contest the confiscation of assets of suspected international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C) subchapter II of chapter 5 of title 5, United States Code (commonly known as the ‘Administrative Procedure Act’).” Sec. 316(c)(1).

85 “Current law does not contain any authority tailored specifically to the confiscation of terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available current forfeiture laws require detailed tracing that is quite difficult for accounts coming through the banks of countries used by many terrorists.

“This section increases the government's ability to strike at terrorist organizations' economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001,” DoJ, at §403. The House Report on H.R. 2975 which contained versions of both sections is no more explicit on the relation of the two sections.

86 “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
981(a)(1)(G). Section 806 as discussed below also calls for the more common confiscation of property derived from and or facilitating acts of domestic or international terrorism against the United States or its citizens. Confiscations under 806 may be challenged under the procedures of 18 U.S.C. 983, since they are not exempted there. To the extent that forfeiture under section 806 is based on international rather than domestic terrorism, claimants may also use the procedures of section 316.

Confiscation based solely on the fact that the property is owned by a criminal offender, rather than that it is derived from or facilitates some crime is fairly uncommon. It is the mark of common law forfeiture of estate. At common law, a felon forfeited all of his property. Most contemporary forfeiture statutes employ statutory forfeiture, a more familiar presence in American law,\(^87\) which consists of the confiscation of things whose possession is criminal, of the fruits of crime, and of the means of crime – untaxed whiskey, the drug dealer’s profits, and the rum runner’s ship.

Three characteristics set forfeiture of estate apart. The property is lost solely by reason of its ownership by a felon. All of a felon’s property is confiscated, not merely that which is related to the crime for which he is convicted. Finally, it occasions attainder which negates the felon’s right to hold property or for title to property to pass through him to his heirs. It was with this in mind, that the Framers declared that “no attainder of treason shall work corruption of blood or forfeiture exception during the life of the person attainted.”\(^88\) And for this reason, President Lincoln insisted that the confiscated real estate of Confederate supporters should revert their heirs at death.\(^89\)

\(^{87}\) *Austin v. United States*, 509 U.S. 602, 611-12 (1993)(“Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture . . . . Of England’s three kinds of forfeiture, only the third took hold in the United States”).

\(^{88}\) *U.S.Const.* Art.III, §3, cl.2.

\(^ {89}\) 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal *in personam* proceedings following criminal conviction as a means of accomplishing confiscation.
Neither section 106 nor 806 require conviction of the terrorist property owner.\textsuperscript{90} Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers.\textsuperscript{91} The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners.\textsuperscript{92} Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them.\textsuperscript{93} The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate

\textsuperscript{90} Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c) (“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act”).

\textsuperscript{91} Silesian American Corp. V. Clark, 332 U.S. 469 (1947); cf., Societe Internationale v. Rogers, 357 U.S. 197, 211 (1958) (“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).

\textsuperscript{92} Zitzman v. McGrath, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’”).

any presumption of remedial purposes. The same has been said of the applicability of the ex post facto clause.

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO. If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

**Other Forfeiture Amendments.** In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.

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95 See e.g., United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.), 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994).

96 DoJ, at §403.

97 18 U.S.C. 1956(b). Cf., H.R.Rep.No. 107-250, at 54-5 (2001) (“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas.\textsuperscript{98} Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted

\textsuperscript{98} 18 U.S.C. 981(k). H.R.Rep.No. 107-250, at 57-8 (2001)(“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank's customers.

Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank’s correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”).
defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation.\textsuperscript{99}

Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here.\textsuperscript{100} Section 320 enlarges this provisions to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements.\textsuperscript{101} This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.\textsuperscript{102}

\textsuperscript{99} Cf., H.R.Rep.No. 107-250, at 58-9 (2001) ("Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of ‘substitute assets’ when the defendant has placed the property otherwise subject to forfeiture ‘beyond the jurisdiction of the court.’ Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

“Specifically, a Federal court could issue a repatriation order--either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. 853(e) to restrain property--so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both").

\textsuperscript{100} 18 U.S.C. 981(a)(1)(B).

\textsuperscript{101} H.R.Rep.No. 107-250, at 56 (2001)(“This section is intended to reinforce the United States’ compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act").

\textsuperscript{102} H.R.Rep.No. 107-250, at 59-60 (2001)(“Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country.

Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
A fugitive may not challenge a federal forfeiture. Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in “order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.”
Alien Terrorists and Victims

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

Border Protection. The border protection provisions:

- authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401

- authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402

- remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404

- authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405

- authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.

- instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007

- direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418

- express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414

- add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415

- call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416

- limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).

- instruct the Attorney General to report on the feasibility of using biometric scanners to help prevent terrorists and other foreign criminals from entering the country, section 1008

- authorize appropriations of $250,000 for the FBI to determine the feasibility of providing airlines with computer access to the names of suspected terrorists, section 1009

- authorize reciprocal sharing of the State Department’s visa lookout data and related information with other nations in order to prevent terrorism, drug trafficking, slave marketing, and gun running, section 413

**Detention and Removal.** Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity, 8 U.S.C. 1227 (a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(iv). Aliens may be inadmissible for any number of terrorism-related reasons, 8 U.S.C. 1182 (a)(3)(B). Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported.


Section 411 defines “terrorist organization” to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the Federal Register as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C.

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104 As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).
Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).


An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in “premeditated, politically motivated violence perpetrated against noncombatant targets,” or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security or endanger some individual or the general public. The Attorney General's determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

Victims. The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

- permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421\(^{105}\)
- extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422\(^{106}\)

\(^{105}\) "The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

\(^{106}\) "The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks.

“The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from timely filing by immigration office closures, airline schedule disruptions or other similar impediments. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed lawfully if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application.

“Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

"Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 31.

"Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.


107 “Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

"The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

"The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death),” H.R.Rep.No. 107-236, at 68 (2001).

108 “Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien’s 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien’s 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
• a denial of benefits of the Act to terrorists and their families, section 427
• authority for the Attorney General to establish evidentiary standards to implement the alien victim provisions of the Act, section 426.

Other Crimes, Penalties, & Procedures

New Crimes. The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department, the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offense for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents, 18 U.S.C. 175b. Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.

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109 “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . . .” DoJ at §305.

110 The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

111 “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2)(“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The USA PATRIOT Act: A Legal Analysis

April 15, 2002

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The USA PATRIOT Act: A Legal Analysis

Summary

The USA PATRIOT Act passed in the wake of the September 11 terrorist attacks. It flows from a consultation draft circulated by the Department of Justice, to which Congress made substantial modifications and additions. The stated purpose of the Act is to enable law enforcement officials to track down and punish those responsible for the attacks and to protect against any similar attacks.

The Act grants federal officials greater powers to trace and intercept terrorists’ communications both for law enforcement and foreign intelligence purposes. It enforces federal anti-money laundering laws and regulations in an effort to deny terrorists the resources necessary for future attacks. It tightens our immigration laws to close our borders to foreign terrorists and to expel those among us. Finally, it creates a few new federal crimes, such as the one outlawing terrorists’ attacks on mass transit; increases the penalties for many others; and institutes several procedural changes, such as a longer statute of limitations for crimes of terrorism.

Critics have suggested that it may go too far. The authority to monitor e-mail traffic, to share grand jury information with intelligence and immigration officers, to confiscate property, and to impose new book-keeping requirements on financial institutions, are among the features troubling to some.

The Act itself responds to some of these reservations. Many of the wiretapping and foreign intelligence amendments sunset on December 31, 2005. The Act creates judicial safeguards for e-mail monitoring and grand jury disclosures; recognizes innocent owner defenses to forfeiture; and entrusts enhanced anti-money laundering powers to those regulatory authorities whose concerns include the well being of our financial institutions.

This report, stripped of its citations and footnotes, is available in an abbreviated form as The USA PATRIOT Act: A Sketch, CRS Rep.No. RS21203. In addition, much of the information contained here may also be found under a different arrangement in a report entitled, Terrorism: Section by Section Analysis of the USA PATRIOT Act, CRS Rep.No. RL31200 (Dec. 10, 2001). A wider array of terrorism-related analysis appears on the CRS terrorism electronic briefing book page.
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The USA PATRIOT Act: A Legal Analysis

Introduction

Congress passed the USA PATRIOT Act (the Act) in response to the terrorists’ attacks of September 11, 2001. The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to further close our borders to foreign terrorists and to detain and remove those within our borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it is not without safeguards, critics contend some of its provisions go too far. Although it grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough.


1 P.L. 107-56, 115 Stat. 272 (2001); its full title is the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT).”

2 H.R. 2975 was introduced by Representative Sensenbrenner for himself and Representatives Conyers, Hyde, Coble, Goodlatte, Jenkins, Jackson-Lee, Cannon, Meehan, Graham, Bachus, Wexler, Hostettler, Keller, Issa, Hart, Flake, Schiff, Thomas, Goss, Rangel, Berman and Lofgren; S.1510 by Senator Daschle for himself and Senators Lott, Leahy, Hatch, Graham, Shelby and Sarbanes.

3 H.R. 3004 was introduced by Representative Oxley for himself and Representatives LaFalce, Leach, Maloney, Roukema, Bentsen, Hooley, Bereuter, Baker, Bachus, King, Kelly, Gillmore, Cantor, Riley, Latourette, Green (of Wisconsin), and Grucci; and reported out of the House Financial Services Committee with amendments on October 15, 2001, H.R.Rep.No. 107-250. H.R. 3004, as reported out, included Internet gambling amendments that were not included in H.R. 2975/H.R.3108.
ed. Oct. 24, 2001), and H.R. 3162 was sent to the President who signed it on October 26, 2001.

**Criminal Investigations: Tracking and Gathering Communications**

A portion of the Act addresses issues suggested originally in a Department of Justice proposal circulated in mid-September. The first of its suggestions called for amendments to federal surveillance laws, laws which govern the capture and tracking of suspected terrorists’ communications within the United States. Federal law features a three tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications.

The tiers reflected the Supreme Court’s interpretation of the Fourth Amendment’s ban on unreasonable searches and seizures. The Amendment protects private conversations, *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967). It does not cloak information, even highly personal information, for which there is no individual justifiable expectation of privacy, such as telephone company records of calls made to and from an individual's home, *Smith v. Maryland*, 442 U.S. 735 (1979), or bank records of an individual's financial dealings, *United States v. Miller*, 425 U.S. 435 (1976).

Congress responded to *Berger* and *Katz*, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications, 18 U.S.C. 2511. At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious

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4 The Department’s proposal, dated September 20, 2001, came with a brief section by section analysis. Both the proposal (*Draft*) and analysis (*DoJ*) were printed as an appendix in *Administration’s Draft Anti-Terrorism Act of 2001, Hearing Before the House Comm. on the Judiciary, 107th Cong., 1st Sess. 54 (2001).*


6 “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,” *U.S. Const. Amend. IV.*

7 Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
criminal cases. When approved by senior Justice Department officials, law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.

8 "The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of” one or more predicate offense, 18 U.S.C. 2516.

9 The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement), 1751 (presidential and presidential staff assassination, kidnapping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnaping, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or naturalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations, 18 U.S.C. 2518. The court notifies the parties to any conversations seized under the order after the order expires, 18 U.S.C. 2518(8).

Below Title III, the next tier of privacy protection covers some of those matters which the Supreme Court has described as beyond the reach of the Fourth Amendment protection – telephone records, e-mail held in third party storage, and the like, 18 U.S.C. 2701-2709 (Chapter 121). Here, the law permits law enforcement access, ordinarily pursuant to a warrant or court order or under a subpoena in some cases, but in connection with any criminal investigation and without the extraordinary levels of approval or constraint that mark a Title III interception, 18 U.S.C. 2703.

Least demanding and perhaps least intrusive of all is the procedure that governs court orders approving the government’s use of trap and trace devices and pen registers, a kind of secret “caller id”, which identify the source and destination of calls made to and from a particular telephone, 18 U.S.C. 3121-3127 (Chapter 206). The orders are available based on the government's certification, rather than a finding of the court, that the use of the device is likely to produce information relevant to the investigation of a crime, any crime, 18 U.S.C. 3123. The devices record no more than the identity of the participants in a telephone conversation, but neither the orders nor the results they produce need ever be revealed to the participants.

The Act modifies the procedures at each of the three levels. It:

offense involving counterfeiting punishable under 18 U.S.C. 471, 472, or 473; (e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States; (f) any offense including extortionate credit transactions under 18 U.S.C. 892, 893, or 894; (g) a violation of 31 U.S.C. 5322 (dealing with the reporting of currency transactions); (h) any felony violation of 18 U.S.C. 2511 and 2512 (interception and disclosure of certain communications and to certain intercepting devices); (i) any felony violation of 18 U.S.C. ch. 71 (obscenity); (j) 49 U.S.C. 60123(b) (destruction of a natural gas pipeline), 46502 (aircraft piracy); (k) 22 U.S.C. 2778 (Arms Export Control Act); (l) the location of any fugitive from justice from an offense described in this section; (m) a violation of 8 U.S.C. 1324, 1327, or 1328; (n) any felony violation of 18 U.S.C. 922, 924 (firearms); (o) any violation of 26 U.S.C. 5861 (firearms); (p) a felony violation of 18 U.S.C. 1028 (production of false identification documents), 1542 (false statements in passport applications), 1546 (fraud and misuse of visas, permits, and other documents) or a violation of 8 U.S.C. 1324, 1327, or 1328 (smuggling of aliens); (q) 229 (chemical weapons), 2332 (terrorist violence against Americans overseas), 2332a (weapons of mass destruction), 2332b (multinational terrorism), 2332d (financial transactions with countries supporting terrorism), 2339A (support of terrorist), 2332B (support of terrorist organizations); (r) any conspiracy to commit any of these, 18 U.S.C. 2516(1)(crimes added by the Act in italics). Other than telephone face to face conversations (i.e., electronic communications), the approval of senior Justice Department officials is not required and an order may be sought in any felony investigation, 18 U.S.C. 2516(3).

10 Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
• permits pen register and trap and trace orders for electronic communications (e.g., e-mail)

• authorizes nationwide execution of court orders for pen registers, trap and trace devices, and access to stored e-mail or communication records

• treats stored voice mail like stored e-mail (rather than like telephone conversations)

• permits authorities to intercept communications to and from a trespasser within a computer system (with the permission of the system’s owner)

• adds terrorist and computer crimes to Title III’s predicate offense list

• reinforces protection for those who help execute Title III, ch. 121, and ch. 206 orders

• encourages cooperation between law enforcement and foreign intelligence investigators

• establishes a claim against the U.S. for certain communications privacy violations by government personnel

• terminates the authority found in many of the these provisions and several of the foreign intelligence amendments with a sunset provision (Dec. 31, 2005).

Pen Registers and Trap and Trace Devices. In section 216, the Act allows court orders authorizing trap and trace devices and pen registers to be used to capture source and addressee information for computer conversations (e.g., e-mail) as well as telephone conversations, 18 U.S.C. 3121, 3123. In answer to objections that e-mail header information can be more revealing than a telephone number, it creates a detailed report to the court, 18 U.S.C. 3123(a)(3).11

11 “Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public the agency shall ensure that a record will be maintained which will identify – (i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of the such device.

“(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof),” section 216(b)(1).
The use of pen registers or trap and trace devices was limited at one time to the judicial district in which the order was issued, 18 U.S.C. 3123 (2000 ed.). Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States, 18 U.S.C. 3123(b)(1)(C), 3127(2).^12

**Communications Records and Stored E-Mail.** With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber, 18 U.S.C. 2703(a),(b). A warrant will also suffice to seize records describing telephone and other communications transactions without customer notice, 18 U.S.C. 2703(c). In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation, officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records, 18 U.S.C. 2703(b),(c). They can obtain a limited amount of record information (subscribers’ names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena, 18 U.S.C. 2703(c)(1)(C). There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial, 18 U.S.C. 2705.

In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider’s customer records, 18 U.S.C. 2703(c)(1)(C).^13

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.

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^12 The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” DoJ at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

^13 Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user's true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” DoJ at §107.
Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

Previously, only a federal court in the district in which the e-mail was stored could issue the order. Under section 220, federal courts in the district where an offense under investigation occurred may issue orders applicable “without geographic limitation,” 18 U.S.C. 2703.14

The Act, in section 209, treats voice mail like e-mail, that is, subject to the warrant or court order procedure, rather than to the more demanding coverage of Title III once required, United States v. Smith, 155 F.3d 1050, 1055-56 (9th Cir. 1998).

Finally, the Act resolves a conflict between chapter 121 and the federal law governing cable companies. Government entities may have access to cable company customer records only under a court order following an adversary hearing if they can show that the records will evidence that the customer is or has engaged in criminal activity, 47 U.S.C. 511(h). When cable companies began offering telephone and other communications services the question arose whether the more demanding cable rules applied or whether law enforcement agencies were entitled to ex parte court orders under the no-notice procedures applicable to communications providers.15 The Act makes it clear that the cable rules apply when cable television viewing services are

14 Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

15 See e.g., DoJ at §109 ("Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement's access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations").
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

**Electronic Surveillance.** To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202.\(^{16}\) A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(i). Yet only the interloper's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.\(^{17}\)

**Criminal Investigators' Access to Foreign Intelligence Information.**

The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism.\(^{18}\) It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that “the purpose for the surveillance is to obtain foreign intelligence information,” 50 U.S.C. 1804(a)(7)(B)(2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps “the purpose” might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation

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\(^{16}\) 18 U.S.C. 229 (chemical weapons), 2332 (terrorist acts of violence committed against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2332d (financial transactions with countries which support terrorists), 2339A (providing material support to terrorists), and 2339B (providing material support to terrorist organizations).

\(^{17}\) “Because service providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves as permitted under current law, they often have no way to exercise their rights to protect themselves from unauthorized attackers. Moreover, such attackers can target critical infrastructures and engage in cyberterrorism,” DoJ at §106. Elsewhere the Act defines “electronic surveillance” for purposes of the Foreign Intelligence Surveillance Act (FISA) to emphasize that the law enforcement authority for this intruder surveillance does not confer similar authority for purposes of foreign intelligence gathering, section 1003 (50 U.S.C. 1801(f)(2)).

The Justice Department sought FISA surveillance and physical search authority on the basis of “a” foreign intelligence purpose. Section 218 of the Act insists that foreign intelligence gathering be a “significant purpose” for the request for the FISA surveillance or physical search order, 50 U.S.C. 1804(a)(7)(B), 1823(a)(7)(B), a more

Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment's warrant clause. It is here that the “primary purpose” notion originated. In United States v. Truong Dinh Hung, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, “as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.” Subsequent case law, however, is not as clear as it might be: see e.g., United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984)(“FISA permits federal officials to obtain orders authorizing electronic surveillance ‘for the purpose of obtaining foreign intelligence information.’ The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying officials’s belief that the information sought is the type of foreign intelligence information described”); United States v. Pelton, 835 F.2d 1067, 1075-76 (4th Cir. 1987)(“We also reject Pelton’s claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial”); United States v. Sarkissian, 841 F.2d 959, 907-8 (9th Cir. 1988)(“Defendants rely on the primary purpose test articulated in United States v. Truong Dinh Hung. . . . One other court has applied the primary purpose test. Another court has rejected it . . . distinguishing Truong. A third court has declined to decide the issue. We also decline to decide the issue”); United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1991)(“Appellants attack the government's surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance”)

Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” DoJ at §153.
demanding standard than the “a purpose” threshold proposed by the Justice Department, but a clear departure from the original “the purpose” entry point. FISA once described a singular foreign intelligence focus prerequisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k), 1825(k).  

*Protective Measures.* The Act reenforces two kinds of safeguards, one set designed to prevent abuse and the other to protect those who assist the government. The sunset clause is perhaps the best known of the Act’s safeguards. Under the direction of section 224, many of the law enforcement and foreign intelligence authorities granted by the Act expire as of December 31, 2005.  

The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter...
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices). 23 Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees, 24 but could not recover against the United States. 25 Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice's Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government's request until a court order authorizing access can be obtained. 26 Another allows providers to disclose customer records to protect the provider's rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others. 27 A third section,

26 Prior law already granted service providers immunity for disclosure of customer records in compliance with a court access order, 18 U.S.C. 2703(f).
27 "Existing law contains no provision that allows providers of electronic communications service to disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies that threaten death or serious bodily injury. This section amends 18 U.S.C. §2702 to authorize such disclosures if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay. "Current law also contains an odd disconnect: a provider may disclose the contents of the customer's communications in order to protect its rights or property but the current statute does not expressly permit a provider to voluntarily disclose non-content records (such as a subscriber's login records). 18 U.S.C. 2702(b)(5). This problem substantially hinders the ability of providers to protect themselves from cyber-terrorists and criminals. Yet the right to disclose the contents of communications necessarily implies the less intrusive ability to disclose non-content records. In order to promote the protection of our nation's critical infrastructures, this section's amendments allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems," DoJ at
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

Foreign Intelligence Investigations

Although both criminal investigations and foreign intelligence investigations are conducted in the United States, criminal investigations seek information about unlawful activity; foreign intelligence investigations seek information about other countries and their citizens. Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough.

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA), something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President's authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, United States v. United States District Court, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage

§110.

28 Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

29 Thus in the name of assisting in the execution of Title III, chapter 121, or chapter 206 order, the courts may not cite the Act as the basis for an order compelling a service provider to make system modifications or provide any other technical assistance not already required under 18 U.S.C. 2518(4), 2706, or 3124(c), see, H.R.Rep.No. 107-236, at 62-3 (2001) (emphasis added) (“This Act is not intended to affect obligations under Communications Assistance for Law Enforcement Act [which addresses law enforcement-beneficial system modifications and the compensation to be paid for the changes], nor does the act impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance”).

30 E.g., As amended by section 902 of the Act, “‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2)(language added by the Act in italics).

31 50 U.S.C. 1801 et seq.
lockers, 50 U.S.C. 1861-1863 (2000 ed.). Intelligence authorities gained narrow passages through other privacy barriers as well.\textsuperscript{32}

In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs.\textsuperscript{33} There were and still are extra


\textsuperscript{33} “As used in this subchapter: (a) ‘Foreign power’ means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

“(b) ‘Agent of a foreign power’ means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of a foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C).

“(c) ‘International terrorism’ means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnaping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

“(d) ‘Sabotage’ means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

“(e) ‘foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans (“United States persons,” i.e., citizens or permanent resident aliens).\textsuperscript{34} The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

- permits “roving” surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)
- increases the number of judges on the FISA court from 7 to 11
- allows application for a FISA surveillance or search order when gathering foreign intelligence is a significant reason for the application rather than the reason
- authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations
- sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses
- carries a sunset provision
- establishes a claim against the U.S. for certain communications privacy violations by government personnel
- expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to – (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States,” 50 U.S.C. 1801.

\textsuperscript{34} Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
**FISA.** FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases.\(^{35}\) It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

**Search and Surveillance for Intelligence Purposes.** Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, Draft at §151.\(^{36}\)

Section 901 of the Act address a concern raised during the 106th Congress relating to the availability of the FISA orders and the effective use of information gleaned from the execution of a FISA order.\(^{37}\) It vests the Director of Central

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\(^{36}\) See also, DoJ at §151, “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order’s minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed (50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

\(^{37}\) See e.g., S.Rep.No. 106-352, at 3, 6, 7 (2000)(“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application
Intelligence with the responsibility to formulate requirements and priorities for the use of FISA to collect foreign intelligence information. He is also charged with the responsibility of assisting the Attorney General in the efficient and effective dissemination of FISA generated information (50 U.S.C. 403-3(c)).

**Pen Registers and Trap and Trace Devices for Intelligence Gathering.** Section 214 grants the request of the Department of Justice by dropping requirements which limited FISA pen register and trap and trace device orders to facilities used by foreign agents or those engaged in international terrorist or clandestine intelligence activities, 50 U.S.C. 1842(c)(3)(2000 ed.).

It is enough that the order is sought as part of an investigation to protect against international terrorism or clandestine intelligence activities and is not motivated solely by an American’s exercise of his or her First Amendment rights. Elsewhere (section 505), the Act drops a similar limitation for intelligence officials’ access to telephone records, 18 U.S.C.

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38 “When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevancy, an additional factual showing that the communications device has been used to contact an ‘agent of a foreign power’ engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the ‘agent of a foreign power’ prong from the predication, and thus makes the FISA authority more closely track the criminal authority,” DoJ at §155.
Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise be entitled to confidentiality. Section 505, in response to the Justice Department's suggestion, allows FBI field offices to make the requests, see DoJ at §157 (“At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports”).

Third Party Cooperation and Tangible Evidence. As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target’s activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.40

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40 When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court’s order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.’ This would enhance the FBI’s ability to monitor international terrorists and intelligence officers who are
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian. The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities, in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B);
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a);
- the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a));
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v;

trained to thwart surveillance by rapidly changing hotel accommodations, cell phones, Internet accounts, etc., just prior to important meetings or communications. Under the current law, the government would have to return to the FISA Court for an order that named the new carrier, landlord, etc., before effecting surveillance. Under the proposed amendment, the FBI could simply present the newly discovered carrier, landlord, custodian or other person with a generic order issued by the Court and could then effect FISA coverage as soon as technically feasible,” DoJ at 152.


41 “The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigative contexts. The time and difficulty involved in getting such pleadings before the Court usually outweighs the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” DoJ at §156.

42 Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.\(^{43}\)

**Access to Law Enforcement Information.** Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community's access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, *Draft* at §103.\(^{44}\)

\(^{43}\) H.R.Rep.No. 107-205, at 60-1 (2001)(“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

“‘The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

“Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual’s credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding—without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information”).

\(^{44}\) See also, DoJ at §103, “This section facilities the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, *Draft at §354.*

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, *Draft at §154.*

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion.* It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions.”

*See also, DoJ at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.” Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officers.

*See also, DoJ at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”

*Blair v. United States, 250 U.S. 273, 281 (1919)(the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

Critics may protest that the change could lead to the use of the grand jury for intelligence gathering purposes, or less euphemistically, to spy on Americans. The proposal was never among those scheduled to sunset, but earlier versions of the section followed the path used for most other disclosures of grand jury material: prior

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49 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25 HARVARD JOURNAL OF LAW & PUBLIC POLICY 699, 719-20 (2002)(“There is a significant danger that the rule permitting disclosure will be treated as the de facto authorization of an expansion of the grand jury’s investigatory role to encompass seeking material relevant only to matters of national security, national defense, immigration, and so forth. The grand jury's awesome powers should not be unwittingly extended to a much wider range of issues. . . Since the grand jury operates in secret, there are no public checks on the scope of its investigations, and witnesses are not permitted to challenge its jurisdiction. Only the supervising court is in a position to keep the grand jury’s investigation within proper bounds. Requiring judicial approval of foreign intelligence and counterintelligence information disclosures would provide a natural check against the temptation to manipulate the grand jury to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6 (Nov. 2001)(“The grand jury secrecy rule is a rule of policy which has always had exceptions, and it has been frequently modified. The secrecy rule has no credible claim to constitutional stature”).
Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

“Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification.\(^{52}\) By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.\(^{53}\)

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

**Increasing Institutional Capacity.** As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a

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\(^{52}\) *Duncan v. Walker*, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted) (“It is our duty to give effect, if possible, to every clause and word of a statute. *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)); see also *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879)(As early as in Bacon's Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.*

\(^{53}\) Draft at §154, “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”
computerized translation capability to be used in foreign intelligence gathering. Section 907 instructs the Director of the Central Intelligence, in consultation with the Director of the FBI, to report on the creation of a National Virtual Translation Center. The report is to include information concerning staffing, allocation of resources, compatibility with comparable systems to be used for law enforcement purposes, and features which permit its efficient and secure use by all of the intelligence agencies.

**Money Laundering**

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture. The Act bolsters federal efforts in each area.

**Regulation.** Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.

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54 “The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

“The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so,” S.Rep.No. 107-63, at 11 (2001).


56 See e.g., 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 ("It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings").
Records and Reports. For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler’s checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to files SARs as well, reflecting Congress’ view that the information provided the IRS may be valuable for other law enforcement purposes. This concern is likewise


58 H.R.Rep.No. 107-250, at 38-9 (2001)(“Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

“Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a ‘Safeguard Procedures Report’ which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

“While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement
reflected in section 357 which asks the Secretary of the Treasury to report on the Internal Revenue Service’s role in the administration of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311 et seq.), and what transfers of authority, if any, are appropriate.

Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action.59 Section 355 expands the immunity to cover disclosures in

59 “Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

“First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor from civil liability applies in arbitration, as well as judicial, proceedings. Second, it amends section 5318(g)(3) to clarify the safe harbor's coverage of voluntary disclosures (that is, those not covered by the SAR regulatory reporting requirement). The language in section 5318(g)(3)(A) providing that ‘any financial institution that *** makes a disclosure pursuant to *** any other authority *** shall not be liable to any person’ is not intended to avoid the application of the reporting and disclosure provisions of the Federal securities laws to any person, or to insulate any issuers from private rights of actions for disclosures made under the Federal securities laws.

“Subsection [351](b) amends section 5318(g)(2) of title 31--which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed--to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee's official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
employment references to other insured depository financial institutions provided disclosure is not done with malicious intent.\textsuperscript{60}

The Financial Crimes Enforcement Network (FinCEN), a component within the Treasury Department long responsible for these anti-money laundering reporting and record-keeping requirements, 31 C.F.R. pt. 103, was administratively created in 1990 to provide other government agencies with an “intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes,” 55 Fed.Reg. 18433 (May 2, 1990).

The Act, in section 361, makes FinCEN a creature of statute, a bureau within the Treasury Department, 31 U.S.C. 310. Section 362 charges it with the responsibility of establishing a highly secure network to allow financial institutions to file required reports electronically and to permit FinCEN to provide those institutions with alerts and other information concerning money laundering protective measures, 31 U.S.C. 310 note.

**Special Measures.** In extraordinary circumstances involving international financial matters, the Act grants the Secretary of the Treasury, in consultation with other appropriate regulatory authorities, the power to issue regulations and orders involving additional required “special measures” and additional “due diligence” requirements to combat money laundering. The special measure authority, available under section 311, comes to life with the determination that particular institutions, jurisdictions, types of accounts, or types of transactions pose a primary money laundering risk.

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\textsuperscript{60} 31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 67 (2001).
These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

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61 31 U.S.C. 5318A. The circumstances considered in the case of a suspect jurisdiction are: evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction’s banking regulation; the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

62 The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’ including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate
business transactions.

"Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

"Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

"The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

"The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

"The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

"The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information that it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

"The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

"The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed
**Due Diligence.** Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.63

63 See generally, H.R.Rep. No. 107-250, at 71-2 (“Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

“The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

“The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

“For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
General Regulatory Matters. The Act establishes several other regulatory mechanisms directed at the activities involving U.S. financial institutions and foreign individuals or institutions. Section 313, for instance, in another restriction on correspondent accounts for foreign financial institutions, prohibits U.S. financial institutions from maintaining correspondent accounts either directly or indirectly for foreign shell banks (banks with no physical place of business) which have no affiliation with any financial institution through which their banking activities are subject to regulatory supervision.

The Act, in section 325, empowers the Secretary of the Treasury to promulgate regulations to prevent financial institutions from allowing their customers to conceal their financial activities by taking advantage of the institutions’ concentration account practices.

The Secretary of the Treasury is instructed in section 326 to issue regulations for financial institutions’ minimum new customer identification standards and record-
Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a ‘street name’ or omnibus account in the broker-dealer's name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to ‘look through’ the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund's customers. Thus, the fund would not be required to ‘look through’ the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).

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67 31 U.S.C. 5318(1); H.R. Rep. No. 107-250, at 62-3 (2001) (“Section [326](a) amends 31 U.S.C. 5318 by adding a new subsection governing the identification of account holders. Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a ‘street name’ or omnibus account in the broker-dealer's name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to ‘look through’ the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund's customers. Thus, the fund would not be required to ‘look through’ the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature.\textsuperscript{68}

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

\textbf{Reports to Congress.} Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.\textsuperscript{69}

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

\textbf{International Cooperation.} Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.\textsuperscript{70}

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (\textit{i.e.}, the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.


\textsuperscript{70} H.R.Rep.No. 107-250, at 67 (2001)(“This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury's progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

“The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete address information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime”).
**Crimes.** Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, smuggling, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
Section 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

“The definition of ‘financial institution’ in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of ‘commercial bank’ or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad--say to a Mexican bank--and launders them through a series of financial transactions, the government conceivably could not rely on the definition of a ‘financial institution’ in 1956(c)(6) to establish that the transaction was a ‘financial transaction’ within the meaning of 1956(c)(4)(B) (defining a ‘financial transaction’ as a transaction involving the use of a ‘financial institution’), or that it was a ‘monetary transaction’ within the meaning of 1957(f) (defining ‘monetary transaction’ as, inter alia, a transaction that would be a ‘financial transaction’ under 1956(c)(4)(B)).

“Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launders the proceeds of one of the crimes set forth on a list of ‘specified unlawful activities.’ 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),” H.R.Rep.No. 107-250, at 38 (2000).

Section 329 makes it a federal crime to corruptly administer the money laundering regulatory scheme. Offenders are punishable by imprisonment for not more than 15 years and a fine of not more than three times the amount of the bribe.

Section 5326 of title 31 authorizes the Secretary of the Treasury to impose temporary, enhanced reporting requirements upon financial institutions in areas victimized by substantial money laundering activity (geographic targeting regulations and orders). Section 353 makes it clear that the civil sanctions, criminal penalties, and prohibitions on smurfing (structuring transactions to evade reporting requirements) apply to violations of the regulations and orders issued under 31 U.S.C. 5326. It also extends the permissible length of the temporary geographical orders from 60 to 180 days.

Violations of the special measures and special due diligence requirements of sections 311 and 312 are subject to both civil and criminal penalties by virtue of section 363’s amendments to 31 U.S.C. 5321(a) and 5322. The amendments authorize civil penalties and criminal fines of twice the amount of the transaction but not more than $1 million. Criminal offenders would be subject to a fine in the same amount.

71 “[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.73

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents.74 They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

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73 “The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business.

“Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.

“Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive,” H.R.Rep.No. 107-250, at 54 (2001).

74 “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
• 18 U.S.C. 476 (taking impressions of tools used for obligations and securities) from 10 to 25 years;
• 18 U.S.C. 477 (possessing or selling impressions of tools used for obligations or securities) from 10 to 25 years;
• 18 U.S.C. 484 (connecting parts of different notes) from 5 to 10 years;
• 18 U.S.C. 493 (bonds and obligations of certain lending agencies) from 5 to 10 years;
• 18 U.S.C. 478 (foreign obligations or securities) from 5 to 20 years;
• 18 U.S.C. 479 (uttering counterfeit foreign obligations or securities) from 3 to 20 years;
• 18 U.S.C. 480 (possessing counterfeit foreign obligations or securities) from 1 to 20 years;
• 18 U.S.C. 481 (plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities) from 5 to 25 years;
• 18 U.S.C. 482 (foreign bank notes) from 2 to 20 years; and
• 18 U.S.C. 483 (uttering counterfeit foreign bank notes) from 1 to 20 years.

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

**Bulk Cash.** Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act’s bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting.  

The section appears to be the product of reactions to the Supreme Court’s decision in *United States v. Bajakian*, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court’s decision.

75 “For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).
As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency – representing the proceeds of drug trafficking and other criminal offenses – is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad . . .

"Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United State without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

"Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute," H.R.Rep.No. 107-250 at 36-7 (2001).

Section 5317 of title 31 once called for civil forfeiture of property traceable to a violation of 31 U.S.C. 5316 (reports on exporting or importing money instruments worth $10,000 or more). Section 372 of the Act recasts section 5317 to provide for civil and criminal forfeitures for violations of 31 U.S.C. 5316, of 31 U.S.C. 5313 (reports on domestic coins and currency transactions involving $10,000 or more) and of 31 U.S.C. 5324 (structuring transactions to evade reporting requirements (smurfing)).

**Extraterritorial Jurisdiction.** The Act makes 18 U.S.C. 1029, the federal statute condemning various crimes involving credit cards, PIN numbers and other access devices, applicable overseas if the card or device is issued by or controlled by an American bank or other entity and some article is held in or transported to or through the United States during the course of the offense, section 377. The change was part of the original Justice Department proposals. Justice explained that, “[financial crime] admits of no border, utilizing the integrated global financial network for ill purposes. This provision would apply the financial crimes prohibitions to conduct committed abroad, so long as the tools or proceeds of the crimes pass through or are in the United States,” DoJ at §408. The section, however, appears to limit the otherwise applicable extraterritorial jurisdiction implicit in section 1029, since federal courts would likely recognize extraterritorial jurisdiction over a violation of 18 U.S.C. 1029.
under either circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.\textsuperscript{77}

\textbf{Venue.} Section 1004 relies on \textit{dicta} in \textit{United States v. Cabrales}, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering,\textsuperscript{78} in the state and district in which the monetary transaction takes place. The Supreme Court in \textit{Cabrales} held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in \textit{dicta}, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.\textsuperscript{79}

\textbf{Forfeiture.} Forfeiture is the government confiscation of property as a consequence of crime.\textsuperscript{80} The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 \textit{et seq.} (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

\textbf{Constitutional Considerations.} The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 \textit{et seq.}, which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the


\textsuperscript{78} “The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed,” \textit{U.S.Const.} Art.III, §2, cl.3.

“[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,” \textit{U.S.Const.} Amend. VI.

\textsuperscript{79} See also, \textit{United States v. Rodriguez-Moreno}, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnaping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.

\textsuperscript{80} For general background information, see, Doyle, \textit{Crime and Forfeiture}, CRS REP.NO. 97-139A (Oct. 11, 2000).
jurisdiction of the United States, belonging to any foreign individual, foreign entity, or foreign country whom they determine to have planned, authorized, aided or engaged in an attack on the United States by a foreign country or foreign nationals. The section also permits the government to present secretly (ex parte and in camera) any classified information upon which the forfeiture was based should the decision be subject to judicial review. The Justice Department requested the section as a revival of the President's powers in times of unconventional wars. 81 By virtue of section 316, property owners may initiate a challenge to a confiscation by filing a claim under the rules applicable in maritime confiscations. The section permits two defenses to forfeiture – that the property is not subject to confiscation under section 106 or that the claimant is entitled to the innocent owner defense of 18 U.S.C. 983(d). 82 The characterization of the defenses as “affirmative defense” indicates that the claimant bears the burden of proof. The innocent owner defenses of 18 U.S.C. 983(d) are probably not available in cases under section 106, since that section is explicitly

81 “This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App.U.S.C. §5(b).

“This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress's war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

“The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2),” DoJ at §159.

82 “An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
excepted from the coverage of 18 U.S.C. 983. The challenge proceedings permit
the court to admit evidence, such as hearsay evidence, that would not otherwise be
admissible under the Federal Rules of Evidence if the evidence is reliable and if
national security might be imperiled should dictates of the Federal Rules be followed,
§316(b). The section recognizes the rights of claimants to proceed alternatively
under the Constitution or the Administrative Procedure Act.

The Justice Department also recommended enactment of an overlapping
 provision which ultimately passed as section 806 of the Act without any real
discussion of the relationship of the two sections. Section 806 authorizes
confiscation of all property, regardless of where it is found, of any individual, entity,
or organization engaged in domestic or international terrorism (as defined in 18
U.S.C. 2331), against the United States, Americans or their property, 18 U.S.C.

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83 18 U.S.C. 983(i)(2)(D).

84 “The exclusion of certain provisions of Federal law from the definition of the term ‘civil
forfeiture statute’ in section 983(i) of title 18, United States Code, shall not be construed to
deny an owner of property the right to contest the confiscation of assets of suspected
international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C)
subchapter II of chapter 5 of title 5, United States Code (commonly known as the
‘Administrative Procedure Act’).” Sec. 316(c)(1).

85 “Current law does not contain any authority tailored specifically to the confiscation of
terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for
the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of
such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available
current forfeiture laws require detailed tracing that is quite difficult for accounts coming
through the banks of countries used by many terrorists.

This section increases the government’s ability to strike at terrorist organizations’
economic base by permitting the forfeiture of its property regardless of the source of the
property, and regardless of whether the property has actually been used to commit a terrorism
offense. This is similar in concept to the forfeiture now available under RICO. In parity with
the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended
to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate
criminal forfeiture provision because criminal forfeiture is incorporated under current law by
reference. The provision is retroactive to permit it to be applied to the events of September
sections is no more explicit on the relation of the two sections.

86 “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or
acts dangerous to human life that are a violation of the criminal laws of the United States or
of any State, or that would be a criminal violation if committed within the jurisdiction of the
United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian
population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to
affect the conduct of a government by mass destruction, assassination or kidnapping; and (C)
occur primarily outside the territorial jurisdiction of the United States, or transcend national
boundaries in terms of the means by which they are accomplished, the persons they appear
intended to intimidate or coerce, or the locale in which their perpetrators operate or seek
asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts
dangerous to human life that are a violation of the criminal laws of the United States or of any
State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to
influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
Section 806 as discussed below also calls for the more common confiscation of property derived from and or facilitating acts of domestic or international terrorism against the United States or its citizens. Confiscations under 806 may be challenged under the procedures of 18 U.S.C. 983, since they are not exempted there. To the extent that forfeiture under section 806 is based on international rather than domestic terrorism, claimants may also use the procedures of section 316.

Confiscation based solely on the fact that the property is owned by a criminal offender, rather than that it is derived from or facilitates some crime is fairly uncommon. It is the mark of common law forfeiture of estate. At common law, a felon forfeited all of his property. Most contemporary forfeiture statutes employ statutory forfeiture, a more familiar presence in American law,\(^\text{87}\) which consists of the confiscation of things whose possession is criminal, of the fruits of crime, and of the means of crime – untaxed whiskey, the drug dealer’s profits, and the rum runner’s ship.

Three characteristics set forfeiture of estate apart. The property is lost solely by reason of its ownership by a felon. All of a felon’s property is confiscated, not merely that which is related to the crime for which he is convicted. Finally, it occasions attainder which negates the felon’s right to hold property or for title to property to pass through him to his heirs. It was with this in mind, that the Framers declared that “no attainder of treason shall work corruption of blood or forfeiture exception during the life of the person attained.”\(^\text{88}\) And for this reason, President Lincoln insisted that the confiscated real estate of Confederate supporters should revert their heirs at death.\(^\text{89}\)

\(^{87}\) *Austin v. United States*, 509 U.S. 602, 611-12 (1993)(“Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture . . . . Of England’s three kinds of forfeiture, only the third took hold in the United States”).

\(^{88}\) *U.S.Const.* Art.III, §3, cl.2.

\(^{89}\) 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal *in personam* proceedings following criminal conviction as a means of accomplishing confiscation.
Neither section 106 nor 806 require conviction of the terrorist property owner.\(^90\) Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers.\(^91\) The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners.\(^92\) Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them.\(^93\) The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate

\(^90\) Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c) (“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act”).

\(^91\) Silesian American Corp. v. Clark, 332 U.S. 469 (1947); cf., Societe Internationale v. Rogers, 357 U.S. 197, 211 (1958) (“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).

\(^92\) Zittman v. McGrath, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’”).

any presumption of remedial purposes.\footnote{94} The same has been said of the applicability of the ex post facto clause.\footnote{95}

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO.\footnote{96} If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

**Other Forfeiture Amendments.** In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.\footnote{97}

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\footnote{95}See e.g., United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.), 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994).

\footnote{96}DoJ, at §403.

\footnote{97}18 U.S.C. 1956(b). Cf., H.R.Rep.No. 107-250, at 54-5 (2001)(“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas.\textsuperscript{98} Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted

\textsuperscript{98} 18 U.S.C. 981(k). H.R.Rep.No. 107-250, at 57-8 (2001)(“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank's customers.

Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank's correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”).
defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation.\textsuperscript{99}

Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here.\textsuperscript{100} Section 320 enlarges this provision to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements.\textsuperscript{101} This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.\textsuperscript{102}

\textsuperscript{99} \textit{Cf.} H.R.Rep.No. 107-250, at 58-9 (2001) (“Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of ‘substitute assets’ when the defendant has placed the property otherwise subject to forfeiture ‘beyond the jurisdiction of the court.’ Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction. “This section amends 21 U.S.C. 853 to make clear that a court in a criminal case may issue a repatriation order--either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. 853(e) to restrain property--so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both”).

\textsuperscript{100} 18 U.S.C. 981(a)(1)(B).

\textsuperscript{101} H.R.Rep.No. 107-250, at 56 (2001) (“This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act”).

\textsuperscript{102} H.R.Rep.No. 107-250, at 59-60 (2001) (“Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country. “Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
A fugitive may not challenge a federal forfeiture. Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in “order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.”

to contest the restraining order could do so on the ground that 28 U.S.C. 2467 was not properly applied to the particular case, but could not oppose the restraining order on any ground that could also be raised in the proceedings pending in a foreign court. This provision prevents a litigant from taking ‘two bites at the apple’ by raising objections to the basis for the forfeiture in the Federal court that he also raised, or is entitled to raise, in the foreign court where the forfeiture action is pending. It complements the existing provision in section 2467(e) providing that the Federal court is bound by the findings of fact of the foreign court, and may not look behind such findings in determining whether to enter an order enforcing a foreign forfeiture judgment.

“This section also amends 28 U.S.C. 2467 to make clear that it is not necessary to prove that the person asserting an interest in the property received actual notice of the forfeiture proceedings. As is the case with respect to forfeitures under U.S. law, it is sufficient if the foreign nation takes steps to provide notice, in accordance with the principles of due process. See Gonzalez v. United States, 1997 WL 278123 (S.D.N.Y. 1997) (‘the [G]overnment is not required to ensure actual receipt of notice that is properly mailed’); Albajon v. Gugliotta, 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant’s identifications, and mailed after claimant released from jail, is sufficient to satisfy due process, even if claimant never received notice); United States v. Schiavo, 897 F. Supp. 644, 648 49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; due process satisfied even if he did not receive the notice).

“Finally, 28 U.S.C. 2467 is amended to authorize the enforcement of a forfeiture judgment based on any foreign offense that would constitute an offense giving rise to a civil or criminal forfeiture of the same property if the offense had been committed in the United States. This is one of two safeguards that the statute contains against the enforcement of judgments that the United States does not consider appropriate for enforcement: if the judgment is based on an act that would not constitute a crime in the United States, such as removing assets from the reach of a repressive regime, it could not be enforced. In addition, section 2467 already provides that a foreign judgment may only be enforced by a Federal court at the request of the United States, and only after the Attorney General has certified that the judgment was obtained in accordance with the principles of due process. Thus, neither a foreign Government nor a foreign private party could enforce a foreign judgment on its own under this provision.”). Note that the safeguard to which the report refers is the range of foreign offenses that will support an enforceable confiscation order, i.e., drug offenses and crimes on the money laundering predicate offense list, and that the amendment narrows that safeguard by adding additional foreign offenses, i.e., any foreign equivalent of a federal crime which would support a confiscation order.

Alien Terrorists and Victims

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

Border Protection. The border protection provisions:

• authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401

• authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402

• remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404

• authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405

• authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.

• instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007

• direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418

• express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414

• add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415

• call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416

• limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
• instruct the Attorney General to report on the feasibility of using biometric scanners to help prevent terrorists and other foreign criminals from entering the country, section 1008\textsuperscript{104}

• authorize appropriations of $250,000 for the FBI to determine the feasibility of providing airlines with computer access to the names of suspected terrorists, section 1009

• authorize reciprocal sharing of the State Department’s visa lookout data and related information with other nations in order to prevent terrorism, drug trafficking, slave marketing, and gun running, section 413

**Detention and Removal.** Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity, 8 U.S.C. 1227 (a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(iv). Aliens may be inadmissible for any number of terrorism-related reasons, 8 U.S.C. 1182 (a)(3)(B). Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported.


Section 411 defines “terrorist organization” to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the Federal Register as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C.

\textsuperscript{104} As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).
1182(a)(3)(B)(iv). Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).

Prior law made representatives of terrorist organizations designated by the Secretary under section 219 (8 U.S.C. 1189) inadmissible, 8 U.S.C. 1182(a)(3)(B)(i)(IV)(2000 ed.). And so they remain. Section 411 makes representatives of political, social or similar groups, whose public endorsements of terrorist activities undermines U.S. efforts to reduce or eliminate terrorism, inadmissible as well, 8 U.S.C. 1882(a)(3) (B)(i)(IV).

An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in “premeditated, politically motivated violence perpetrated against noncombatant targets,” or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security or endanger some individual or the general public. The Attorney General's determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

Victims. The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

• permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421 105
• extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422 106

105 “The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

106 “The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or his status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks.

“The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application.

“Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

“Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 31.

“Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.


107 “Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

“The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

“The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death),” H.R.Rep.No. 107-236, at 68 (2001).

108 “Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien’s 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien’s 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
Other Crimes, Penalties, & Procedures

New Crimes. The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

- wreck, derail, burn, or disable mass transit;
- place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
- burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
- impair a mass transit signal system;
- interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
- act with the intent to kill or seriously injure someone on mass transit property;
- convey a false alarm concerning violations of the section;
- attempt to violate the section;
- threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department, the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offense for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents, 18 U.S.C. 175b. Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.

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109 “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . . .” DoJ at §305.

110 The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

111 “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2)(“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.\textsuperscript{112}

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D). The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

\begin{itemize}
  \item • destruction of aircraft or their facilities, 18 U.S.C. 32;
  \item • biological weapons offenses, 18 U.S.C. 175;
  \item • chemical weapons offenses, 18 U.S.C. 229;
  \item • nuclear weapons offenses, 18 U.S.C. 831;
  \item • bombing federal buildings, 18 U.S.C. 844(f);
  \item • destruction of an energy facility, 18 U.S.C. 1366;
  \item • violence committed against maritime navigational facilities, 18 U.S.C. 2280;
  \item • offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
  \item • international terrorism, 18 U.S.C. 2232b;
  \item • sabotage of a nuclear facility, 42 U.S.C. 2284;
  \item • air piracy, 49 U.S.C. 46502.
\end{itemize}

\textsuperscript{112} U.S. Const. Art.III, §2, cl.3 (“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . .”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . .”); United States v. Cabrales, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from Cabrales when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnapping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999)(“By way of comparison, last Term in [Cabrales] we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).
The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of ‘material support or resources’ is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’),” DoJ at 306.

Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.115


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115 “The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill (‘Federal terrorism offenses’) is used in identifying the relevant crimes,” DoJ, at §304.

New Penalties. The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically, it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. 3571(b),(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense.117

The proposal, however, failed to identify the critical elements that would trigger the alternative.118 Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

- for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

- for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

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117 “Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersede lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,” DoJ, at §302.

118 “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense,” Draft at §302.
• for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;

• for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;

• for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;

• for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and

• for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism.119 Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:

• arson committed within a federal enclave, 18 U.S.C. 81;
• killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);
• destruction of communications facilities, 18 U.S.C. 1362;
• destruction of property within a federal enclave, 18 U.S.C. 1363;
• causing a train wreck, 18 U.S.C. 1922;
• providing material support to a terrorist, 18 U.S.C. 2339A;
• torture committed overseas under color of law, 18 U.S.C. 2340A;
• sabotage of a nuclear facility, 42 U.S.C. 2284;

119 “The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §§846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

“This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.
• interfering with a flight crew within U.S. special aircraft jurisdiction, 49 U.S.C. 46504;
• carrying a weapon or explosive aboard an aircraft within U.S. special aircraft jurisdiction, 49 U.S.C. 46505; and
• sabotage of interstate gas pipeline facilities, 49 U.S.C. 60123.

When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years).  

The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission), a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

120 Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

121 “Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.

“This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders).

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

**Other Procedural Adjustments.** In other procedural adjustments designed to facilitate criminal investigations, the Act:

- increases the rewards for information in terrorism cases
- expands the Posse Comitatus Act exceptions
- authorizes “sneak and peek” search warrants
- permits nationwide and perhaps worldwide execution of warrants in terrorism cases
- eases government access to confidential information
- allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
- lengthens the statute of limitations applicable to crimes of terrorism
- clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
- adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B.

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122 It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, e.g., damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

123 When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001)(remarks of Rep. Sensenbrenner); for general background, see, Doyle, *McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys*, CRS REP.NO. RL30060 (Dec. 14, 2001).
Rewards. The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L.105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism.\(^\text{124}\)

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

Posse Comitatus. The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.\(^\text{125}\)

Delayed notification of a search (sneak and peek). Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take

\(^{124}\) The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct threat assessments for federal agencies, and to reimburse federal agencies for the costs of detaining terrorist suspects overseas.

\(^{125}\) For a general discussion of the Posse Comitatus Act, see, Doyle, The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law, CRS REP.NO. 95-964 (June 1, 2000).
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, *Richards v. Wisconsin*, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, *Wilson v. Arkansas*, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, *Dalia v. United States*, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, *cf.*, *United States v. Miller*, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, *United States v. Freitas*, 800 F.2d 1451, 1453 (9th Cir. 1986).126

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126 The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in *United States v. New York Telephone Co.*, 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41... Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause... The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41... we hold that there was no compliance with Rule 41 under the facts of this case... While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth
Amendment, demands that surreptitious entries be closely circumscribed,” United States v. Freitas (Freitas I), 800 F.2d 1451, 1455-456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, United States v. Freitas (Freitas II), 856 F.2d 1425 (9th Cir. 1988).

“No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in Dalia v. United States, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in Dalia, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property. . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. See United States v. New York Telephone Co., 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . . Although the Freitas I court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in United States v. Villegas, 899 F.2d 1324 (1999). Although the Freitas I court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in Villegas. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the Freitas I court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” United States v. Pangburn, 983 F.2d 449, 453-55 (2d Cir. 1993).

In Simons, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
The Justice Department urged that the conflict be resolved with a uniform rule which permitted sneak and peek warrants under the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage.\footnote{129}

The Act, in section 213, stops short of the Justice Department proposal. Characterized as a codification of the Second Circuit decision, 147 Cong. Rec. H7197 (daily ed. Oct. 23, 2001), the Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C. 3103a. Its sneak and peek authorization reaches all federal search and seizure warrants where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (\textit{e.g.}, risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (\textit{e.g.}, jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, \textit{i.e.}, in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation.\footnote{130} The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

\footnote{129}{The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. \$2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities,” \textit{DoJ} at \$353.}

\footnote{130}{Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department’s initial proposal, the Department’s justification does not address the question.}
constitutionally “reasonable,” that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

**Nationwide terrorism search warrants.** The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either “within or outside the district,” (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases.\(^{131}\) The provision may anticipate execution both in this country and overseas.\(^{132}\) The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage.\(^{133}\)

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\(^{131}\) The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

\(^{132}\) The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

\(^{133}\) *United States v. Barona*, 56 F.3d 1087, 1092 (9th Cir. 1995)(“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994)(“if American law enforcement officials substantially participated in the search or if the

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” F.R.Crim.P. 41, *Advisory Committee Notes: 1990 Amendment*. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

**Terrorists’ DNA.** The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards *per se.* 135 Existing federal law allowed the Attorney General to collect samples from foreign officials conducting the search were actually acting as agents for their American counterparts’); *United States v. Maturo*, 982 F.2d 57, 61 (2d Cir. 1992)(“where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials” or “where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials”); *United States v. Mitro*, 880 F.2d 1480, 1482 (1st Cir. 1989)(“where American agents participated in the foreign search or the foreign officers acted as agents for their American counterparts”); *United States v. Mount*, 757 F.2d 1315, 1318 (D.C.Cir. 1985)(“if American officials or officers participated in some significant way”); *United States v. Marzano*, 537 F.2d 257, 270 (7th Cir. 1976)(declining to adopt the “joint venture” standards, but finding level of American participation in the case before it insignificant); *United States v. Morrow*, 537 F.2d 120, 139 (5th Cir. 1976)(“if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts”); each of the decisions also suggests that evidence secured in a manner which shocked the conscience of the court would be excluded.

134 The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, see, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), reprinted, 78 Cong.Rec. 4982-983 (1934)(“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.) (conferring judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

federal prisoners convicted of a variety of violent crimes, 42 U.S.C. 14135a. The Act enlarges the predicate offense list to include any crime of violence or any terrorism offense, section 503.\(^\text{136}\)

**Access to Educational Records.** Finally, the Act calls for an ex parte court order procedure under which senior Justice Department officials may seek authorization to collect educational records relevant to an investigation or prosecution of a crime of terrorism, section 507 (as an exception to the confidentiality requirements of the General Education Provisions Act, 20 U.S.C. 1232g), section 508 (as an exception to the confidentiality requirements of the National Education Statistics Act, 20 U.S.C. 9007).

**Statute of Limitations.** Prosecution for murder in violation of federal law may be initiated at any time, 18 U.S.C. 3281. A five year statute of limitations applied for most other federal crimes before passage of the Act, with a few exceptions. Among the relevant exceptions were an eight year statute of limitations for several terrorist offenses, 18 U.S.C. 3286,\(^\text{137}\) and a ten year statute of limitations for a few arson and explosives offenses, 18 U.S.C. 3295. The Justice Department recommended the elimination of a statute of limitations in terrorism cases.\(^\text{138}\)

\(^{136}\) Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples form convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes,” DoJ at §353.


\(^{137}\) 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

\(^{138}\) “This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

“This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in
The Act takes less dramatic action in section 809. It eliminates the statute of limitations for any crime of terrorism\footnote{As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 (sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).} that risks or results in a death or serious bodily injury, 18 U.S.C. 3286. In the absence of such a risk or result, all other terrorism offenses become subject to the eight year statute of limitations unless already covered by the ten year statute for explosives and arson offenses, 18 U.S.C. 3286.

Application of the statute of limitations rarely provokes a constitutional inquiry. Nevertheless, due process precludes prosecution when it can be shown that pre-indictment delay “caused substantial prejudice to [a defendant’s] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.”\footnote{United States v. Marion, 404 U.S. 307, 325 (1971); United States v. Lovasco, 431 U.S. 783,790 (1977).} Moreover, a judicial difference of opinion has appeared in those cases connection with the September 11, 2001 terrorist attacks. The constitutionality of such retroactive applications of changes in statutes of limitations is well-settled, See, e.g., United States v. Grimes, 142 F.3d 1342, 1350-51 (11th Cir. 1998); People v. Frazer, 982 P.2d 180 (Cal. 1999).
when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period.\footnote{United States v. De La Matta, 266 F.3d 1275, 1286 (11th Cir. 2001); United States v. Grimes, 142 F.3d 1342, 1351 (11th Cir. 1998); United States v. Morrow, 177 F.3d 272, 294 (5th Cir. 1999); Falter v. United States, 23 F.2d 420, 425-26 (2d Cir. 1928).} Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.\footnote{People v. Frazer, 24 Cal.4th 737, 759, 982 P.2d 180, 1294, 88 Cal.Rptr.2d 312, 327 (1999).}

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (Grimes, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (Frazer, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

\textbf{Extraterritoriality.} Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States or elsewhere. . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.\footnote{United States v. Layton, 855 F.2d 1388 (9th Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); United States v. Benítez, 741 F.2d 1312 (11th Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).}

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnapping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.\footnote{Compare, United States v. Gatlin, 216 F.3d 207 (2d Cir. 2000); United States v. Laden, 92 F.Supp.2d 189 (S.D.N.Y. 2000); with, United States v. Corey, 232 F.3d 1166 (9th Cir. 2000); United States v. Erdos, 474 F.2d 157 (4th Cir. 1973).}

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

Victims. Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11th Victim Compensation Fund legislation before it passed the Act. Consequently, the Act’s victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 \textit{et seq.}, and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 \textit{et seq.}

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:
• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year)(42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d) (5)), section 621(d)

• waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

• eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
• makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

• prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

• allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

• reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

• makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

• allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986)) (Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

• establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

**Increasing Institutional Capacity.** A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

• $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)

• necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)

• $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)

• $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816

• $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701

• $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)

• $5 million for DEA police training in South and Central Asia, section 1007.

Miscellaneous. Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might to used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act,145 or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b), 807.146

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145 *I.e.*, Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).

The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

• destruction of aircraft or their facilities, 18 U.S.C. 32;
• biological weapons offenses, 18 U.S.C. 175;
• chemical weapons offenses, 18 U.S.C. 229;
• nuclear weapons offenses, 18 U.S.C. 831;
• bombing federal buildings, 18 U.S.C. 844(f);
• destruction of an energy facility, 18 U.S.C. 1366;
• violence committed against maritime navigational facilities, 18 U.S.C. 2280;
• offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
• international terrorism, 18 U.S.C. 2232b;
• sabotage of a nuclear facility, 42 U.S.C. 2284;
• air piracy, 49 U.S.C. 46502.

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.\(^{112}\)

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D). The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

\(^{112}\) U.S. Const. Art.III, §2, cl.3 (“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . .”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . .”); United States v. Cabrales, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from Cabrales when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnaping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999)(“By way of comparison, last Term in [Cabrales] we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).
The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of ‘material support or resources’ is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’),” DoJ at 307.

And it adds expert advice or assistance to the types of assistance that may not be provided under section 2339A. This last addition may encounter the same First Amendment vagueness problems some courts have found in assistance which takes the form of “training” and “personnel,” *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1137-136 (9th Cir. 2000). Finally, the section announces that a prosecution for violation of section 2339A (support of terrorists) may be brought where the support is provided or where the predicate act of terrorism occurs. There may be some question whether the Constitution permits prosecution where the predicate act occurs.

Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.


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113 The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of ‘material support or resources’ is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’),” DoJ at 306.


115 “The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill (‘Federal terrorism offenses’) is used in identifying the relevant crimes,” DoJ, at §304.

**New Penalties.** The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. §3571(b),(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense.\(^\text{117}\)

The proposal, however, failed to identify the critical elements that would trigger the alternative.\(^\text{118}\) Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

- for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

- for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

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\(^{117}\) “Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersede lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,” *DoJ*, at §302.

\(^{118}\) “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense,” *Draft* at §302.
• for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;

• for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;

• for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;

• for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and

• for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism. \(^{119}\) Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:

• arson committed within a federal enclave, 18 U.S.C. 81;
• killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);
• destruction of communications facilities, 18 U.S.C. 1362;
• destruction of property within a federal enclave, 18 U.S.C. 1363;
• causing a train wreck, 18 U.S.C. 1922;
• providing material support to a terrorist, 18 U.S.C. 2339A;
• torture committed overseas under color of law, 18 U.S.C. 2340A;
• sabotage of a nuclear facility, 42 U.S.C. 2284;

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\(^{119}\) The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §§846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

“This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.
• interfering with a flight crew within U.S. special aircraft jurisdiction, 49 U.S.C. 46504;
• carrying a weapon or explosive abroad an aircraft within U.S. special aircraft jurisdiction, 49 U.S.C. 46505; and
• sabotage of interstate gas pipeline facilities, 49 U.S.C. 60123.

When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years). The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission), a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

120 Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

121 “Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.

“This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders). 122

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

**Other Procedural Adjustments.** In other procedural adjustments designed to facilitate criminal investigations, the Act:

- increases the rewards for information in terrorism cases
- expands the Posse Comitatus Act exceptions
- authorizes “sneak and peek” search warrants
- permits nationwide and perhaps worldwide execution of warrants in terrorism cases
- eases government access to confidential information
- allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
- lengthens the statute of limitations applicable to crimes of terrorism
- clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
- adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B. 123

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122 It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, e.g., damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

123 When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001)(remarks of Rep. Sensenbrenner); for general background, see, Doyle, *McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys*, CRS REP.NO. RL30060 (Dec. 14, 2001).
**Rewards.** The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L.105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism.124

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

**Posse Comitatus.** The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.125

**Delayed notification of a search (sneak and peek).** Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take

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124 The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct threat assessments for federal agencies, and to reimburse federal agencies for the costs of detaining terrorist suspects overseas.

125 For a general discussion of the Posse Comitatus Act, see, Doyle, *The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law*, CRS REP.NO. 95-964 (June 1, 2000).
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, Richards v. Wisconsin, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, Wilson v. Arkansas, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, Dalia v. United States, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, cf., United States v. Miller, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, United States v. Freitas, 800 F.2d 1451, 1453 (9th Cir. 1986).

126 The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in United States v. New York Telephone Co., 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth
The Second Circuit was less convinced and preferred to hold sneak and peek searches to the demands of Rule 41, *United States v. Pangburn*, 983 F.2d 449 (2d Cir. 1993). The Fourth Circuit was, if anything, less convinced. Moreover, the facts in the case demonstrate the potential impact of the issue on computer privacy, *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000).

Amendment, demands that surreptitious entries be closely circumscribed,” *United States v. Freitas (Freitas I)*, 800 F.2d 1451, 1455-456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, *United States v. Freitas (Freitas II)*, 856 F.2d 1425 (9th Cir. 1988).

127 “No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in *Dalia v. United States*, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in *Dalia*, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property. . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. *See United States v. New York Telephone Co.*, 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . . Although the *Freitas I* court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in *United States v. Villegas*, 899 F.2d 1324 (1999). Although the *Freitas I* court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in *Villegas*. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the *Freitas I* court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” *United States v. Pangburn*, 983 F.2d 449, 453-55 (2d Cir. 1993).

128 In *Simons*, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
The Justice Department urged that the conflict be resolved with a uniform rule which permitted sneak and peek warrants under the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage.\textsuperscript{129}

The Act, in section 213, stops short of the Justice Department proposal. Characterized as a codification of the Second Circuit decision, 147 Cong.Rec. H7197 (daily ed. Oct. 23, 2001), the Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C. 3103a. Its sneak and peek authorization reaches all federal search and seizure warrants where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (\textit{e.g.}, risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (\textit{e.g.}, jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, \textit{i.e.}, in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation.\textsuperscript{130} The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

\textsuperscript{129} “The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities,” \textit{DoJ} at §353.

\textsuperscript{130} Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department’s initial proposal, the Department’s justification does not address the question.
The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, United States v. Verdugo-Urquidez, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage. Neither Rule 41 nor any other provision of federal

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” F.R.Crim.P. 41, *Advisory Committee Notes: 1990 Amendment*. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

**Terrorists' DNA.** The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards *per se*. 135 Existing federal law allowed the Attorney General to collect samples from foreign officials conducting the search were actually acting as agents for their American counterparts”); *United States v. Maturo*, 982 F.2d 57, 61 (2d Cir. 1992)(“where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials” or “where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials”); *United States v. Mitro*, 880 F.2d 1480, 1482 (1st Cir. 1989)(“where American agents participated in the foreign search or the foreign officers acted as agents for their American counterparts”); *United States v. Mount*, 757 F.2d 1315, 1318 (D.C.Cir. 1985)(“if American officials or officers participated in some significant way”); *United States v. Marzano*, 537 F.2d 257, 270 (7th Cir. 1976)(declining to adopt the “joint venture” standards, but finding level of American participation in the case before it insignificant); *United States v. Morrow*, 537 F.2d 120, 139 (5th Cir. 1976)(“if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts”); each of the decisions also suggests that evidence secured in a manner which shocked the conscience of the court would be excluded.

134 The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, see, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), *reprinted*, 78 *Cong.Rec.* 4982-983 (1934)(“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.)(conferring judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

federal prisoners convicted of a variety of violent crimes, 42 U.S.C. 14135a. The Act enlarges the predicate offense list to include any crime of violence or any terrorism offense, section 503.\footnote{Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples form convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes,” DoJ at §353.}

**Access to Educational Records.** Finally, the Act calls for an ex parte court order procedure under which senior Justice Department officials may seek authorization to collect educational records relevant to an investigation or prosecution of a crime of terrorism, section 507 (as an exception to the confidentiality requirements of the General Education Provisions Act, 20 U.S.C. 1232g), section 508 (as an exception to the confidentiality requirements of the National Education Statistics Act, 20 U.S.C. 9007).

**Statute of Limitations.** Prosecution for murder in violation of federal law may be initiated at any time, 18 U.S.C. 3281. A five year statute of limitations applied for most other federal crimes before passage of the Act, with a few exceptions. Among the relevant exceptions were an eight year statute of limitations for several terrorist offenses, 18 U.S.C. 3286,\footnote{18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).} and a ten year statute of limitations for a few arson and explosives offenses, 18 U.S.C. 3295. The Justice Department recommended the elimination of a statute of limitations in terrorism cases.\footnote{138 “This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended. “This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in}

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\footnote{136 For a general discussion, see, Fischer, DNA Identification: Applications and Issues, CRS REP.NO. RL30717 (Jan. 12, 2001).}
The Act takes less dramatic action in section 809. It eliminates the statute of limitations for any crime of terrorism\textsuperscript{139} that risks or results in a death or serious bodily injury, 18 U.S.C. 3286. In the absence of such a risk or result, all other terrorism offenses become subject to the eight year statute of limitations unless already covered by the ten year statute for explosives and arson offenses, 18 U.S.C. 3286.

Application of the statute of limitations rarely provokes a constitutional inquiry. Nevertheless, due process precludes prosecution when it can be shown that pre-indictment delay “caused substantial prejudice to [a defendant’s] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.”\textsuperscript{140} Moreover, a judicial difference of opinion has appeared in those cases

connection with the September 11, 2001 terrorist attacks. The constitutionality of such retroactive applications of changes in statutes of limitations is well-settled, See, e.g., \textit{United States v. Grimes}, 142 F.3d 1342, 1350-51 (11th Cir. 1998); \textit{People v. Frazer}, 982 P.2d 180 (Cal. 1999).

“Existing federal law (18 U.S.C. §3282) bars prosecuting most offenses after five years. 18 U.S.C. §3286, as currently formulated, extends the limitation period for prosecution for certain offenses that may be committed by terrorists – but only to eight years. While this is a limited improvement over the five-year limitation period for most federal offenses, it is patently inadequate in relation to the catastrophic human and social costs that frequently follow from such crimes as destruction of aircraft (18 U.S.C. §32), aircraft hijackings ([49] U.S.C. §§46502, 46504-06, attempted political assassinations (18 U.S.C. §§351, 1116, 1751), or hostage taking (18 U.S.C. §1203). These are not minor acts of misconduct which can properly be forgiven or forgotten merely because the perpetrator has avoided apprehension for some period of time. Anomalously, existing law provides longer limitation periods for such offenses as bank frauds and certain artwork thefts (18 U.S.C.§§3293-94) than it does for crimes characteristically committed by terrorists.

“In many American jurisdictions, the limitation periods for prosecution for serious offenses are more permissible than those found in federal law, including a number of states which have no limitation period for the prosecution of felonies generally. While this section does not go so far, it does eliminate the limitation period for prosecution of the major crimes that are most likely to be committed by terrorists (‘Federal terrorism offenses’), as specified in section 309 of this bill,” DoJ at 301.

\textsuperscript{139} As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bomber property); 844(i)(bomber property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 (sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period.\textsuperscript{141} Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.\textsuperscript{142}

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (\textit{Grimes}, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (\textit{Frazer}, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

\textbf{Extraterritoriality.} Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States or elsewhere. . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.\textsuperscript{143}

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnapping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.

\textsuperscript{141} \textit{United States v. De La Matta}, 266 F.3d 1275, 1286 (11th Cir. 2001); \textit{United States v. Grimes}, 142 F.3d 1342, 1351 (11th Cir. 1998); \textit{United States v. Morrow}, 177 F.3d 272, 294 (5th Cir. 1999); \textit{Falter v. United States}, 23 F.2d 420, 425-26 (2d Cir. 1928).

\textsuperscript{142} \textit{People v. Frazer}, 24 Cal.4th 737, 759, 982 P.2d 180, 1294, 88 Cal.Rptr.2d 312, 327 (1999).

\textsuperscript{143} \textit{United States v. Layton}, 855 F.2d 1388 (9th Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); \textit{United States v. Benítez}, 741 F.2d 1312 (11th Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.  

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

Victims. Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11th Victim Compensation Fund legislation before it passed the Act. Consequently, the Act’s victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 et seq., and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 et seq.

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:

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• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year)(42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d)(5)), section 621(d)

• waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

• eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

Increasing Institutional Capacity. A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

- $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)

- necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)

- $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)

- $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816

- $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701

- $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)

- $5 million for DEA police training in South and Central Asia, section 1007.

**Miscellaneous.** Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might to used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act, or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b), 807.

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145 *I.e.*, Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).

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The USA PATRIOT Act: A Legal Analysis

April 15, 2002

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The USA PATRIOT Act: A Legal Analysis

Summary

The USA PATRIOT Act passed in the wake of the September 11 terrorist attacks. It flows from a consultation draft circulated by the Department of Justice, to which Congress made substantial modifications and additions. The stated purpose of the Act is to enable law enforcement officials to track down and punish those responsible for the attacks and to protect against any similar attacks.

The Act grants federal officials greater powers to trace and intercept terrorists’ communications both for law enforcement and foreign intelligence purposes. It reinforces federal anti-money laundering laws and regulations in an effort to deny terrorists the resources necessary for future attacks. It tightens our immigration laws to close our borders to foreign terrorists and to expel those among us. Finally, it creates a few new federal crimes, such as the one outlawing terrorists’ attacks on mass transit; increases the penalties for many others; and institutes several procedural changes, such as a longer statute of limitations for crimes of terrorism.

Critics have suggested that it may go too far. The authority to monitor e-mail traffic, to share grand jury information with intelligence and immigration officers, to confiscate property, and to impose new book-keeping requirements on financial institutions, are among the features troubling to some.

The Act itself responds to some of these reservations. Many of the wiretapping and foreign intelligence amendments sunset on December 31, 2005. The Act creates judicial safeguards for e-mail monitoring and grand jury disclosures; recognizes innocent owner defenses to forfeiture; and entrusts enhanced anti-money laundering powers to those regulatory authorities whose concerns include the well being of our financial institutions.

This report, stripped of its citations and footnotes, is available in an abbreviated form as The USA PATRIOT Act: A Sketch, CRS Rep.No. RS21203. In addition, much of the information contained here may also be found under a different arrangement in a report entitled, Terrorism: Section by Section Analysis of the USA PATRIOT Act, CRS Rep.No. RL31200 (Dec. 10, 2001). A wider array of terrorism-related analysis appears on the CRS terrorism electronic briefing book page.
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The USA PATRIOT Act: A Legal Analysis

Introduction

Congress passed the USA PATRIOT Act (the Act) in response to the terrorists’ attacks of September 11, 2001. The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to further close our borders to foreign terrorists and to detain and remove those within our borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it is not without safeguards, critics contend some of its provisions go too far. Although it grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough.


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1 P.L. 107-56, 115 Stat. 272 (2001); its full title is the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT).”

2 H.R. 2975 was introduced by Representative Sensenbrenner for himself and Representatives Conyers, Hyde, Coble, Goodlatte, Jenkins, Jackson-Lee, Cannon, Meehan, Graham, Bachus, Wexler, Hostettler, Keller, Issa, Hart, Flake, Schiff, Thomas, Goss, Rangel, Berman and Lofgren; S.1510 by Senator Daschle for himself and Senators Lott, Leahy, Hatch, Graham, Shelby and Sarbanes.

3 H.R. 3004 was introduced by Representative Oxley for himself and Represenatives LaFalce, Leach, Maloney, Roukema, Bentsen, Hooley, Bereuter, Baker, Bachus, King, Kelly, Gillmore, Cantor, Riley, Latourette, Green (of Wisconsin), and Grucci; and reported out of the House Financial Services Committee with amendments on October 15, 2001, H.R.Rep.No. 107-250. H.R. 3004, as reported out, included Internet gambling amendments that were not included in H.R. 2975/H.R.3108.
ed. Oct. 24, 2001), and H.R. 3162 was sent to the President who signed it on October 26, 2001.

**Criminal Investigations: Tracking and Gathering Communications**

A portion of the Act addresses issues suggested originally in a Department of Justice proposal circulated in mid-September. The first of its suggestions called for amendments to federal surveillance laws, laws which govern the capture and tracking of suspected terrorists’ communications within the United States. Federal law features a three tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications.\footnote{The Department’s proposal, dated September 20, 2001, came with a brief section by section analysis. Both the proposal (Draft) and analysis (DoJ) were printed as an appendix in Administration’s Draft Anti-Terrorism Act of 2001, Hearing Before the House Comm. on the Judiciary, 107th Cong., 1st Sess. 54 (2001).}


Congress responded to *Berger* and *Katz*, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications, 18 U.S.C. 2511.\footnote{“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,” *U.S. Const.* Amend. IV.} At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious
criminal cases. When approved by senior Justice Department officials, law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.

8 The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of” one or more predicate offense, 18 U.S.C. 2516.

9 The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement), 1751 (presidential and presidential staff assassination, kidnapping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnapping, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or nationalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations, 18 U.S.C. 2518. The court notifies the parties to any conversations seized under the order after the order expires, 18 U.S.C. 2518(8).

Below Title III, the next tier of privacy protection covers some of those matters which the Supreme Court has described as beyond the reach of the Fourth Amendment protection – telephone records, e-mail held in third party storage, and the like, 18 U.S.C. 2701-2709 (Chapter 121). Here, the law permits law enforcement access, ordinarily pursuant to a warrant or court order or under a subpoena in some cases, but in connection with any criminal investigation and without the extraordinary levels of approval or constraint that mark a Title III interception, 18 U.S.C. 2703.

Least demanding and perhaps least intrusive of all is the procedure that governs court orders approving the government’s use of trap and trace devices and pen registers, a kind of secret “caller id”, which identify the source and destination of calls made to and from a particular telephone, 18 U.S.C. 3121-3127 (Chapter 206). The orders are available based on the government’s certification, rather than a finding of the court, that the use of the device is likely to produce information relevant to the investigation of a crime, any crime, 18 U.S.C. 3123. The devices record no more than the identity of the participants in a telephone conversation, but neither the orders nor the results they produce need ever be revealed to the participants.

The Act modifies the procedures at each of the three levels. It:

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offense involving counterfeiting punishable under 18 U.S.C. 471, 472, or 473; (e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States; (f) any offense including extortionate credit transactions under 18 U.S.C. 892, 893, or 894; (g) a violation of 31 U.S.C. 5322 (dealing with the reporting of currency transactions); (h) any felony violation of 18 U.S.C. 2511 and 2512 (interception and disclosure of certain communications and to certain intercepting devices); (i) any felony violation of 18 U.S.C. ch. 71 (obscenity); (j) 49 U.S.C. 60123(b) (destruction of a natural gas pipeline), 46502 (aircraft piracy); (k) 22 U.S.C. 2778 (Arms Export Control Act); (l) the location of any fugitive from justice from an offense described in this section; (m) a violation of 8 U.S.C. 1324, 1327, or 1328; (n) any felony violation of 18 U.S.C. 922, 924 (firearms); (o) any violation of 26 U.S.C. 5861 (firearms); (p) a felony violation of 18 U.S.C. 1028 (production of false identification documents), 1542 (false statements in passport applications), 1546 (fraud and misuse of visas, permits, and other documents) or a violation of 8 U.S.C. 1324, 1327, or 1328 (smuggling of aliens); (p) 229 (chemical weapons), 2332 (terrorist violence against Americans overseas), 2332a (weapons of mass destruction), 2332b (multinational terrorism), 2332d (financial transactions with countries supporting terrorism), 2339A (support of terrorist), 2332B (support of terrorist organizations); (r) any conspiracy to commit any of these, 18 U.S.C. 2516(1)(crimes added by the Act in italics). Other than telephone face to face conversations (i.e., electronic communications), the approval of senior Justice Department officials is not required and an order may be sought in any felony investigation, 18 U.S.C. 2516(3).

10 Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
• permits pen register and trap and trace orders for electronic communications (e.g., e-mail)

• authorizes nationwide execution of court orders for pen registers, trap and trace devices, and access to stored e-mail or communication records

• treats stored voice mail like stored e-mail (rather than like telephone conversations)

• permits authorities to intercept communications to and from a trespasser within a computer system (with the permission of the system’s owner)

• adds terrorist and computer crimes to Title III’s predicate offense list

• reenforces protection for those who help execute Title III, ch. 121, and ch. 206 orders

• encourages cooperation between law enforcement and foreign intelligence investigators

• establishes a claim against the U.S. for certain communications privacy violations by government personnel

• terminates the authority found in many of the these provisions and several of the foreign intelligence amendments with a sunset provision (Dec. 31, 2005).

Pen Registers and Trap and Trace Devices. In section 216, the Act allows court orders authorizing trap and trace devices and pen registers to be used to capture source and addressee information for computer conversations (e.g., e-mail) as well as telephone conversations, 18 U.S.C. 3121, 3123. In answer to objections that e-mail header information can be more revealing than a telephone number, it creates a detailed report to the court, 18 U.S.C. 3123(a)(3).11

11 “Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public the agency shall ensure that a record will be maintained which will identify – (i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of the such device.

“(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof),” section 216(b)(1).
The use of pen registers or trap and trace devices was limited at one time to the judicial district in which the order was issued, 18 U.S.C. 3123 (2000 ed.). Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States, 18 U.S.C. 3123(b)(1)(C), 3127(2).12

Communications Records and Stored E-Mail. With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber, 18 U.S.C. 2703(a),(b). A warrant will also suffice to seize records describing telephone and other communications transactions without customer notice, 18 U.S.C. 2703(c). In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation, officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records, 18 U.S.C. 2703(b),(c). They can obtain a limited amount of record information (subscribers’ names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena, 18 U.S.C. 2703(c)(1)(C). There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial, 18 U.S.C. 2705.

In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider’s customer records, 18 U.S.C. 2703(c)(1)(C).13

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.

12 The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” DoJ at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

13 Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user's true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” DoJ at §107.
Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

The Act, in section 209, treats voice mail like e-mail, that is, subject to the warrant or court order procedure, rather than to the more demanding coverage of Title III once required, United States v. Smith, 155 F.3d 1050, 1055-56 (9th Cir. 1998).

Finally, the Act resolves a conflict between chapter 121 and the federal law governing cable companies. Government entities may have access to cable company customer records only under a court order following an adversary hearing if they can show that the records will evidence that the customer is or has engaged in criminal activity, 47 U.S.C. 511(h). When cable companies began offering telephone and other communications services the question arose whether the more demanding cable rules applied or whether law enforcement agencies were entitled to ex parte court orders under the no-notice procedures applicable to communications providers. The Act makes it clear that the cable rules apply when cable television viewing services are

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14 Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

15 See e.g., DoJ at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement’s access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

**Electronic Surveillance.** To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202. A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(i). Yet only the interloper's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.

**Criminal Investigators' Access to Foreign Intelligence Information.** The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism. It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that “the purpose for the surveillance is to obtain foreign intelligence information,” 50 U.S.C. 1804(a)(7)(B)(2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps “the purpose” might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation

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16 18 U.S.C. 229 (chemical weapons), 2332 (terrorist acts of violence committed against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2332d (financial transactions with countries which support terrorists), 2339A (providing material support to terrorists), and 2339B (providing material support to terrorist organizations).

17 “Because service providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves as permitted under current law, they often have no way to exercise their rights to protect themselves from unauthorized attackers. Moreover, such attackers can target critical infrastructures and engage in cyberterrorism,” DoJ at §106. Elsewhere the Act defines “electronic surveillance” for purposes of the Foreign Intelligence Surveillance Act (FISA) to emphasize that the law enforcement authority for this intruder surveillance does not confer similar authority for purposes of foreign intelligence gathering, section 1003 (50 U.S.C. 1801(f)(2)).

The Justice Department sought FISA surveillance and physical search authority on the basis of “a” foreign intelligence purpose. Section 218 of the Act insists that foreign intelligence gathering be a “significant purpose” for the request for the FISA surveillance or physical search order, 50 U.S.C. 1804(a)(7)(B), 1823(a)(7)(B), a more official was required to either end surveillance or secure an order under Title III.  

Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment's warrant clause. It is here that the “primary purpose” notion originated. In United States v. Truong Dinh Hung, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, “as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.” Subsequent case law, however, is not as clear as it might be: see e.g., United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984)(“FISA permits federal officials to obtain orders authorizing electronic surveillance ‘for the purpose of obtaining foreign intelligence information.’ The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying officials’ belief that the information sought is the type of foreign intelligence information described”); United States v. Pelton, 835 F.2d 1067, 1075-76 (4th Cir. 1987)(“We also reject Pelton’s claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial”); United States v. Sarkissian, 841 F.2d 959, 907-8 (9th Cir. 1988)(“Defendants rely on the primary purpose test articulated in United States v. Truong Dinh Hung. . . . One other court has applied the primary purpose test. Another court has rejected it . . . distinguishing Truong. A third court has declined to decide the issue. We also decline to decide the issue”); United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1991)(“Appellants attack the government’s surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance”).

20 “Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” DoJ at §153.
demanding standard than the “a purpose” threshold proposed by the Justice Department, but a clear departure from the original “the purpose” entry point. FISA once described a singular foreign intelligence focus prerequisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k), 1825(k).21

**Protective Measures.** The Act reenforces two kinds of safeguards, one set designed to prevent abuse and the other to protect those who assist the government. The sunset clause is perhaps the best known of the Act’s safeguards. Under the direction of section 224, many of the law enforcement and foreign intelligence authorities granted by the Act expire as of December 31, 2005.22 The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter

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21 “(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. (2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, infra, quoting, 50 U.S.C. 1801.

22 “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210[subpoenas for communications provider customer records], 211[access to cable company communication service records], 213[sneak and peek], 216[pen register and trap and trace device amendments], 221[trade sanctions], and 222[assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005. “(b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers' communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices). Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees, but could not recover against the United States. Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice's Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government's request until a court order authorizing access can be obtained. Another allows providers to disclose customer records to protect the provider's rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others. A third section,

26 Prior law already granted service providers immunity for disclosure of customer records in compliance with a court access order, 18 U.S.C. 2703(f).
27 "Existing law contains no provision that allows providers of electronic communications service to disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies that threaten death or serious bodily injury. This section amends 18 U.S.C. §2702 to authorize such disclosures if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.

“Current law also contains an odd disconnect: a provider may disclose the contents of the customer's communications in order to protect its rights or property but the current statute does not expressly permit a provider to voluntarily disclose non-content records (such as a subscriber's login records). 18 U.S.C. 2702(b)(5). This problem substantially hinders the ability of providers to protect themselves from cyber-terrorists and criminals. Yet the right to disclose the contents of communications necessarily implies the less intrusive ability to disclose non-content records. In order to promote the protection of our nation's critical infrastructures, this section's amendments allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems," DoJ at
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

**Foreign Intelligence Investigations**

Although both criminal investigations and foreign intelligence investigations are conducted in the United States, criminal investigations seek information about unlawful activity; foreign intelligence investigations seek information about other countries and their citizens. Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough.

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA), something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President's authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, United States v. United States District Court, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage

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28 Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

29 Thus in the name of assisting in the execution of Title III, chapter 121, or chapter 206 order, the courts may not cite the Act as the basis for an order compelling a service provider to make system modifications or provide any other technical assistance not already required under 18 U.S.C. 2518(4), 2706, or 3124(c), see, H.R.Rep.No. 107-236, at 62-3 (2001) (emphasis added) (“This Act is not intended to affect obligations under Communications Assistance for Law Enforcement Act [which addresses law enforcement-beneficial system modifications and the compensation to be paid for the changes], nor does the act impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance”).

30 *E.g.*, As amended by section 902 of the Act, “‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2)(language added by the Act in italics).

31 50 U.S.C. 1801 *et seq.*

In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs. There were and still are extra


33 “As used in this subchapter: (a) ‘Foreign power’ means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

“(b) ‘Agent of a foreign power’ means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C).

“(c) ‘International terrorism’ means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnaping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

“(d) ‘Sabotage’ means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

“(e) ‘Foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans (“United States persons,” i.e., citizens or permanent resident aliens). The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

• permits “roving” surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)

• increases the number of judges on the FISA court from 7 to 11

• allows application for a FISA surveillance or search order when gathering foreign intelligence is a significant reason for the application rather than the reason

• authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations

• sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses

• carries a sunset provision

• establishes a claim against the U.S. for certain communications privacy violations by government personnel

• expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to – (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States,” 50 U.S.C. 1801.

34 Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
FISA. FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases. It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

Search and Surveillance for Intelligence Purposes. Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, Draft at §151.36

Section 901 of the Act address a concern raised during the 106th Congress relating to the availability of the FISA orders and the effective use of information gleaned from the execution of a FISA order. It vests the Director of Central

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36 See also, DoJ at §151, “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order’s minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed (50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

37 See e.g., S.Rep.No. 106-352, at 3, 6, 7 (2000) (“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application
process, as interpreted by the OIPR is administratively burdensome and, at times, extremely slow. Many applications undergo months of scrutiny before submission to the court because the OIPR prescribes standards and restrictions not imposed by the statute. . . . In particular, the OIPR has been criticized for an overly restrictive interpretation of the FISA ‘currency’ requirement. This is the issue of how recent a subject’s activities must be to support a finding of probable cause that the subject is engaged in clandestine intelligence gathering activities. . . . While existing law does not specifically address “past activities,” it does not preclude, and legislative history supports, the conclusion that past activities may be part of the totality of circumstances considered by the FISC in making a probable cause determination. . . . By definition, information collected pursuant to a court order issued under the Foreign Intelligence Surveillance Act is foreign intelligence not law enforcement information. Accordingly, the Committee wants to clarify that the FISA ‘take’ can and must be shared by the Federal Bureau of Investigation with appropriate intelligence agencies. For the intelligence mission of the United States to be successful, there must be a cooperative and concerted effort among intelligence agencies. Any information collected by one agency under foreign intelligence authorities that could assist another agency in executing its lawful mission should be shared fully and promptly. Only then can the United States Government pursue aggressively important national security targets including, for example, counterterrorist and counternarcotics targets”); see also, 147 Cong.Rec. S799-803 (daily ed. Feb. 24, 2000)(remarks of Sens. Specter, Torricelli and Biden).

Pen Registers and Trap and Trace Devices for Intelligence Gathering. Section 214 grants the request of the Department of Justice by dropping requirements which limited FISA pen register and trap and trace device orders to facilities used by foreign agents or those engaged in international terrorist or clandestine intelligence activities, 50 U.S.C. 1842(c)(3)(2000 ed.). It is enough that the order is sought as part of an investigation to protect against international terrorism or clandestine intelligence activities and is not motivated solely by an American’s exercise of his or her First Amendment rights. Elsewhere (section 505), the Act drops a similar limitation for intelligence officials’ access to telephone records, 18 U.S.C.

38 “When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevance, an additional factual showing that the communications device has been used to contact an ‘agent of a foreign power’ engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the ‘agent of a foreign power’ prong from the predication, and thus makes the FISA authority more closely track the criminal authority,” DoJ at §155.
Section 214 adjusts the language of the FISA pen register-trap and trace authority to permit its use to capture source and destination information relating to electronic communications (e.g., e-mail) as well as telephone communications, 50 U.S.C. 1842(d). The section makes it clear that requests for a FISA pen register-trap and trace order, like requests for other FISA orders, directed against Americans (U.S. persons) may not be based solely on activities protected by the First Amendment, 50 U.S.C. 1842, 1843.

**Third Party Cooperation and Tangible Evidence.** As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target's activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.

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39 Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise to be entitled to confidentiality. Section 505, in response to the Justice Department's suggestion, allows FBI field offices to make the requests, see DoJ at §157 (“At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports”.

40 When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court's order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.’ This would enhance the FBI's ability to monitor international terrorists and intelligence officers who are
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian. The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities, in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B);
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a);
- the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a);
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v;

41 “The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigatory contexts. The time and difficulty involved in getting such pleadings before the Court usually outweighs the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” DoJ at §156.

42 Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.\(^{43}\)

**Access to Law Enforcement Information.** Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community's access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, *Draft* at §103.\(^{44}\)

\(^{43}\) H.R.Rep.No. 107-205, at 60-1 (2001) (“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

“The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

“Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual's credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding--without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information”).

\(^{44}\) See also, *DoJ* at §103, “This section facilities the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, Draft at §354.45

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, Draft at §154.46

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion.47 It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions.”

45 See also, DoJ at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.” Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officers

46 See also, DoJ at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”

47 Blair v. United States, 250 U.S. 273, 281 (1919)(the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

The Act, in section 203(a), allows disclosure of matters occurring before the grand jury to “any federal law enforcement, intelligence, protective, immigration, national defense, or national security” officer to assist in the performance of his official duties, F.R.Crim.P. 6(e)(3)(C)(i)(V).48

Critics may protest that the change could lead to the use of the grand jury for intelligence gathering purposes, or less euphemistically, to spy on Americans.49 The proposal was never among those scheduled to sunset, but earlier versions of the section followed the path used for most other disclosures of grand jury material: prior

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49 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25 HARVARD JOURNAL OF LAW & PUBLIC POLICY 699, 719-20 (2002)(“There is a significant danger that the rule permitting disclosure will be treated as the de facto authorization of an expansion of the grand jury’s investigative role to encompass seeking material relevant only to matters of national security, national defense, immigration, and so forth. The grand jury’s awesome powers should not be unwittingly extended to a much wider range of issues. . . Since the grand jury operates in secret, there are no public checks on the scope of its investigations, and witnesses are not permitted to challenge its jurisdiction. Only the supervising court is in a position to keep the grand jury’s investigation within proper bounds. Requiring judicial approval of foreign intelligence and counterintelligence information disclosures would provide a natural check against the temptation to manipulate the grand jury to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6 (Nov. 2001)(“The grand jury secrecy rule is a rule of policy which has always had exceptions, and it has been frequently modified. The secrecy rule has no credible claim to constitutional stature”).
Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

50 Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

51 “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person’s official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification. By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

**Increasing Institutional Capacity.** As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a

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52 *Duncan v. Walker*, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted) (“It is our duty to give effect, if possible, to every clause and word of a statute. *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)); see also *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879)(As early as in Bacon's Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage in any setting. *Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687, 698 (1995); see also *Ratzlaf v. United States*, 510 U.S. 135, 140 (1994)

It is not possible to conclude that Congress intended the universal subsection (d) to apply until sunset and the grand jury and Title III subsections (a), (b), and (c) to operate thereafter, because the Title III subsection expires at the same time as the universal subsection.

53 *Draft at §154, “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”*
computerized translation capability to be used in foreign intelligence gathering. Section 907 instructs the Director of the Central Intelligence, in consultation with the Director of the FBI, to report on the creation of a National Virtual Translation Center. The report is to include information concerning staffing, allocation of resources, compatibility with comparable systems to be used for law enforcement purposes, and features which permit its efficient and secure use by all of the intelligence agencies.

**Money Laundering**

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture. The Act bolsters federal efforts in each area.

**Regulation.** Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.

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54 “The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

“The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so,” S.Rep.No. 107-63, at 11 (2001).


56 See e.g., 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
**Records and Reports.** For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department's Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler's checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to files SARs as well,57 reflecting Congress’ view that the information provided the IRS may be valuable for other law enforcement purposes.58 This concern is likewise


58 H.R.Rep.No. 107-250, at 38-9 (2001)(“Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

“Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a ‘Safeguard Procedures Report’ which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

“While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement
authorities as the various reports mandated by the Bank Secrecy Act, which can typically be retrieved electronically from a database maintained by the Treasury Department. The differential access to the two kinds of reports is made anomalous by the fact that Form 8300 elicits much the same information that is required to be disclosed by the Bank Secrecy Act. For example, just as Form 8300 seeks the name, address, and social security number of a customer who engages in a cash transaction exceeding $10,000 with a trade or business, Currency Transaction Reports (CTRs) mandated by the Bank Secrecy Act require the same information to be reported on a cash transaction exceeding $10,000 between a financial institution and its customer.

Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action.59 Section 355 expands the immunity to cover disclosures in

59 “Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

“First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor from civil liability applies in arbitration, as well as judicial, proceedings. Second, it amends section 5318(g)(3) to clarify the safe harbor’s coverage of voluntary disclosures (that is, those not covered by the SAR regulatory reporting requirement). The language in section 5318(g)(3)(A) providing that ‘any financial institution that *** makes a disclosure pursuant to *** any other authority *** shall not be liable to any person’ is not intended to avoid the application of the reporting and disclosure provisions of the Federal securities laws to any person, or to insulate any issuers from private rights of actions for disclosures made under the Federal securities laws.

“Subsection [351](b) amends section 5318(g)(2) of title 31—which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed—to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee's official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
employment references to other insured depository financial institutions provided disclosure is not done with malicious intent.\footnote{31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 66 (2001).}

The Financial Crimes Enforcement Network (FinCEN), a component within the Treasury Department long responsible for these anti-money laundering reporting and record-keeping requirements, 31 C.F.R. pt. 103, was administratively created in 1990 to provide other government agencies with an “intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes,” 55 Fed.Reg. 18433 (May 2, 1990).

The Act, in section 361, makes FinCEN a creature of statute, a bureau within the Treasury Department, 31 U.S.C. 310. Section 362 charges it with the responsibility of establishing a highly secure network to allow financial institutions to file required reports electronically and to permit FinCEN to provide those institutions with alerts and other information concerning money laundering protective measures, 31 U.S.C. 310 note.

\textbf{Special Measures.} In extraordinary circumstances involving international financial matters, the Act grants the Secretary of the Treasury, in consultation with other appropriate regulatory authorities, the power to issue regulations and orders involving additional required “special measures” and additional “due diligence” requirements to combat money laundering. The special measure authority, available under section 311, comes to life with the determination that particular institutions, jurisdictions, types of accounts, or types of transactions pose a primary money...
These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

61 31 U.S.C. 5318A. The circumstances considered in the case of a suspect jurisdiction are: evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction’s banking regulation; the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

62 The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’ including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

‘Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate
Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent’ account for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information that it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed...
**Due Diligence.** Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.63

by regulation, order, or otherwise as permitted by law. However, if the Secretary proceeds by issuing an order, the order must be accompanied by a notice of proposed rulemaking relating to the imposition of the special measure, and may not remain in effect for more than 120 days, except pursuant to a regulation prescribed on or before the end of the 120-day period. The fifth special measure may be imposed only by regulation,” H.R.Rep.No. 107-250, at 68-9.

63 See generally, H.R.Rep.No. 107-250, at 71-2 (“Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

“The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

“The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

“For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
**General Regulatory Matters.** The Act establishes several other regulatory mechanisms directed at the activities involving U.S. financial institutions and foreign individuals or institutions. Section 313, for instance, in another restriction on correspondent accounts for foreign financial institutions, prohibits U.S. financial institutions from maintaining correspondent accounts either directly or indirectly for foreign shell banks (banks with no physical place of business) which have no affiliation with any financial institution through which their banking activities are subject to regulatory supervision.

The Act, in section 325, empowers the Secretary of the Treasury to promulgate regulations to prevent financial institutions from allowing their customers to conceal their financial activities by taking advantage of the institutions’ concentration account practices.

The Secretary of the Treasury is instructed in section 326 to issue regulations for financial institutions’ minimum new customer identification standards and record-
31 U.S.C. 5318(l); H.R.Rep.No. 107-250, at 62-3 (2001)(“Section [326](a) amends 31 U.S.C. 5318 by adding a new subsection governing the identification of account holders. Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a ‘street name’ or omnibus account in the broker-dealer's name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to ‘look through’ the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund’s customers. Thus, the fund would not be required to ‘look through’ the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature.68

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

**Reports to Congress.** Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

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exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.69

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

International Cooperation. Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.70

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (i.e., the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.


70 H.R.Rep.No. 107-250, at 67 (2001)(“This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury's progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

“The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime”).
Crimes. Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, smuggling, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
expands 18 U.S.C. 1956 to cover financial transactions conducted in foreign financial institutions.\textsuperscript{71}

Section 329 makes it a federal crime to corruptly administer the money laundering regulatory scheme. Offenders are punishable by imprisonment for not more than 15 years and a fine of not more than three times the amount of the bribe.

Section 5326 of title 31 authorizes the Secretary of the Treasury to impose temporary, enhanced reporting requirements upon financial institutions in areas victimized by substantial money laundering activity (geographic targeting regulations and orders). Section 353 makes it clear that the civil sanctions, criminal penalties, and prohibitions on smurfing (structuring transactions to evade reporting requirements) apply to violations of the regulations and orders issued under 31 U.S.C. 5326.\textsuperscript{72} It also extends the permissible length of the temporary geographical orders from 60 to 180 days.

Violations of the special measures and special due diligence requirements of sections 311 and 312 are subject to both civil and criminal penalties by virtue of section 363's amendments to 31 U.S.C. 5321(a) and 5322. The amendments authorize civil penalties and criminal fines of twice the amount of the transaction but not more than $1 million. Criminal offenders would be subject to a fine in the same amount.

\textsuperscript{71} “[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

“The definition of ‘financial institution’ in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of ‘commercial bank’ or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad—say to a Mexican bank—and launders them through a series of financial transactions, the government conceivably could not rely on the definition of a ‘financial institution’ in 1956(c)(6) to establish that the transaction was a ‘financial transaction’ within the meaning of 1956(c)(4)(B) (defining a ‘financial transaction’ as a transaction involving the use of a ‘financial institution’), or that it was a ‘monetary transaction’ within the meaning of 1957(f) (defining ‘monetary transaction’ as, inter alia, a transaction that would be a ‘financial transaction’ under 1956(c)(4)(B)).

“Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launders the proceeds of one of the crimes set forth on a list of ‘specified unlawful activities.’ 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),” H.R.Rep.No. 107-250, at 38 (2000).

Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.73

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents.74 They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

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73 "The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business.

“Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.

“Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive,” H.R.Rep.No. 107-250, at 54 (2001).

74 “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
• 18 U.S.C. 476 (taking impressions of tools used for obligations and securities) from 10 to 25 years;
• 18 U.S.C. 477 (possessing or selling impressions of tools used for obligations or securities) from 10 to 25 years;
• 18 U.S.C. 484 (connecting parts of different notes) from 5 to 10 years;
• 18 U.S.C. 493 (bonds and obligations of certain lending agencies) from 5 to 10 years;
• 18 U.S.C. 478 (foreign obligations or securities) from 5 to 20 years;
• 18 U.S.C. 479 (uttering counterfeit foreign obligations or securities) from 3 to 20 years;
• 18 U.S.C. 480 (possessing counterfeit foreign obligations or securities) from 1 to 20 years;
• 18 U.S.C. 481 (plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities) from 5 to 25 years;
• 18 U.S.C. 482 (foreign bank notes) from 2 to 20 years; and
• 18 U.S.C. 483 (uttering counterfeit foreign bank notes) from 1 to 20 years.

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

**Bulk Cash.** Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act’s bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting. 

The section appears to be the product of reactions to the Supreme Court’s decision in *United States v. Bajakian*, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court’s

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75 “For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).
"As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency – representing the proceeds of drug trafficking and other criminal offenses – is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad. . . .

"Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United States without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

"Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute," H.R.Rep.No. 107-250 at 36-7 (2001).

76 As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency – representing the proceeds of drug trafficking and other criminal offenses – is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad. . . .

**Extraterritorial Jurisdiction.** The Act makes 18 U.S.C. 1029, the federal statute condemning various crimes involving credit cards, PIN numbers and other access devices, applicable overseas if the card or device is issued by or controlled by an American bank or other entity and some article is held in or transported to or through the United States during the course of the offense, section 377. The change was part of the original Justice Department proposals. Justice explained that, “[financial crime] admits of no border, utilizing the integrated global financial network for ill purposes. This provision would apply the financial crimes prohibitions to conduct committed abroad, so long as the tools or proceeds of the crimes pass through or are in the United States,” DoJ at §408. The section, however, appears to limit the otherwise applicable extraterritorial jurisdiction implicit in section 1029, since federal courts would likely recognize extraterritorial jurisdiction over a violation of section 1029.
under either circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.\textsuperscript{77}

**Venue.** Section 1004 relies on dicta in *United States v. Cabrales*, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering,\textsuperscript{78} in the state and district in which the monetary transaction takes place. The Supreme Court in *Cabrales* held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in dicta, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.\textsuperscript{79}

**Forfeiture.** Forfeiture is the government confiscation of property as a consequence of crime.\textsuperscript{80} The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 et seq. (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

**Constitutional Considerations.** The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 et seq., which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the


\textsuperscript{78} “The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed,” U.S.Const. Art.III, §2, cl.3.

“[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,” U.S.Const. Amend. VI.

\textsuperscript{79} See also, *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnaping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.

\textsuperscript{80} For general background information, see, Doyle, *Crime and Forfeiture*, CRS REP.NO. 97-139A (Oct. 11, 2000).
jurisdiction of the United States, belonging to any foreign individual, foreign entity, or foreign country whom they determine to have planned, authorized, aided or engaged in an attack on the United States by a foreign country or foreign nationals. The section also permits the government to present secretly (ex parte and in camera) any classified information upon which the forfeiture was based should the decision be subject to judicial review. The Justice Department requested the section as a revival of the President's powers in times of unconventional wars. 81 By virtue of section 316, property owners may initiate a challenge to a confiscation by filing a claim under the rules applicable in maritime confiscations. The section permits two defenses to forfeiture – that the property is not subject to confiscation under section 106 or that the claimant is entitled to the innocent owner defense of 18 U.S.C. 983(d). 82 The characterization of the defenses as “affirmative defense” indicates that the claimant bears the burden of proof. The innocent owner defenses of 18 U.S.C. 983(d) are probably not available in cases under section 106, since that section is explicitly

81 “This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App.U.S.C. §5(b).

“This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress's war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

“The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2),” DoJ at §159.

82 “An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
excepted from the coverage of 18 U.S.C. 983. The challenge proceedings permit the court to admit evidence, such as hearsay evidence, that would not otherwise be admissible under the Federal Rules of Evidence if the evidence is reliable and if national security might be imperiled should dictates of the Federal Rules be followed, §316(b). The section recognizes the rights of claimants to proceed alternatively under the Constitution or the Administrative Procedure Act.

The Justice Department also recommended enactment of an overlapping provision which ultimately passed as section 806 of the Act without any real discussion of the relationship of the two sections. Section 806 authorizes confiscation of all property, regardless of where it is found, of any individual, entity, or organization engaged in domestic or international terrorism (as defined in 18 U.S.C. 2331), against the United States, Americans or their property, 18 U.S.C.

83 18 U.S.C. 983(i)(2)(D).
84 “The exclusion of certain provisions of Federal law from the definition of the term ‘civil forfeiture statute’ in section 983(i) of title 18, United States Code, shall not be construed to deny an owner of property the right to contest the confiscation of assets of suspected international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C) subchapter II of chapter 5 of title 5, United States Code (commonly known as the ‘Administrative Procedure Act’).” Sec. 316(c)(1).
85 “Current law does not contain any authority tailored specifically to the confiscation of terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available current forfeiture laws require detailed tracing that is quite difficult for accounts coming through the banks of countries used by many terrorists.

“This section increases the government's ability to strike at terrorist organizations' economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001,” DoJ, at §403. The House Report on H.R. 2975 which contained versions of both sections is no more explicit on the relation of the two sections.
86 “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
981(a)(1)(G). Section 806 as discussed below also calls for the more common confiscation of property derived from and or facilitating acts of domestic or international terrorism against the United States or its citizens. Confiscations under 806 may be challenged under the procedures of 18 U.S.C. 983, since they are not exempted there. To the extent that forfeiture under section 806 is based on international rather than domestic terrorism, claimants may also use the procedures of section 316.

Confiscation based solely on the fact that the property is owned by a criminal offender, rather than that it is derived from or facilitates some crime is fairly uncommon. It is the mark of common law forfeiture of estate. At common law, a felon forfeited all of his property. Most contemporary forfeiture statutes employ statutory forfeiture, a more familiar presence in American law,\(^87\) which consists of the confiscation of things whose possession is criminal, of the fruits of crime, and of the means of crime – untaxed whiskey, the drug dealer’s profits, and the rum runner’s ship.

Three characteristics set forfeiture of estate apart. The property is lost solely by reason of its ownership by a felon. All of a felon’s property is confiscated, not merely that which is related to the crime for which he is convicted. Finally, it occasions attainder which negates the felon’s right to hold property or for title to property to pass through him to his heirs. It was with this in mind, that the Framers declared that “no attainder of treason shall work corruption of blood or forfeiture exception during the life of the person attainted.”\(^88\) And for this reason, President Lincoln insisted that the confiscated real estate of Confederate supporters should revert their heirs at death.\(^89\)

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\(^{87}\) *Austin v. United States*, 509 U.S. 602, 611-12 (1993)(“Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture . . . . Of England’s three kinds of forfeiture, only the third took hold in the United States”).

\(^{88}\) *U.S.Const.* Art.III, §3, cl.2.

\(^{89}\) 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal *in personam* proceedings following criminal conviction as a means of accomplishing confiscation.
Neither section 106 nor 806 require conviction of the terrorist property owner. Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers. The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners. Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them. The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate

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90 Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c) (“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act”).

91 Silesian American Corp. v. Clark, 332 U.S. 469 (1947); cf., Societe Internationale v. Rogers, 357 U.S. 197, 211 (1958) (“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).

92 Zittman v. McGrath, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’”).

any presumption of remedial purposes. The same has been said of the applicability of the ex post facto clause.

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO. If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

Other Forfeiture Amendments. In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.

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95 See e.g., United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.), 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994).
96 DoJ, at §403.
97 18 U.S.C. 1956(b). Cf., H.R.Rep.No. 107-250, at 54-5 (2001) (“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas.\textsuperscript{98} Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted

\textsuperscript{98} 18 U.S.C. 981(k). H.R.Rep.No. 107-250, at 57-8 (2001)(“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank’s customers.

Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank’s correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”).
defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation.99

Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here.100 Section 320 enlarges this provisions to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements.101 This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.102

99 Cf., H.R.Rep.No. 107-250, at 58-9 (2001) ("Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of 'substitute assets' when the defendant has placed the property otherwise subject to forfeiture 'beyond the jurisdiction of the court.' Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction."

"This section amends 21 U.S.C. 853 to make clear that a court in a criminal case may issue a repatriation order--either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. 853(e) to restrain property--so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both").


101 H.R.Rep.No. 107-250, at 56 (2001)("This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act").

102 H.R.Rep.No. 107-250, at 59-60 (2001)("Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country."

"Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
A fugitive may not challenge a federal forfeiture. Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in “order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.”

to contest the restraining order could do so on the ground that 28 U.S.C. 2467 was not properly applied to the particular case, but could not oppose the restraining order on any ground that could also be raised in the proceedings pending in a foreign court. This provision prevents a litigant from taking ‘two bites at the apple’ by raising objections to the basis for the forfeiture in the Federal court that he also raised, or is entitled to raise, in the foreign court where the forfeiture action is pending. It complements the existing provision in section 2467(e) providing that the Federal court is bound by the findings of fact of the foreign court, and may not look behind such findings in determining whether to enter an order enforcing a foreign forfeiture judgment.

“This section also amends 28 U.S.C. 2467 to make clear that it is not necessary to prove that the person asserting an interest in the property received actual notice of the forfeiture proceedings. As is the case with respect to forfeitures under U.S. law, it is sufficient if the foreign nation takes steps to provide notice, in accordance with the principles of due process. See Gonzalez v. United States, 1997 WL 278123 (S.D.N.Y. 1997) (‘the [G]overnment is not required to ensure actual receipt of notice that is properly mailed’); Albajon v. Gugliotta, 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant’s identifications, and mailed after claimant released from jail, is sufficient to satisfy due process, even if claimant never received notice); United States v. Schiavo, 897 F. Supp. 644, 648 49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; due process satisfied even if he did not receive the notice).

“Finally, 28 U.S.C. 2467 is amended to authorize the enforcement of a forfeiture judgment based on any foreign offense that would constitute an offense giving rise to a civil or criminal forfeiture of the same property if the offense had been committed in the United States. This is one of two safeguards that the statute contains against the enforcement of judgments that the United States does not consider appropriate for enforcement: if the judgment is based on an act that would not constitute a crime in the United States, such as removing assets from the reach of a repressive regime, it could not be enforced. In addition, section 2467 already provides that a foreign judgment may only be enforced by a Federal court at the request of the United States, and only after the Attorney General has certified that the judgment was obtained in accordance with the principles of due process. Thus, neither a foreign Government nor a foreign private party could enforce a foreign judgment on its own under this provision.”). Note that the safeguard to which the report refers is the range of foreign offenses that will support an enforceable confiscation order, i.e., drug offenses and crimes on the money laundering predicate offense list, and that the amendment narrows that safeguard by adding additional foreign offenses, i.e., any foreign equivalent of a federal crime which would support a confiscation order.

Alien Terrorists and Victims

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

Border Protection. The border protection provisions:

- authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401

- authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402

- remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404

- authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405

- authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.

- instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007

- direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418

- express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414

- add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415

- call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416

- limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation’s Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).

Detention and Removal. Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity, 8 U.S.C. 1227 (a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(iv). Aliens may be inadmissible for any number of terrorism-related reasons, 8 U.S.C. 1182(a)(3)(B). Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported.


Section 411 defines “terrorist organization” to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the Federal Register as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C.
Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).


An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in “premeditated, politically motivated violence perpetrated against noncombatant targets,” or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security or endanger some individual or the general public. The Attorney General's determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without...
The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a direct result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident.

Victims. The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

- permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421
- extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422

105 “The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a direct result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

106 “The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks.

“Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
• preservation of certain immigration benefits available to alien family members that would be otherwise lost as a consequence of the death of a victim of September 11, section 423\textsuperscript{107}

• limited easing of age restrictions on visas available to aliens under 21 years of age for those whose 21\textsuperscript{st} birthday occurred immediately before or soon after September 11, section 424\textsuperscript{108}

• temporary administrative relief for alien family members of a victim of September 11 who are not otherwise entitled to relief under the Act, section 425

the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

“Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 31.

“Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.


\textsuperscript{107} “Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

“The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

“The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death),” H.R.Rep.No. 107-236, at 68 (2001).

\textsuperscript{108} “Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien’s 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien’s 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
• a denial of benefits of the Act to terrorists and their families, section 427

• authority for the Attorney General to establish evidentiary standards to implement the alien victim provisions of the Act, section 426.

Other Crimes, Penalties, & Procedures

New Crimes. The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department, the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offenses for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents, 18 U.S.C. 175b. Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.

109 “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon, 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . . .” DoJ at §305.

110 The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

111 “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2)(“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.\(^{112}\)

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D). The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

\(^{112}\) *U.S. Const.* Art.III, §2, cl.3 (“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . .”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . . .”); [*United States v. Cabrales*, 524 U.S. 1 (1998)](a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from *Cabrales* when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnaping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, [*United States v. Rodriguez-Moreno*, 526 U.S. 275, 280-81 n.4 (1999)](“By way of comparison, last Term in *Cabrales* we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).
• chemical weapons offenses, 18 U.S.C. 229;
• terrorist attacks on mass transportation, 18 U.S.C. 1993;
• sabotage of a nuclear facility, 42 U.S.C. 2284; and
• sabotage of interstate pipelines, 49 U.S.C. 60123(b).

And it adds expert advice or assistance to the types of assistance that may not be provided under section 2339A. This last addition may encounter the same First Amendment vagueness problems some courts have found in assistance which takes the form of “training” and “personnel,” Humanitarian Law Project v. Reno, 205 F.3d 1130, 1137-136 (9th Cir. 2000). Finally, the section announces that a prosecution for violation of section 2339A (support of terrorists) may be brought where the support is provided or where the predicate act of terrorism occurs. There may be some question whether the Constitution permits prosecution where the predicate act occurs.

Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.


113 The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of ‘material support or resources’ is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’),” DoJ at 306.


115 “The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill (‘Federal terrorism offenses’) is used in identifying the relevant crimes,” DoJ, at §304.

New Penalties. The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. 3571(b)-(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense.  

The proposal, however, failed to identify the critical elements that would trigger the alternative. Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

- for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

- for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

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117 “Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersede lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,” DoJ, at §302.

118 “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense,” Draft at §302.
The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.

- for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;
- for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;
- for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;
- for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and
- for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism. Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:
- arson committed within a federal enclave, 18 U.S.C. 81;
- killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);
- destruction of communications facilities, 18 U.S.C. 1362;
- destruction of property within a federal enclave, 18 U.S.C. 1363;
- causing a train wreck, 18 U.S.C. 1922;
- providing material support to a terrorist, 18 U.S.C. 2339A;
- torture committed overseas under color of law, 18 U.S.C. 2340A;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

119 “The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

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• interfering with a flight crew within U.S. special aircraft jurisdiction, 49 U.S.C. 46504;
• carrying a weapon or explosive abroad an aircraft within U.S. special aircraft jurisdiction, 49 U.S.C. 46505; and
• sabotage of interstate gas pipeline facilities, 49 U.S.C. 60123.

When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years). 120 The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission), 121 a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

120 Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

121 “Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.

“This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders).  

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

Other Procedural Adjustments. In other procedural adjustments designed to facilitate criminal investigations, the Act:

- increases the rewards for information in terrorism cases
- expands the Posse Comitatus Act exceptions
- authorizes “sneak and peek” search warrants
- permits nationwide and perhaps worldwide execution of warrants in terrorism cases
- eases government access to confidential information
- allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
- lengthens the statute of limitations applicable to crimes of terrorism
- clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
- adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B.

122 It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, e.g., damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

123 When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001)(remarks of Rep. Sensenbrenner); for general background, see, Doyle, McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys, CRS REP.NO. RL30060 (Dec. 14, 2001).
**Rewards.** The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L.105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism.\(^\text{124}\)

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

**Posse Comitatus.** The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.\(^\text{125}\)

**Delayed notification of a search (sneak and peek).** Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take

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\(^{124}\) The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct threat assessments for federal agencies, and to reimburse federal agencies for the costs of detaining terrorist suspects overseas.

\(^{125}\) For a general discussion of the Posse Comitatus Act, see, Doyle, *The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law*, CRS REP.NO. 95-964 (June 1, 2000).
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, Richards v. Wisconsin, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, Wilson v. Arkansas, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, Dalia v. United States, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, cf., United States v. Miller, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, United States v. Freitas, 800 F.2d 1451, 1453 (9th Cir. 1986).126

126 The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in United States v. New York Telephone Co., 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth
The Second Circuit was less convinced and preferred to hold sneak and peek searches to the demands of Rule 41, *United States v. Pangburn*, 983 F.2d 449 (2d Cir. 1993). The Fourth Circuit was, if anything, less convinced. Moreover, the facts in the case demonstrate the potential impact of the issue on computer privacy, *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000).

Amendment, demands that surreptitious entries be closely circumscribed,” *United States v. Freitas (Freitas I)*, 800 F.2d 1451, 1455-456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, *United States v. Freitas (Freitas II)*, 856 F.2d 1425 (9th Cir. 1988).

127 “No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in *Dalia v. United States*, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in *Dalia*, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property. . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. See *United States v. New York Telephone Co.*, 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . . Although the *Freitas I* court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in *United States v. Villegas*, 899 F.2d 1324 (9th Cir. 1990). Although the *Freitas I* court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in *Villegas*. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the *Freitas I* court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles, “*United States v. Pangburn*, 983 F.2d 449, 453-55 (2d Cir. 1993).

128 In *Simons*, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drive diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
The Justice Department urged that the conflict be resolved with a uniform rule which permitted sneak and peek warrants under the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage.129

The Act, in section 213, stops short of the Justice Department proposal. Characterized as a codification of the Second Circuit decision, 147 Cong.Rec. H7197 (daily ed. Oct. 23, 2001), the Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C. 3103a. Its sneak and peek authorization reaches all federal search and seizure warrants where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (e.g., risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (e.g., jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, i.e., in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation.130 The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

Fourth Amendment does not mention notice, and the Supreme Court has stated that the constitution does not categorically proscribe covert entries, which necessarily involve a delay in notice. And insofar as the August search satisfied the requirements of the Fourth Amendment, i.e., it was conducted pursuant to a warrant based on probable cause issued by a neutral and detached magistrate, we perceive no basis for concluding that the 45-day delay in notice rendered the search unconstitutional. Having concluded that the Rule 41(d) violation at issue here did not infringe on Simons' constitutional rights, we must now evaluate his argument that the violation was deliberate. . . . The district court did not address the intent issue when it ruled on Simons' motion to suppress. . . . We therefore remand for the district court to consider whether the Government intentionally and deliberately disregarded the notice provision of Rule 41(d) when it carried out the August 6, 1998 search,” 206 F.3d at 403.

129 “The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities,” DoJ at §353.

130 Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department's initial proposal, the Department's justification does not address the question.
constitutionally “reasonable,” that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

**Nationwide terrorism search warrants.** The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either “within or outside the district,” (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases. The provision may anticipate execution both in this country and overseas. The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage. Neither Rule 41 nor any other provision of federal

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131 The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

132 The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

133 *United States v. Barona*, 56 F.3d 1087, 1092 (9th Cir. 1995)(“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994)(“if American law enforcement officials substantially participated in the search or if the
law apparently contemplated extraterritorial execution, cf., F.R.Crim.P.41, Advisory Committee Notes: 1990 Amendment (discussing a proposal for extraterritorial execution that the Supreme Court rejected). 134

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” F.R.Crim.P. 41, Advisory Committee Notes: 1990 Amendment. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

_Terrorists’ DNA._ The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards per se. 135 Existing federal law allowed the Attorney General to collect samples from

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134 The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, see, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), reprinted, 78 Cong.Rec. 4982-983 (1934)(“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.)(conferring judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

135 Roe v. Marcotte, 193 F.3d 72 (2d Cir. 1999); Shaffer v. Saffle, 148 F.3d 1180 (10th Cir. 1998); Rise v. Oregon, 59 F.3d 1556 (9th Cir. 1995); Jones v. Murray, 962 F.2d 302 (4th Cir. 1992).
federal prisoners convicted of a variety of violent crimes, 42 U.S.C. 14135a. The Act enlarges the predicate offense list to include any crime of violence or any terrorism offense, section 503.136

**Access to Educational Records.** Finally, the Act calls for an ex parte court order procedure under which senior Justice Department officials may seek authorization to collect educational records relevant to an investigation or prosecution of a crime of terrorism, section 507 (as an exception to the confidentiality requirements of the General Education Provisions Act, 20 U.S.C. 1232g), section 508 (as an exception to the confidentiality requirements of the National Education Statistics Act, 20 U.S.C. 9007).

**Statute of Limitations.** Prosecution for murder in violation of federal law may be initiated at any time, 18 U.S.C. 3281. A five year statute of limitations applied for most other federal crimes before passage of the Act, with a few exceptions. Among the relevant exceptions were an eight year statute of limitations for several terrorist offenses, 18 U.S.C. 3286,137 and a ten year statute of limitations for a few arson and explosives offenses, 18 U.S.C. 3295. The Justice Department recommended the elimination of a statute of limitations in terrorism cases.138

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136 Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples form convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes,” DoJ at §353.


137 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

138 “This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

“This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in
The Act takes less dramatic action in section 809. It eliminates the statute of limitations for any crime of terrorism\textsuperscript{139} that risks or results in a death or serious bodily injury, 18 U.S.C. 3286. In the absence of such a risk or result, all other terrorism offenses become subject to the eight year statute of limitations unless already covered by the ten year statute for explosives and arson offenses, 18 U.S.C. 3286.

Application of the statute of limitations rarely provokes a constitutional inquiry. Nevertheless, due process precludes prosecution when it can be shown that pre-indictment delay “caused substantial prejudice to [a defendant’s] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.”\textsuperscript{140} Moreover, a judicial difference of opinion has appeared in those cases connection with the September 11, 2001 terrorist attacks. The constitutionality of such retroactive applications of changes in statutes of limitations is well-settled, See, e.g., United States v. Grimes, 142 F.3d 1342, 1350-51 (11th Cir. 1998); People v. Frazer, 982 P.2d 180 (Cal. 1999).

“Existing federal law (18 U.S.C. §3282) bars prosecuting most offenses after five years. 18 U.S.C. §3286, as currently formulated, extends the limitation period for prosecution for certain offenses that may be committed by terrorists – but only to eight years. While this is a limited improvement over the five-year limitation period for most federal offenses, it is patently inadequate in relation to the catastrophic human and social costs that frequently follow from such crimes as destruction of aircraft (18 U.S.C. §32), aircraft hijackings ([49] U.S.C. §§46502, 46504-06, attempted political assassinations (18 U.S.C. §§351, 1116, 1751), or hostage taking (18 U.S.C. §1203). These are not minor acts of misconduct which can properly be forgiven or forgotten merely because the perpetrator has avoided apprehension for some period of time. Anomalously, existing law provides longer limitation periods for such offenses as bank frauds and certain artwork thefts (18 U.S.C. §§3293-94) than it does for crimes characteristically committed by terrorists.

“In many American jurisdictions, the limitation periods for prosecution for serious offenses are more permissible than those found in federal law, including a number of states which have no limitation period for the prosecution of felonies generally. While this section does not go so far, it does eliminate the limitation period for prosecution of the major crimes that are most likely to be committed by terrorists (‘Federal terrorism offenses’), as specified in section 309 of this bill,” DoJ at 301.

\textsuperscript{139} As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 (sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period.\textsuperscript{141} Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.\textsuperscript{142}

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (\textit{Grimes}, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (\textit{Frazer}, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

\textbf{Extraterritoriality.} Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States or elsewhere. . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.\textsuperscript{143}

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnaping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.

\begin{itemize}
  \item \textsuperscript{141} United States v. De La Matta, 266 F.3d 1275, 1286 (11th Cir. 2001); United States v. Grimes, 142 F.3d 1342, 1351 (11th Cir. 1998); United States v. Morrow, 177 F.3d 272, 294 (5th Cir. 1999); Falter v. United States, 23 F.2d 420, 425-26 (2d Cir. 1928).
  \item \textsuperscript{142} People v. Frazer, 24 Cal.4th 737, 759, 982 P.2d 180, 1294, 88 Cal.Rptr.2d 312, 327 (1999).
  \item \textsuperscript{143} United States v. Layton, 855 F.2d 1388 (9th Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); United States v. Benítez, 741 F.2d 1312 (11th Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).
\end{itemize}
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.  

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

Victims. Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11th Victim Compensation Fund legislation before it passed the Act. Consequently, the Act’s victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 et seq., and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 et seq.

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:

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• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year)(42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d)(5)), section 621(d)

• waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

• eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
• makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

• prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

• allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

• reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

• makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

• allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

• establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603b(c)), section 624(c)

Increasing Institutional Capacity. A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

- $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)
- necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)
- $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)
- $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816
- $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701
- $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)
- $5 million for DEA police training in South and Central Asia, section 1007.

Miscellaneous. Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might be used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act,\textsuperscript{145} or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b), 807.\textsuperscript{146}

\textsuperscript{145} \textit{i.e.}, Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).

\textsuperscript{146} For a general discussion of trade sanctions legislation, \textit{see}, Jurenas, \textit{Exempting Food and Agriculture Products from U.S. Economic Sanctions: Status and Implementation}, CRS ISSUE BRIEF IB100061.
constitutionally “reasonable,” that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

**Nationwide terrorism search warrants.** The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either “within or outside the district,” (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases. The provision may anticipate execution both in this country and overseas. The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage.

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131 The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

132 The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” *DoJ* at §351.

133 *United States v. Barona*, 56 F.3d 1087, 1092 (9th Cir. 1995)(“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994)(“if American law enforcement officials substantially participated in the search or if the

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” *F.R.Crim.P. 41, Advisory Committee Notes: 1990 Amendment*. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

**Terrorists' DNA.** The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards *per se*.  

Existing federal law allowed the Attorney General to collect samples from foreign officials conducting the search were actually acting as agents for their American counterparts”); *United States v. Maturo*, 982 F.2d 57, 61 (2d Cir. 1992)(“where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials” or “where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials”); *United States v. Mitro*, 880 F.2d 1480, 1482 (1st Cir. 1989)(“where American agents participated in the foreign search or the foreign officers acted as agents for their American counterparts”); *United States v. Mount*, 757 F.2d 1315, 1318 (D.C.Cir. 1985)(“if American officials or officers participated in some significant way”); *United States v. Marzano*, 537 F.2d 120, 139 (5th Cir. 1976)(“if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts”); each of the decisions also suggests that evidence secured in a manner which shocked the conscience of the court would be excluded.

The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, *see*, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), *reprinted*, 78 Cong.Rec. 4982-983 (1934)(“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.)(confering judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

federal prisoners convicted of a variety of violent crimes, 42 U.S.C. 14135a. The Act enlarges the predicate offense list to include any crime of violence or any terrorism offense, section 503.\(^{136}\)

Access to Educational Records. Finally, the Act calls for an ex parte court order procedure under which senior Justice Department officials may seek authorization to collect educational records relevant to an investigation or prosecution of a crime of terrorism, section 507 (as an exception to the confidentiality requirements of the General Education Provisions Act, 20 U.S.C. 1232g), section 508 (as an exception to the confidentiality requirements of the National Education Statistics Act, 20 U.S.C. 9007).

Statute of Limitations. Prosecution for murder in violation of federal law may be initiated at any time, 18 U.S.C. 3281. A five year statute of limitations applied for most other federal crimes before passage of the Act, with a few exceptions. Among the relevant exceptions were an eight year statute of limitations for several terrorist offenses, 18 U.S.C. 3286,\(^{137}\) and a ten year statute of limitations for a few arson and explosives offenses, 18 U.S.C. 3295. The Justice Department recommended the elimination of a statute of limitations in terrorism cases.\(^{138}\)

\(^{136}\) Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples form convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes,” DoJ at §353.


\(^{137}\) 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

\(^{138}\) “This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

“This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in
connection with the September 11, 2001 terrorist attacks. The constitutionality of such retroactive applications of changes in statutes of limitations is well-settled, See, e.g., United States v. Grimes, 142 F.3d 1342, 1350-51 (11th Cir. 1998); People v. Frazer, 982 P.2d 180 (Cal. 1999).

“Existing federal law (18 U.S.C. §3282) bars prosecuting most offenses after five years. 18 U.S.C. §3286, as currently formulated, extends the limitation period for prosecution for certain offenses that may be committed by terrorists – but only to eight years. While this is a limited improvement over the five-year limitation period for most federal offenses, it is patently inadequate in relation to the catastrophic human and social costs that frequently follow from such crimes as destruction of aircraft (18 U.S.C. §32), aircraft hijackings ([49] U.S.C. §§46502, 46504-06), attempted political assassinations (18 U.S.C. §§351, 1116, 1751), or hostage taking (18 U.S.C. §1203). These are not minor acts of misconduct which can properly be forgiven or forgotten merely because the perpetrator has avoided apprehension for some period of time. Anomalously, existing law provides longer limitation periods for such offenses as bank frauds and certain artwork thefts (18 U.S.C.§§3293-94) than it does for crimes characteristically committed by terrorists.

“In many American jurisdictions, the limitation periods for prosecution for serious offenses are more permissible than those found in federal law, including a number of states which have no limitation period for the prosecution of felonies generally. While this section does not go so far, it does eliminate the limitation period for prosecution of the major crimes that are most likely to be committed by terrorists (‘Federal terrorism offenses’), as specified in section 309 of this bill,” DoJ at 301.

As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 (sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

Moreover, a judicial difference of opinion has appeared in those cases

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period.\textsuperscript{141} Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.\textsuperscript{142}

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (\textit{Grimes}, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (\textit{Frazer}, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

\textbf{Extraterritoriality.} Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States or elsewhere. . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.\textsuperscript{143}

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnapping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.

\textsuperscript{141} \textit{United States v. De La Matta}, 266 F.3d 1275, 1286 (11th Cir. 2001); \textit{United States v. Grimes}, 142 F.3d 1342, 1351 (11th Cir. 1998); \textit{United States v. Morrow}, 177 F.3d 272, 294 (5th Cir. 1999); \textit{Falter v. United States}, 23 F.2d 420, 425-26 (2d Cir. 1928).

\textsuperscript{142} \textit{People v. Frazer}, 24 Cal.4th 737, 759, 982 P.2d 180, 1294, 88 Cal.Rptr.2d 312, 327 (1999).

\textsuperscript{143} \textit{United States v. Layton}, 855 F.2d 1388 (9th Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); \textit{United States v. Benítez}, 741 F.2d 1312 (11th Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.\(^\text{144}\)

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

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Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

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\(^{144}\) *Compare, United States v. Gatlin*, 216 F.3d 207 (2d Cir. 2000); *United States v. Laden*, 92 F.Supp.2d 189 (S.D.N.Y. 2000); *with, United States v. Corey*, 232 F.3d 1166 (9th Cir. 2000); *United States v. Erdos*, 474 F.2d 157 (4\(^{th}\) Cir. 1973).
• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year)(42 U.S.C. 10601(c)), section 621(b)

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• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

Increasing Institutional Capacity. A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

• $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)

• necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)

• $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)

• $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816

• $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701

• $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)

• $5 million for DEA police training in South and Central Asia, section 1007.

Miscellaneous. Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might to used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act, or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b), 807.

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145 *I.e.*, Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).

The use of pen registers or trap and trace devices was limited at one time to the judicial district in which the order was issued, 18 U.S.C. 3123 (2000 ed.). Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States, 18 U.S.C. 3123(b)(1)(C), 3127(2).\(^\text{12}\)

**Communications Records and Stored E-Mail.** With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber, 18 U.S.C. 2703(a),(b). A warrant will also suffice to seize records describing telephone and other communications transactions without customer notice, 18 U.S.C. 2703(c). In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation, officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records, 18 U.S.C. 2703(b),(c). They can obtain a limited amount of record information (subscribers' names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena, 18 U.S.C. 2703(c)(1)(C). There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial, 18 U.S.C. 2705.

In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider’s customer records, 18 U.S.C. 2703(c)(1)(C).\(^\text{13}\)

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.

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\(^{12}\) The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” *DoJ* at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

\(^{13}\) Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user's true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” *DoJ* at §107.
Previously, only a federal court in the district in which the e-mail was stored could issue the order. Under section 220, federal courts in the district where an offense under investigation occurred may issue orders applicable “without geographic limitation,” 18 U.S.C. 2703.14

The Act, in section 209, treats voice mail like e-mail, that is, subject to the warrant or court order procedure, rather than to the more demanding coverage of Title III once required, *United States v. Smith*, 155 F.3d 1050, 1055-56 (9th Cir. 1998).

Finally, the Act resolves a conflict between chapter 121 and the federal law governing cable companies. Government entities may have access to cable company customer records only under a court order following an adversary hearing if they can show that the records will evidence that the customer is or has engaged in criminal activity, 47 U.S.C. 511(h). When cable companies began offering telephone and other communications services the question arose whether the more demanding cable rules applied or whether law enforcement agencies were entitled to ex parte court orders under the no-notice procedures applicable to communications providers.15 The Act makes it clear that the cable rules apply when cable television viewing services are

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14 Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

15 See e.g., DoJ at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement’s access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
The USA PATRIOT Act: A Legal Analysis

April 15, 2002

Charles Doyle
Senior Specialist
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The USA PATRIOT Act: A Legal Analysis

Summary

The USA PATRIOT Act passed in the wake of the September 11 terrorist attacks. It flows from a consultation draft circulated by the Department of Justice, to which Congress made substantial modifications and additions. The stated purpose of the Act is to enable law enforcement officials to track down and punish those responsible for the attacks and to protect against any similar attacks.

The Act grants federal officials greater powers to trace and intercept terrorists’ communications both for law enforcement and foreign intelligence purposes. It reenforces federal anti-money laundering laws and regulations in an effort to deny terrorists the resources necessary for future attacks. It tightens our immigration laws to close our borders to foreign terrorists and to expel those among us. Finally, it creates a few new federal crimes, such as the one outlawing terrorists’ attacks on mass transit; increases the penalties for many others; and institutes several procedural changes, such as a longer statute of limitations for crimes of terrorism.

Critics have suggested that it may go too far. The authority to monitor e-mail traffic, to share grand jury information with intelligence and immigration officers, to confiscate property, and to impose new book-keeping requirements on financial institutions, are among the features troubling to some.

The Act itself responds to some of these reservations. Many of the wiretapping and foreign intelligence amendments sunset on December 31, 2005. The Act creates judicial safeguards for e-mail monitoring and grand jury disclosures; recognizes innocent owner defenses to forfeiture; and entrusts enhanced anti-money laundering powers to those regulatory authorities whose concerns include the well being of our financial institutions.

This report, stripped of its citations and footnotes, is available in an abbreviated form as The USA PATRIOT Act: A Sketch, CRS Rep.No. RS21203. In addition, much of the information contained here may also be found under a different arrangement in a report entitled, Terrorism: Section by Section Analysis of the USA PATRIOT Act, CRS Rep.No. RL31200 (Dec. 10, 2001). A wider array of terrorism-related analysis appears on the CRS terrorism electronic briefing book page.
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The USA PATRIOT Act: A Legal Analysis

Introduction

Congress passed the USA PATRIOT Act (the Act) in response to the terrorists’ attacks of September 11, 2001.¹ The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to further close our borders to foreign terrorists and to detain and remove those within our borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it is not without safeguards, critics contend some of its provisions go too far. Although it grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough.


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¹ P.L. 107-56, 115 Stat. 272 (2001); its full title is the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT).”

² H.R. 2975 was introduced by Representative Sensenbrenner for himself and Representatives Conyers, Hyde, Coble, Goodlatte, Jenkins, Jackson-Lee, Cannon, Meehan, Graham, Bachus, Wexler, Hostettler, Keller, Issa, Hart, Flake, Schiff, Thomas, Goss, Rangel, Berman and Lofgren; S.1510 by Senator Daschle for himself and Senators Lott, Leahy, Hatch, Graham, Shelby and Sarbanes.

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ed. Oct. 24, 2001), and H.R. 3162 was sent to the President who signed it on October 26, 2001.

**Criminal Investigations: Tracking and Gathering Communications**

A portion of the Act addresses issues suggested originally in a Department of Justice proposal circulated in mid-September. The first of its suggestions called for amendments to federal surveillance laws, laws which govern the capture and tracking of suspected terrorists’ communications within the United States. Federal law features a three tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications.

The tiers reflected the Supreme Court’s interpretation of the Fourth Amendment’s ban on unreasonable searches and seizures. The Amendment protects private conversations, *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967). It does not cloak information, even highly personal information, for which there is no individual justifiable expectation of privacy, such as telephone company records of calls made to and from an individual's home, *Smith v. Maryland*, 442 U.S. 735 (1979), or bank records of an individual's financial dealings, *United States v. Miller*, 425 U.S. 435 (1976).

Congress responded to *Berger* and *Katz*, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications, 18 U.S.C. 2511. At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious

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4 The Department’s proposal, dated September 20, 2001, came with a brief section by section analysis. Both the proposal (Draft) and analysis (DoJ) were printed as an appendix in *Administration's Draft Anti-Terrorism Act of 2001, Hearing Before the House Comm. on the Judiciary*, 107th Cong., 1st Sess. 54 (2001).


6 “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,” *U.S. Const. Amend. IV*.

7 Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
criminal cases. When approved by senior Justice Department officials, law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.

8 The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of” one or more predicate offense, 18 U.S.C. 2516.

9 The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement), 1751 (presidential and presidential staff assassination, kidnaping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnaping, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or nationalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations, 18 U.S.C. 2518. The court notifies the parties to any conversations seized under the order after the order expires, 18 U.S.C. 2518(8).

Below Title III, the next tier of privacy protection covers some of those matters which the Supreme Court has described as beyond the reach of the Fourth Amendment protection – telephone records, e-mail held in third party storage, and the like, 18 U.S.C. 2701-2709 (Chapter 121). Here, the law permits law enforcement access, ordinarily pursuant to a warrant or court order or under a subpoena in some cases, but in connection with any criminal investigation and without the extraordinary levels of approval or constraint that mark a Title III interception, 18 U.S.C. 2703.

Least demanding and perhaps least intrusive of all is the procedure that governs court orders approving the government's use of trap and trace devices and pen registers, a kind of secret “caller id”, which identify the source and destination of calls made to and from a particular telephone, 18 U.S.C. 3121-3127 (Chapter 206). The orders are available based on the government's certification, rather than a finding of the court, that the use of the device is likely to produce information relevant to the investigation of a crime, any crime, 18 U.S.C. 3123. The devices record no more than the identity of the participants in a telephone conversation, but neither the orders nor the results they produce need ever be revealed to the participants.

The Act modifies the procedures at each of the three levels. It:

offense involving counterfeiting punishable under 18 U.S.C. 471, 472, or 473; (e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States; (f) any offense including extortionate credit transactions under 18 U.S.C. 892, 893, or 894; (g) a violation of 31 U.S.C. 5322 (dealing with the reporting of currency transactions); (h) any felony violation of 18 U.S.C. 2511 and 2512 (interception and disclosure of certain communications and to certain intercepting devices); (i) any felony violation of 18 U.S.C. ch. 71 (obscenity); (j) 49 U.S.C. 60123(b) (destruction of a natural gas pipeline), 46502 (aircraft piracy); (k) 22 U.S.C. 2778 (Arms Export Control Act); (l) the location of any fugitive from justice from an offense described in this section; (m) a violation of 8 U.S.C. 1324, 1327, or 1328; (n) any felony violation of 18 U.S.C. 922, 924 (firearms); (o) any violation of 26 U.S.C. 5861 (firearms); (p) a felony violation of 18 U.S.C. 1028 (production of false identification documents), 1542 (false statements in passport applications), 1546 (fraud and misuse of visas, permits, and other documents) or a violation of 8 U.S.C. 1324, 1327, or 1328 (smuggling of aliens); (p) 229 (chemical weapons), 2332 (terrorist violence against Americans overseas), 2332a (weapons of mass destruction), 2332b (multinational terrorism), 2332d (financial transactions with countries supporting terrorism), 2339A (support of terrorist), 2332B (support of terrorist organizations); (r) any conspiracy to commit any of these, 18 U.S.C. 2516(1)(crimes added by the Act in italics). Other than telephone face to face conversations (i.e., electronic communications), the approval of senior Justice Department officials is not required and an order may be sought in any felony investigation, 18 U.S.C. 2516(3).

10 Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
• permits pen register and trap and trace orders for electronic communications (e.g., e-mail)

• authorizes nationwide execution of court orders for pen registers, trap and trace devices, and access to stored e-mail or communication records

• treats stored voice mail like stored e-mail (rather than like telephone conversations)

• permits authorities to intercept communications to and from a trespasser within a computer system (with the permission of the system’s owner)

• adds terrorist and computer crimes to Title III’s predicate offense list

• reenforces protection for those who help execute Title III, ch. 121, and ch. 206 orders

• encourages cooperation between law enforcement and foreign intelligence investigators

• establishes a claim against the U.S. for certain communications privacy violations by government personnel

• terminates the authority found in many of the these provisions and several of the foreign intelligence amendments with a sunset provision (Dec. 31, 2005).

Pen Registers and Trap and Trace Devices. In section 216, the Act allows court orders authorizing trap and trace devices and pen registers to be used to capture source and addressee information for computer conversations (e.g., e-mail) as well as telephone conversations, 18 U.S.C. 3121, 3123. In answer to objections that e-mail header information can be more revealing than a telephone number, it creates a detailed report to the court, 18 U.S.C. 3123(a)(3).

11 “Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public the agency shall ensure that a record will be maintained which will identify – (i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of the such device.

“(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof),” section 216(b)(1).
The use of pen registers or trap and trace devices was limited at one time to the judicial district in which the order was issued, 18 U.S.C. 3123 (2000 ed.). Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States, 18 U.S.C. 3123(b)(1)(C), 3127(2).

Communications Records and Stored E-Mail. With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber, 18 U.S.C. 2703(a),(b). A warrant will also suffice to seize records describing telephone and other communications transactions without customer notice, 18 U.S.C. 2703(c). In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation, officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records, 18 U.S.C. 2703(b),(c). They can obtain a limited amount of record information (subscribers’ names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena, 18 U.S.C. 2703(c)(1)(C). There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial, 18 U.S.C. 2705.

In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider’s customer records, 18 U.S.C. 2703(c)(1)(C).

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.

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12 The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” DoJ at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

13 Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user’s true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” DoJ at §107.
Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

Previously, only a federal court in the district in which the e-mail was stored could issue the order. Under section 220, federal courts in the district where an offense under investigation occurred may issue orders applicable “without geographic limitation,” 18 U.S.C. 2703.14

The Act, in section 209, treats voice mail like e-mail, that is, subject to the warrant or court order procedure, rather than to the more demanding coverage of Title III once required, United States v. Smith, 155 F.3d 1050, 1055-56 (9th Cir. 1998).

Finally, the Act resolves a conflict between chapter 121 and the federal law governing cable companies. Government entities may have access to cable company customer records only under a court order following an adversary hearing if they can show that the records will evidence that the customer is or has engaged in criminal activity, 47 U.S.C. 511(h). When cable companies began offering telephone and other communications services the question arose whether the more demanding cable rules applied or whether law enforcement agencies were entitled to ex parte court orders under the no-notice procedures applicable to communications providers.15 The Act makes it clear that the cable rules apply when cable television viewing services are

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15 See e.g., DoJ at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement’s access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

**Electronic Surveillance.** To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202. A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(i). Yet only the interloper's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.

**Criminal Investigators' Access to Foreign Intelligence Information.** The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism. It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that “the purpose for the surveillance is to obtain foreign intelligence information,” 50 U.S.C. 1804(a)(7)(B)(2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps “the purpose” might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation

16 18 U.S.C. 229 (chemical weapons), 2332(terrorist acts of violence committed against Americans overseas), 2332a(use of weapons of mass destruction), 2332b(acts of terrorism transcending national boundaries), 2332d(financial transactions with countries which support terrorists), 2339A(providing material support to terrorists), and 2339B(providing material support to terrorist organizations).

17 “Because service providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves as permitted under current law, they often have no way to exercise their rights to protect themselves from unauthorized attackers. Moreover, such attackers can target critical infrastructures and engage in cyberterrorism,” DoJ at §106. Elsewhere the Act defines “electronic surveillance” for purposes of the Foreign Intelligence Surveillance Act (FISA) to emphasize that the law enforcement authority for this intruder surveillance does not confer similar authority for purposes of foreign intelligence gathering, section 1003 (50 U.S.C. 1801(f)(2)).

Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment's warrant clause. It is here that the “primary purpose” notion originated. In *United States v. Truong Dinh Hung*, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, “as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.” Subsequent case law, however, is not as clear as it might be: *see e.g.*, *United States v. Duggan*, 743 F.2d 59, 77 (2d Cir. 1984) (“FISA permits federal officials to obtain orders authorizing electronic surveillance ‘for the purpose of obtaining foreign intelligence information.’ The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying officials’ belief that the information sought is the type of foreign intelligence information described”); *United States v. Pelton*, 835 F.2d 1067, 1075-76 (4th Cir. 1987) (“We also reject Pelton’s claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial”); *United States v. Sarkissian*, 841 F.2d 959, 907-8 (9th Cir. 1988) (“Defendants rely on the primary purpose test articulated in *United States v. Truong Dinh Hung*. . . . One other court has applied the primary purpose test. Another court has rejected it . . . distinguishing *Truong*. A third court has declined to decide the issue. We also decline to decide the issue”); *United States v. Johnson*, 952 F.2d 565, 572 (1st Cir. 1991) (“Appellants attack the government’s surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance”).

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20 “Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” DoJ at §153.
demanding standard than the “a purpose” threshold proposed by the Justice Department, but a clear departure from the original “the purpose” entry point. FISA once described a singular foreign intelligence focus prerequisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k), 1825(k).\footnote{21}

**Protective Measures.** The Act reenforces two kinds of safeguards, one set designed to prevent abuse and the other to protect those who assist the government. The sunset clause is perhaps the best known of the Act’s safeguards. Under the direction of section 224, many of the law enforcement and foreign intelligence authorities granted by the Act expire as of December 31, 2005.\footnote{22} The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter

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\footnotetext{21}{“(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. (2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, infra, quoting, 50 U.S.C. 1801.}

\footnotetext{22}{“(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210[subpoenas for communications provider customer records], 211[access to cable company communication service records], 213[sneak and peek], 216[pen register and trap and trace device amendments], 221[trade sanctions], and 222[assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005. “(b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers’ communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).}
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices). 23 Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees, 24 but could not recover against the United States. 25 Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice's Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government's request until a court order authorizing access can be obtained. 26 Another allows providers to disclose customer records to protect the provider's rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others. 27 A third section,

26 Prior law already granted service providers immunity for disclosure of customer records in compliance with a court access order, 18 U.S.C. 2703(f).
27 “Existing law contains no provision that allows providers of electronic communications service to disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies that threaten death or serious bodily injury. This section amends 18 U.S.C. §2702 to authorize such disclosures if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.

“Current law also contains an odd disconnect: a provider may disclose the contents of the customer's communications in order to protect its rights or property but the current statute does not expressly permit a provider to voluntarily disclose non-content records (such as a subscriber's login records). 18 U.S.C. 2702(b)(5). This problem substantially hinders the ability of providers to protect themselves from cyber-terrorists and criminals. Yet the right to disclose the contents of communications necessarily implies the less intrusive ability to disclose non-content records. In order to promote the protection of our nation's critical infrastructures, this section's amendments allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems,” DoJ at
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

Foreign Intelligence Investigations

Although both criminal investigations and foreign intelligence investigations are conducted in the United States, criminal investigations seek information about unlawful activity; foreign intelligence investigations seek information about other countries and their citizens. Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough.

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA), something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President's authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, United States v. United States District Court, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage

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28 Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

29 Thus in the name of assisting in the execution of Title III, chapter 121, or chapter 206 order, the courts may not cite the Act as the basis for an order compelling a service provider to make system modifications or provide any other technical assistance not already required under 18 U.S.C. 2518(4), 2706, or 3124(c), see, H.R.Rep.No. 107-236, at 62-3 (2001) (emphasis added) (“This Act is not intended to affect obligations under Communications Assistance for Law Enforcement Act [which addresses law enforcement-beneficial system modifications and the compensation to be paid for the changes], nor does the act impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance”).

30 E.g., As amended by section 902 of the Act, “‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2)(language added by the Act in italics).

31 50 U.S.C. 1801 et seq.
In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs.\textsuperscript{33} There were and still are extra locks, 50 U.S.C. 1861-1863 (2000 ed.). Intelligence authorities gained narrow passages through other privacy barriers as well.\textsuperscript{32}


\textsuperscript{33} “As used in this subchapter: (a) ‘Foreign power’ means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

“(b) ‘Agent of a foreign power’ means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of a foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C).

“(c) ‘International terrorism’ means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnapping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

“(d) ‘Sabotage’ means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

“(e) ‘Foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans (“United States persons,” i.e., citizens or permanent resident aliens). The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

- permits “roving” surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)
- increases the number of judges on the FISA court from 7 to 11
- allows application for a FISA surveillance or search order when gathering foreign intelligence is a significant reason for the application rather than the reason
- authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations
- sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses
- carries a sunset provision
- establishes a claim against the U.S. for certain communications privacy violations by government personnel
- expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to – (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States,” 50 U.S.C. 1801.

34 Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
FISA. FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases. It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

Search and Surveillance for Intelligence Purposes. Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, Draft at §151.

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order's minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed (50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

See e.g., S.Rep.No. 106-352, at 3, 6, 7 (2000) (“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application

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36 See also, DoJ at §151, “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”

37 See e.g., S.Rep.No. 106-352, at 3, 6, 7 (2000) (“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application
process, as interpreted by the OIPR is administratively burdensome and, at times, extremely slow. Many applications undergo months of scrutiny before submission to the court because the OIPR prescribes standards and restrictions not imposed by the statute. . . . In particular, the OIPR has been criticized for an overly restrictive interpretation of the FISA ‘currency’ requirement. This is the issue of how recent a subject’s activities must be to support a finding of probable cause that the subject is engaged in clandestine intelligence gathering activities. . . . While existing law does not specifically address “past activities,” it does not preclude, and legislative history supports, the conclusion that past activities may be part of the totality of circumstances considered by the FISC in making a probable cause determination. . . . By definition, information collected pursuant to a court order issued under the Foreign Intelligence Surveillance Act is foreign intelligence not law enforcement information. Accordingly, the Committee wants to clarify that the FISA ‘take’ can and must be shared by the Federal Bureau of Investigation with appropriate intelligence agencies. For the intelligence mission of the United States to be successful, there must be a cooperative and concerted effort among intelligence agencies. Any information collected by one agency under foreign intelligence authorities that could assist another agency in executing its lawful mission should be shared fully and promptly. Only then can the United States Government pursue aggressively important national security targets including, for example, counterterrorist and counternarcotics targets”); see also, 147 Cong.Rec. S799-803 (daily ed. Feb. 24, 2000)(remarks of Sens. Specter, Torricelli and Biden).

38 “When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevance, an additional factual showing that the communications device has been used to contact an ‘agent of a foreign power’ engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the ‘agent of a foreign power’ prong from the predication, and thus makes the FISA authority more closely track the criminal authority,” DoJ at §155.
Section 214 adjusts the language of the FISA pen register-trap and trace authority to permit its use to capture source and destination information relating to electronic communications (e.g., e-mail) as well as telephone communications, 50 U.S.C. 1842(d). The section makes it clear that requests for a FISA pen register-trap and trace order, like requests for other FISA orders, directed against Americans (U.S. persons) may not be based solely on activities protected by the First Amendment, 50 U.S.C. 1842, 1843.

**Third Party Cooperation and Tangible Evidence.** As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target's activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.40

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39 Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise to be entitled to confidentiality. Section 505, in response to the Justice Department's suggestion, allows FBI field offices to make the requests, see DoJ at §157 (“At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports”).

40 When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court's order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.’ This would enhance the FBI's ability to monitor international terrorists and intelligence officers who are
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian. The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities, in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B);
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a);
- the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a);
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v;

trained to thwart surveillance by rapidly changing hotel accommodations, cell phones, Internet accounts, etc., just prior to important meetings or communications. Under the current law, the government would have to return to the FISA Court for an order that named the new carrier, landlord, etc., before effecting surveillance. Under the proposed amendment, the FBI could simply present the newly discovered carrier, landlord, custodian or other person with a generic order issued by the Court and could then effect FISA coverage as soon as technically feasible,” DoJ at 152.


41 “The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigative contexts. The time and difficulty involved in getting such pleadings before the Court usually outweighs the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” DoJ at §156.

42 Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.\textsuperscript{43}

**Access to Law Enforcement Information.** Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community's access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, Draft at §103.\textsuperscript{44}

\textsuperscript{43} H.R.Rep.No. 107-205, at 60-1 (2001)(“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

“The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

“Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual’s credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding--without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information”).

\textsuperscript{44} See also, DoJ at §103, “This section facilities the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, *Draft at §354.45*

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, *Draft at §154.46*

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion.47 It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions.”

45 See also, DoJ at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.” Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officers.

46 See also, DoJ at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”

47 *Blair v. United States*, 250 U.S. 273, 281 (1919)(the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

Critics may protest that the change could lead to the use of the grand jury for intelligence gathering purposes, or less euphemistically, to spy on Americans. The proposal was never among those scheduled to sunset, but earlier versions of the section followed the path used for most other disclosures of grand jury material: prior

48 These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

49 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25 Harvard Journal of Law & Public Policy 699, 719-20 (2002)(“There is a significant danger that the rule permitting disclosure will be treated as the de facto authorization of an expansion of the grand jury’s investigative role to encompass seeking material relevant only to matters of national security, national defense, immigration, and so forth. The grand jury’s awesome powers should not be unwittingly extended to a much wider range of issues... Since the grand jury operates in secret, there are no public checks on the scope of its investigations, and witnesses are not permitted to challenge its jurisdiction. Only the supervising court is in a position to keep the grand jury’s investigation within proper bounds. Requiring judicial approval of foreign intelligence and counterintelligence information disclosures would provide a natural check against the temptation to manipulate the grand jury to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6 (Nov. 2001)(“The grand jury secrecy rule is a rule of policy which has always had exceptions, and it has been frequently modified. The secrecy rule has no credible claim to constitutional stature”).
Court approval, H.R.Rep. No. 107-236, at 73 (2001). The Act, in section 203(a), instead calls for confidential notification of the court that a disclosure has occurred and the entity to whom it was made, F.R.Crim.P. 6(e)(3)(C)(iii). It also insists that the Attorney General establish implementing procedures for instances when the disclosure “identifies” Americans (U.S. persons), section 203(c).

Law enforcement officials may share Title III information with the intelligence community under the same conditions, section 203(b), although the grand jury and Title III sharing provisions differ in at least three important respects. The court need not be notified of Title III disclosures. On the other hand, the authority for sharing Title III information expires on December 31, 2005, section 224, and agencies and their personnel guilty of intentional improper disclosures may be subject to a claim for damages and disciplinary action, 18 U.S.C. 2520.

The third subsection of section 203 remains something of an enigma. It speaks in much the same language as its counterparts. It allows law enforcement officials to share information with the intelligence community, “notwithstanding any other provisions of law,” section 203(d). It either swallows the other subsections, or supplements them. Several factors argue for its classification as a supplement. Congress is unlikely to have crafted subsections (a), (b) and (c) only to completely

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50 Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

51 “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person’s official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification.\textsuperscript{52} By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.\textsuperscript{53}

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

**Increasing Institutional Capacity.** As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a

\textsuperscript{52}Duncan v. Walker, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted) (“It is our duty to give effect, if possible, to every clause and word of a statute. United States v. Menasche, 348 U.S. 528, 538-539 (1955) (quoting Montclair v. Ramsdell, 107 U.S. 147, 152 (1883)); see also Williams v. Taylor, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); Market Co. v. Hoffman, 101 U.S. 112, 115 (1879)(As early as in Bacon's Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage in any setting. Babbitt v. Sweet Home Chapter, Communities for Great Ore., 515 U.S. 687, 698 (1995); see also Ratzlaf v. United States, 510 U.S. 135, 140 (1994)”).

It is not possible to conclude that Congress intended the universal subsection (d) to apply until sunset and the grand jury and Title III subsections (a), (b), and (c) to operate thereafter, because the Title III subsection expires at the same time as the universal subsection.

\textsuperscript{53}Draft at §154, “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”
computerized translation capability to be used in foreign intelligence gathering.\textsuperscript{54} Section 907 instructs the Director of the Central Intelligence, in consultation with the Director of the FBI, to report on the creation of a National Virtual Translation Center. The report is to include information concerning staffing, allocation of resources, compatibility with comparable systems to be used for law enforcement purposes, and features which permit its efficient and secure use by all of the intelligence agencies.

**Money Laundering**

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture.\textsuperscript{55} The Act bolsters federal efforts in each area.

**Regulation.** Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.\textsuperscript{56}

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\textsuperscript{54} “The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

“‘The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so,” S.Rep.No. 107-63, at 11 (2001).


\textsuperscript{56} See e.g., 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
Records and Reports. For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler’s checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to files SARs as well,57 reflecting Congress’ view that the information provided the IRS may be valuable for other law enforcement purposes.58 This concern is likewise

58 H.R.Rep.No. 107-250, at 38-9 (2001)(“Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a ‘Safeguard Procedures Report’ which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement
authorities as the various reports mandated by the Bank Secrecy Act, which can typically be retrieved electronically from a database maintained by the Treasury Department. The differential access to the two kinds of reports is made anomalous by the fact that Form 8300 elicits much the same information that is required to be disclosed by the Bank Secrecy Act. For example, just as Form 8300 seeks the name, address, and social security number of a customer who engages in a cash transaction exceeding $10,000 with a trade or business, Currency Transaction Reports (CTRs) mandated by the Bank Secrecy Act require the same information to be reported on a cash transaction exceeding $10,000 between a financial institution and its customer.

Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action.

Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor from civil liability applies in arbitration, as well as judicial, proceedings. Second, it amends section 5318(g)(3) to clarify the safe harbor’s coverage of voluntary disclosures (that is, those not covered by the SAR regulatory reporting requirement). The language in section 5318(g)(3)(A) providing that ‘any financial institution that *** makes a disclosure pursuant to *** any other authority *** shall not be liable to any person’ is not intended to avoid the application of the reporting and disclosure provisions of the Federal securities laws to any person, or to insulate any issuers from private rights of actions for disclosures made under the Federal securities laws.

Subsection [351](b) amends section 5318(g)(2) of title 31—which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed—to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee’s official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
employment references to other insured depository financial institutions provided disclosure is not done with malicious intent.\textsuperscript{60}

The Financial Crimes Enforcement Network (FinCEN), a component within the Treasury Department long responsible for these anti-money laundering reporting and record-keeping requirements, 31 C.F.R. pt. 103, was administratively created in 1990 to provide other government agencies with an “intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes,” 55 Fed. Reg. 18433 (May 2, 1990).

The Act, in section 361, makes FinCEN a creature of statute, a bureau within the Treasury Department, 31 U.S.C. 310. Section 362 charges it with the responsibility of establishing a highly secure network to allow financial institutions to file required reports electronically and to permit FinCEN to provide those institutions with alerts and other information concerning money laundering protective measures, 31 U.S.C. 310 note.

**Special Measures.** In extraordinary circumstances involving international financial matters, the Act grants the Secretary of the Treasury, in consultation with other appropriate regulatory authorities, the power to issue regulations and orders involving additional required “special measures” and additional “due diligence” requirements to combat money laundering. The special measure authority, available under section 311, comes to life with the determination that particular institutions, jurisdictions, types of accounts, or types of transactions pose a primary money

\textsuperscript{60} 31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 67 (2001).
launting concern. These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

61 31 U.S.C. 5318A. The circumstances considered in the case of a suspect jurisdiction are: evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction’s banking regulation; the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

62 The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’ including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

“Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate
Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information that it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed
Due Diligence. Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption. 63

63 See generally, H.R.Rep. No. 107-250, at 71-2 (“Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

“The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

“The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

“For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
General Regulatory Matters. The Act establishes several other regulatory mechanisms directed at the activities involving U.S. financial institutions and foreign individuals or institutions. Section 313, for instance, in another restriction on correspondent accounts for foreign financial institutions, prohibits U.S. financial institutions from maintaining correspondent accounts either directly or indirectly for foreign shell banks (banks with no physical place of business64) which have no affiliation with any financial institution through which their banking activities are subject to regulatory supervision.65

The Act, in section 325, empowers the Secretary of the Treasury to promulgate regulations to prevent financial institutions from allowing their customers to conceal their financial activities by taking advantage of the institutions’ concentration account practices.66

The Secretary of the Treasury is instructed in section 326 to issue regulations for financial institutions’ minimum new customer identification standards and record-
keeping and to recommend a means to effectively verify the identification of foreign customers.\(^{67}\)

\(^{67}\) 31 U.S.C. 5318(l); H.R.Rep.No. 107-250, at 62-3 (2001)(“Section [326](a) amends 31 U.S.C. 5318 by adding a new subsection governing the identification of account holders. Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a 'street name' or omnibus account in the broker-dealer's name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to ‘look through’ the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund's customers. Thus, the fund would not be required to ‘look through’ the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature.\(^68\)

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

**Reports to Congress.** Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

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Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

**International Cooperation.** Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.\(^{70}\)

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (\textit{i.e.}, the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.


\(^{70}\) H.R.Rep.No. 107-250, at 67 (2001)(“This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury's progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

“The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addresssee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime”).
**Crimes.** Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, smuggling, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
The USA PATRIOT Act: A Legal Analysis

April 15, 2002

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Summary

The USA PATRIOT Act passed in the wake of the September 11 terrorist attacks. It flows from a consultation draft circulated by the Department of Justice, to which Congress made substantial modifications and additions. The stated purpose of the Act is to enable law enforcement officials to track down and punish those responsible for the attacks and to protect against any similar attacks.

The Act grants federal officials greater powers to trace and intercept terrorists’ communications both for law enforcement and foreign intelligence purposes. It reenforces federal anti-money laundering laws and regulations in an effort to deny terrorists the resources necessary for future attacks. It tightens our immigration laws to close our borders to foreign terrorists and to expel those among us. Finally, it creates a few new federal crimes, such as the one outlawing terrorists’ attacks on mass transit; increases the penalties for many others; and institutes several procedural changes, such as a longer statute of limitations for crimes of terrorism.

Critics have suggested that it may go too far. The authority to monitor e-mail traffic, to share grand jury information with intelligence and immigration officers, to confiscate property, and to impose new book-keeping requirements on financial institutions, are among the features troubling to some.

The Act itself responds to some of these reservations. Many of the wiretapping and foreign intelligence amendments sunset on December 31, 2005. The Act creates judicial safeguards for e-mail monitoring and grand jury disclosures; recognizes innocent owner defenses to forfeiture; and entrusts enhanced anti-money laundering powers to those regulatory authorities whose concerns include the well being of our financial institutions.

This report, stripped of its citations and footnotes, is available in an abbreviated form as The USA PATRIOT Act: A Sketch, CRS Rep.No. RS21203. In addition, much of the information contained here may also be found under a different arrangement in a report entitled, Terrorism: Section by Section Analysis of the USA PATRIOT Act, CRS Rep.No. RL31200 (Dec. 10, 2001). A wider array of terrorism-related analysis appears on the CRS terrorism electronic briefing book page.
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The USA PATRIOT Act: A Legal Analysis

Introduction

Congress passed the USA PATRIOT Act (the Act) in response to the terrorists’ attacks of September 11, 2001. The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to further close our borders to foreign terrorists and to detain and remove those within our borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it is not without safeguards, critics contend some of its provisions go too far. Although it grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough.


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1 P.L. 107-56, 115 Stat. 272 (2001); its full title is the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT).”

2 H.R. 2975 was introduced by Representative Sensenbrenner for himself and Representatives Conyers, Hyde, Coble, Goodlatte, Jenkins, Jackson-Lee, Cannon, Meehan, Graham, Bachus, Wexler, Hostettler, Keller, Issa, Hart, Flake, Schiff, Thomas, Goss, Rangel, Berman and Lofgren; S.1510 by Senator Daschle for himself and Senators Lott, Leahy, Hatch, Graham, Shelby and Sarbanes.

3 H.R. 3004 was introduced by Representative Oxley for himself and Represenatives LaFalce, Leach, Maloney, Roukema, Bentsen, Hooley, Bereuter, Baker, Bachus, King, Kelly, Gillmore, Cantor, Riley, Latourette, Green (of Wisconsin), and Grucci; and reported out of the House Financial Services Committee with amendments on October 15, 2001, H.R.Rep.No. 107-250. H.R. 3004, as reported out, included Internet gambling amendments that were not included in H.R. 2975/H.R.3108.
ed. Oct. 24, 2001), and H.R. 3162 was sent to the President who signed it on October 26, 2001.

**Criminal Investigations: Tracking and Gathering Communications**

A portion of the Act addresses issues suggested originally in a Department of Justice proposal circulated in mid-September. The first of its suggestions called for amendments to federal surveillance laws, laws which govern the capture and tracking of suspected terrorists’ communications within the United States. Federal law features a three tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications.

The tiers reflected the Supreme Court’s interpretation of the Fourth Amendment’s ban on unreasonable searches and seizures. The Amendment protects private conversations, *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967). It does not cloak information, even highly personal information, for which there is no individual justifiable expectation of privacy, such as telephone company records of calls made to and from an individual’s home, *Smith v. Maryland*, 442 U.S. 735 (1979), or bank records of an individual’s financial dealings, *United States v. Miller*, 425 U.S. 435 (1976).

Congress responded to *Berger* and *Katz*, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications, 18 U.S.C. 2511. At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious

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4 The Department’s proposal, dated September 20, 2001, came with a brief section by section analysis. Both the proposal *(Draft)* and analysis *(DoJ)* were printed as an appendix in *Administration’s Draft Anti-Terrorism Act of 2001, Hearing Before the House Comm. on the Judiciary, 107th Cong., 1st Sess. 54 (2001).*


6 “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,” *U.S. Const.* Amend. IV.

7 Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
criminal cases. When approved by senior Justice Department officials, law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.

8 "The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of" one or more predicate offense, 18 U.S.C. 2516.

9 The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement), 1751 (presidential and presidential staff assassination, kidnapping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnapping, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or naturalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations, 18 U.S.C. 2518. The court notifies the parties to any conversations seized under the order after the order expires, 18 U.S.C. 2518(8).

Below Title III, the next tier of privacy protection covers some of those matters which the Supreme Court has described as beyond the reach of the Fourth Amendment protection – telephone records, e-mail held in third party storage, and the like, 18 U.S.C. 2701-2709 (Chapter 121). Here, the law permits law enforcement access, ordinarily pursuant to a warrant or court order or under a subpoena in some cases, but in connection with any criminal investigation and without the extraordinary levels of approval or constraint that mark a Title III interception, 18 U.S.C. 2703.

Least demanding and perhaps least intrusive of all is the procedure that governs court orders approving the government’s use of trap and trace devices and pen registers, a kind of secret “caller id”, which identify the source and destination of calls made to and from a particular telephone, 18 U.S.C. 3121-3127 (Chapter 206). The orders are available based on the government's certification, rather than a finding of the court, that the use of the device is likely to produce information relevant to the investigation of a crime, any crime, 18 U.S.C. 3123. The devices record no more than the identity of the participants in a telephone conversation, but neither the orders nor the results they produce need ever be revealed to the participants.

The Act modifies the procedures at each of the three levels. It:

- offense involving counterfeiting punishable under 18 U.S.C. 471, 472, or 473; (e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States; (f) any offense including extortionate credit transactions under 18 U.S.C. 892, 893, or 894; (g) a violation of 31 U.S.C. 5322 (dealing with the reporting of currency transactions); (h) any felony violation of 18 U.S.C. 2511 and 2512 (interception and disclosure of certain communications and to certain intercepting devices); (i) any felony violation of 18 U.S.C. ch. 71 (obscenity); (j) 49 U.S.C. 60123(b) (destruction of a natural gas pipeline), 46502 (aircraft piracy); (k) 22 U.S.C. 2778 (Arms Export Control Act); (l) the location of any fugitive from justice from an offense described in this section; (m) a violation of 8 U.S.C. 1324, 1327, or 1328; (n) any felony violation of 18 U.S.C. 922, 924 (firearms); (o) any violation of 26 U.S.C. 5861 (firearms); (p) a felony violation of 18 U.S.C. 1028 (production of false identification documents), 1542 (false statements in passport applications), 1546 (fraud and misuse of visas, permits, and other documents) or a violation of 8 U.S.C. 1324, 1327, or 1328 (smuggling of aliens); (p) 229 (chemical weapons), 2332 (terrorist violence against Americans overseas), 2332a (weapons of mass destruction), 2332b (multinational terrorism), 2332d (financial transactions with countries supporting terrorism), 2339A (support of terrorist), 2332B (support of terrorist organizations); (r) any conspiracy to commit any of these, 18 U.S.C. 2516(1)(crimes added by the Act in italics). Other than telephone face to face conversations (i.e., electronic communications), the approval of senior Justice Department officials is not required and an order may be sought in any felony investigation, 18 U.S.C. 2516(3).

10 Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
permits pen register and trap and trace orders for electronic communications (e.g., e-mail)

authorizes nationwide execution of court orders for pen registers, trap and trace devices, and access to stored e-mail or communication records

treats stored voice mail like stored e-mail (rather than like telephone conversations)

permits authorities to intercept communications to and from a trespasser within a computer system (with the permission of the system’s owner)

adds terrorist and computer crimes to Title III’s predicate offense list

reenforces protection for those who help execute Title III, ch. 121, and ch. 206 orders

encourages cooperation between law enforcement and foreign intelligence investigators

establishes a claim against the U.S. for certain communications privacy violations by government personnel

terminates the authority found in many of the these provisions and several of the foreign intelligence amendments with a sunset provision (Dec. 31, 2005).

Pen Registers and Trap and Trace Devices. In section 216, the Act allows court orders authorizing trap and trace devices and pen registers to be used to capture source and addressee information for computer conversations (e.g., e-mail) as well as telephone conversations, 18 U.S.C. 3121, 3123. In answer to objections that e-mail header information can be more revealing than a telephone number, it creates a detailed report to the court, 18 U.S.C. 3123(a)(3).11

11 “Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public the agency shall ensure that a record will be maintained which will identify – (i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of the such device.

“(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof),” section 216(b)(1).
The use of pen registers or trap and trace devices was limited at one time to the judicial district in which the order was issued, 18 U.S.C. 3123 (2000 ed.). Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States, 18 U.S.C. 3123(b)(1)(C), 3127(2).

**Communications Records and Stored E-Mail.** With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber, 18 U.S.C. 2703(a),(b). A warrant will also suffice to seize records describing telephone and other communications transactions without customer notice, 18 U.S.C. 2703(c). In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation, officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records, 18 U.S.C. 2703(b),(c). They can obtain a limited amount of record information (subscribers’ names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena, 18 U.S.C. 2703(c)(1)(C). There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial, 18 U.S.C. 2705.

In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider’s customer records, 18 U.S.C. 2703(c)(1)(C).

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.

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12 The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” *DoJ* at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

13 Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user's true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” *DoJ* at §107.
Previously, only a federal court in the district in which the e-mail was stored could issue the order. Under section 220, federal courts in the district where an offense under investigation occurred may issue orders applicable “without geographic limitation,” 18 U.S.C. 2703.14

The Act, in section 209, treats voice mail like e-mail, that is, subject to the warrant or court order procedure, rather than to the more demanding coverage of Title III once required, United States v. Smith, 155 F.3d 1050, 1055-56 (9th Cir. 1998).

Finally, the Act resolves a conflict between chapter 121 and the federal law governing cable companies. Government entities may have access to cable company customer records only under a court order following an adversary hearing if they can show that the records will evidence that the customer is or has engaged in criminal activity, 47 U.S.C. 511(h). When cable companies began offering telephone and other communications services the question arose whether the more demanding cable rules applied or whether law enforcement agencies were entitled to ex parte court orders under the no-notice procedures applicable to communications providers.15 The Act makes it clear that the cable rules apply when cable television viewing services are

14 Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

15 See e.g., DoJ at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement’s access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

**Electronic Surveillance.** To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202. A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(i). Yet only the interloper's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.

**Criminal Investigators' Access to Foreign Intelligence Information.**
The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism. It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that “the purpose for the surveillance is to obtain foreign intelligence information,” 50 U.S.C. 1804(a)(7)(B)(2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps “the purpose” might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation

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16 18 U.S.C. 229 (chemical weapons), 2332(terrorist acts of violence committed against Americans overseas), 2332a(use of weapons of mass destruction), 2332b(acts of terrorism transcending national boundaries), 2332d(financial transactions with countries which support terrorists), 2339A(providing material support to terrorists), and 2339B(providing material support to terrorist organizations).

17 “Because service providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves as permitted under current law, they often have no way to exercise their rights to protect themselves from unauthorized attackers. Moreover, such attackers can target critical infrastructures and engage in cyberterrorism,” DoJ at §106. Elsewhere the Act defines “electronic surveillance” for purposes of the Foreign Intelligence Surveillance Act (FISA) to emphasize that the law enforcement authority for this intruder surveillance does not confer similar authority for purposes of foreign intelligence gathering, section 1003 (50 U.S.C. 1801(f)(2)).

Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment's warrant clause. It is here that the “primary purpose” notion originated. In *United States v. Truong Dinh Hung*, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, “as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.”

Subsequent case law, however, is not as clear as it might be: see e.g., *United States v. Duggan*, 743 F.2d 59, 77 (2d Cir. 1984) (“FISA permits federal officials to obtain orders authorizing electronic surveillance ‘for the purpose of obtaining foreign intelligence information.’ The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying officials’ belief that the information sought is the type of foreign intelligence information described”); *United States v. Pelton*, 835 F.2d 1067, 1075-76 (4th Cir. 1987) (“We also reject Pelton’s claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial”); *United States v. Sarkissian*, 841 F.2d 959, 907-8 (9th Cir. 1988) (“Defendants rely on the primary purpose test articulated in *United States v. Truong Dinh Hung*. . . . One other court has applied the primary purpose test. Another court has rejected it . . . distinguishing *Truong*. A third court has declined to decide the issue. We also decline to decide the issue”); *United States v. Johnson*, 952 F.2d 565, 572 (1st Cir. 1991) (“Appellants attack the government’s surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance”).

“Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” DoJ at §153.
demanding standard than the “a purpose” threshold proposed by the Justice Department, but a clear departure from the original “the purpose” entry point. FISA once described a singular foreign intelligence focus prerequisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k), 1825(k).  

**Protective Measures.** The Act reenforces two kinds of safeguards, one set designed to prevent abuse and the other to protect those who assist the government. The sunset clause is perhaps the best known of the Act’s safeguards. Under the direction of section 224, many of the law enforcement and foreign intelligence authorities granted by the Act expire as of December 31, 2005. The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter

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\(^{21}\) "(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. (2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, infra, quoting, 50 U.S.C. 1801.

\(^{22}\) “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210[subpoenas for communications provider customer records], 211[access to cable company communication service records], 213[sneak and peek], 216[pen register and trap and trace device amendments], 221[trade sanctions], and 222[assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005. “(b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers' communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices). 23 Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees, 24 but could not recover against the United States. 25 Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice's Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government's request until a court order authorizing access can be obtained. 26 Another allows providers to disclose customer records to protect the provider's rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others. 27 A third section,

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26 Prior law already granted service providers immunity for disclosure of customer records in compliance with a court access order, 18 U.S.C. 2703(f).
27 "Existing law contains no provision that allows providers of electronic communications service to disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies that threaten death or serious bodily injury. This section amends 18 U.S.C. §2702 to authorize such disclosures if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.
"Current law also contains an odd disconnect: a provider may disclose the contents of the customer's communications in order to protect its rights or property but the current statute does not expressly permit a provider to voluntarily disclose non-content records (such as a subscriber's login records). 18 U.S.C. 2702(b)(5). This problem substantially hinders the ability of providers to protect themselves from cyber-terrorists and criminals. Yet the right to disclose the contents of communications necessarily implies the less intrusive ability to disclose non-content records. In order to promote the protection of our nation's critical infrastructures, this section's amendments allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems," DoJ at
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

**Foreign Intelligence Investigations**

Although both criminal investigations and foreign intelligence investigations are conducted in the United States, criminal investigations seek information about unlawful activity; foreign intelligence investigations seek information about other countries and their citizens. Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough.

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA), something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President's authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, United States v. United States District Court, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage

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28 Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

29 Thus in the name of assisting in the execution of Title III, chapter 121, or chapter 206 order, the courts may not cite the Act as the basis for an order compelling a service provider to make system modifications or provide any other technical assistance not already required under 18 U.S.C. 2518(4), 2706, or 3124(c), see, H.R.Rep.No. 107-236, at 62-3 (2001) (emphasis added) (“This Act is not intended to affect obligations under Communications Assistance for Law Enforcement Act [which addresses law enforcement-beneficial system modifications and the compensation to be paid for the changes], nor does the act impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance”).

30 *E.g.*, As amended by section 902 of the Act, “‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2)(language added by the Act in italics).

31 50 U.S.C. 1801 *et seq.*
In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs. There were and still are extra 


33 “As used in this subchapter: (a) ‘Foreign power’ means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

“(b) ‘Agent of a foreign power’ means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C).

“(c) ‘International terrorism’ means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnaping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

“(d) ‘Sabotage’ means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

“(e) ‘Foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans (“United States persons,” i.e., citizens or permanent resident aliens). The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

- permits “roving” surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)

- increases the number of judges on the FISA court from 7 to 11

- allows application for a FISA surveillance or search order when gathering foreign intelligence is a significant reason for the application rather than the reason

- authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations

- sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses

- carries a sunset provision

- establishes a claim against the U.S. for certain communications privacy violations by government personnel

- expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to – (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States,” 50 U.S.C. 1801.

34 Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
**FISA.** FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases.\(^{35}\) It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

**Search and Surveillance for Intelligence Purposes.** Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, Draft at §151.\(^{36}\)

Section 901 of the Act address a concern raised during the 106th Congress relating to the availability of the FISA orders and the effective use of information gleaned from the execution of a FISA order.\(^{37}\) It vests the Director of Central

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\(^{36}\) See also, DoJ at §151, “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order’s minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed (50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

\(^{37}\) See e.g., S.Rep.No. 106-352, at 3, 6, 7 (2000)(“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application
Intelligence with the responsibility to formulate requirements and priorities for the use of FISA to collect foreign intelligence information. He is also charged with the responsibility of assisting the Attorney General in the efficient and effective dissemination of FISA generated information (50 U.S.C. 403-3(c)).

**Pen Registers and Trap and Trace Devices for Intelligence Gathering.** Section 214 grants the request of the Department of Justice by dropping requirements which limited FISA pen register and trap and trace device orders to facilities used by foreign agents or those engaged in international terrorist or clandestine intelligence activities, 50 U.S.C. 1842(c)(3)(2000 ed.). It is enough that the order is sought as part of an investigation to protect against international terrorism or clandestine intelligence activities and is not motivated solely by an American’s exercise of his or her First Amendment rights. Elsewhere (section 505), the Act drops a similar limitation for intelligence officials’ access to telephone records, 18 U.S.C.

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38 “When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevancy, an additional factual showing that the communications device has been used to contact an ‘agent of a foreign power’ engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the ‘agent of a foreign power’ prong from the predication, and thus makes the FISA authority more closely track the criminal authority,” *DoJ* at §155.
Section 214 adjusts the language of the FISA pen register-trap and trace authority to permit its use to capture source and destination information relating to electronic communications (e.g., e-mail) as well as telephone communications, 50 U.S.C. 1842(d). The section makes it clear that requests for a FISA pen register-trap and trace order, like requests for other FISA orders, directed against Americans (U.S. persons) may not be based solely on activities protected by the First Amendment, 50 U.S.C. 1842, 1843.

**Third Party Cooperation and Tangible Evidence.** As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target’s activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.

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39 Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise to be entitled to confidentiality. Section 505, in response to the Justice Department's suggestion, allows FBI field offices to make the requests, see DoJ at §157 (“At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports”).

40 When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court’s order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.’ This would enhance the FBI’s ability to monitor international terrorists and intelligence officers who are...
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian.\textsuperscript{41} The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities,\textsuperscript{42} in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B);
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a);
- the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a);
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v;

\textsuperscript{41} “The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigative contexts. The time and difficulty involved in getting such pleadings before the Court usually outweighs the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” \textit{DoJ} at §156.

\textsuperscript{42} Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.  

**Access to Law Enforcement Information.** Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community's access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, *Draft* at §103.  

43 H.R.Rep.No. 107-205, at 60-1 (2001)(“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

“The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

“Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual’s credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding—without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information”).

44 *See also, DoJ at §103,* “This section facilities the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, Draft at §354.45

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, Draft at §154.46

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion.47 It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions.”

45 See also, DoJ at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.” Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officers

46 See also, DoJ at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”

47 Blair v. United States, 250 U.S. 273, 281 (1919)(the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

The Act, in section 203(a), allows disclosure of matters occurring before the grand jury to “any federal law enforcement, intelligence, protective, immigration, national defense, or national security” officer to assist in the performance of his official duties, F.R.Crim.P. 6(e)(3)(C)(i)(V).

Critics may protest that the change could lead to the use of the grand jury for intelligence gathering purposes, or less euphemistically, to spy on Americans. The proposal was never among those scheduled to sunset, but earlier versions of the section followed the path used for most other disclosures of grand jury material: prior

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48 These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

49 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25 Harvard Journal of Law & Public Policy 699, 719-20 (2002)(“There is a significant danger that the rule permitting disclosure will be treated as the de facto authorization of an expansion of the grand jury’s investigative role to encompass seeking material relevant only to matters of national security, national defense, immigration, and so forth. The grand jury’s awesome powers should not be unwittingly extended to a much wider range of issues. . . Since the grand jury operates in secret, there are no public checks on the scope of its investigations, and witnesses are not permitted to challenge its jurisdiction. Only the supervising court is in a position to keep the grand jury’s investigation within proper bounds. Requiring judicial approval of foreign intelligence and counterintelligence information disclosures would provide a natural check against the temptation to manipulate the grand jury to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6 (Nov. 2001)(“The grand jury secrecy rule is a rule of policy which has always had exceptions, and it has been frequently modified. The secrecy rule has no credible claim to constitutional stature”).
Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

“Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person’s official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification. By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

Increasing Institutional Capacity. As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a

52 Duncan v. Walker, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted) (“It is our duty to give effect, if possible, to every clause and word of a statute. United States v. Menasche, 348 U.S. 528, 538-539 (1955) (quoting Montclair v. Ramsdell, 107 U.S. 147, 152 (1883)); see also Williams v. Taylor, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); Market Co. v. Hoffman, 101 U.S. 112, 115 (1879)(As early as in Bacon's Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage.

It is not possible to conclude that Congress intended the universal subsection (d) to apply until sunset and the grand jury and Title III subsections (a), (b), and (c) to operate thereafter, because the Title III subsection expires at the same time as the universal subsection.

53 Draft at §154, “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”
computerized translation capability to be used in foreign intelligence gathering.\textsuperscript{54} Section 907 instructs the Director of the Central Intelligence, in consultation with the Director of the FBI, to report on the creation of a National Virtual Translation Center. The report is to include information concerning staffing, allocation of resources, compatibility with comparable systems to be used for law enforcement purposes, and features which permit its efficient and secure use by all of the intelligence agencies.

**Money Laundering**

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture.\textsuperscript{55} The Act bolsters federal efforts in each area.

**Regulation.** Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.\textsuperscript{56}

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\textsuperscript{54} “The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

“The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so,” S.Rep.No. 107-63, at 11 (2001).


\textsuperscript{56} See e.g., 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
**Records and Reports.** For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler’s checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to files SARs as well, reflecting Congress’ view that the information provided the IRS may be valuable for other law enforcement purposes. This concern is likewise...

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58 H.R.Rep.No. 107-250, at 38-9 (2001) (“Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

“Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a ‘Safeguard Procedures Report’ which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

“While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement...
reflected in section 357 which asks the Secretary of the Treasury to report on the Internal Revenue Service’s role in the administration of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311 et seq.), and what transfers of authority, if any, are appropriate.

Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action.59 Section 355 expands the immunity to cover disclosures in authorities as the various reports mandated by the Bank Secrecy Act, which can typically be retrieved electronically from a database maintained by the Treasury Department. The differential access to the two kinds of reports is made anomalous by the fact that Form 8300 elicits much the same information that is required to be disclosed by the Bank Secrecy Act. For example, just as Form 8300 seeks the name, address, and social security number of a customer who engages in a cash transaction exceeding $10,000 with a trade or business, Currency Transaction Reports (CTRs) mandated by the Bank Secrecy Act require the same information to be reported on a cash transaction exceeding $10,000 between a financial institution and its customer”).

59 “Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

“First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor from civil liability applies in arbitration, as well as judicial, proceedings. Second, it amends section 5318(g)(3) to clarify the safe harbor’s coverage of voluntary disclosures (that is, those not covered by the SAR regulatory reporting requirement). The language in section 5318(g)(3)(A) providing that ‘any financial institution that *** makes a disclosure pursuant to *** any other authority *** shall not be liable to any person’ is not intended to avoid the application of the reporting and disclosure provisions of the Federal securities laws to any person, or to insulate any issuers from private rights of actions for disclosures made under the Federal securities laws.

“Subsection [351](b) amends section 5318(g)(2) of title 31—which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed—to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee’s official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
employment references to other insured depository financial institutions provided disclosure is not done with malicious intent.\textsuperscript{60}

The Financial Crimes Enforcement Network (FinCEN), a component within the Treasury Department long responsible for these anti-money laundering reporting and record-keeping requirements, 31 C.F.R. pt. 103, was administratively created in 1990 to provide other government agencies with an “intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes,” 55 Fed.Reg. 18433 (May 2, 1990).

The Act, in section 361, makes FinCEN a creature of statute, a bureau within the Treasury Department, 31 U.S.C. 310. Section 362 charges it with the responsibility of establishing a highly secure network to allow financial institutions to file required reports electronically and to permit FinCEN to provide those institutions with alerts and other information concerning money laundering protective measures, 31 U.S.C. 310 note.

**Special Measures.** In extraordinary circumstances involving international financial matters, the Act grants the Secretary of the Treasury, in consultation with other appropriate regulatory authorities, the power to issue regulations and orders involving additional required “special measures” and additional “due diligence” requirements to combat money laundering. The special measure authority, available under section 311, comes to life with the determination that particular institutions, jurisdictions, types of accounts, or types of transactions pose a primary money

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\textsuperscript{60} 31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 67 (2001).
These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

61 31 U.S.C. 5318A. The circumstances considered in the case of a suspect jurisdiction are: evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction’s banking regulation; the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

62 The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’ including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

“Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate
business transactions.

“Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

“Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

“The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

“The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

“The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

“The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information that it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

“The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

“The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed
Due Diligence. Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.63

63 See generally, H.R.Rep.No. 107-250, at 71-2 ("Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

“The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

“The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

“For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
 detect and report transactions that may involve the proceeds of foreign corruption. A private bank account is defined as an account (or any combination of accounts) that requires a minimum aggregate deposit of funds or other assets of not less than $1 million; is established on behalf of one or more individuals who have a direct or beneficial ownership in the account; and is assigned to, or administered or managed by, an officer, employee or agent of a financial institution acting as a liaison between the institution and the direct or beneficial owner of the account.

“This section directs the Secretary of the Treasury, within 6 months of enactment of this bill and in consultation with appropriate Federal functional regulators, to further define and clarify, by regulation, the requirements imposed by this section”.

64 Or more exactly, a bank which has no physical presence in any country; a “physical presence” for a foreign bank is defined as “a place of business that – (i) is maintained by a foreign bank; (ii) is located at a fixed address (other than solely an electronic address) in a country in which the foreign bank is authorized to conduct banking activities, at which location the foreign bank – (I) employs 1 or more individuals on a full-time basis; and (II) maintains operating records relating to its banking activities; and (iii) is subject to inspection by the banking authority which licensed the foreign bank to conduct banking activities,” 31 U.S.C. 5318(j)(4).


66 The Act does not define “concentration accounts,” although the House Financial Services Committee report provides some incite into the section’s intent, H.R.Rep.No. 107-250, at 72-3 (2001)(“This section gives the Secretary of the Treasury discretionary authority to prescribe regulations governing the maintenance of concentration accounts by financial institutions, to ensure that these accounts are not used to prevent association of the identity of an individual customer with the movement of funds of which the customer is the direct or beneficial owner. If promulgated, the regulations are required to prohibit financial institutions from allowing clients to direct transactions into, out of, or through the concentration accounts of the institution; prohibit financial institutions and their employees from informing customers of the existence of, or means of identifying, the concentration accounts of the institution; and to establish written procedures governing the documentation of all transactions involving a concentration account.”)
Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a ‘street name’ or omnibus account in the broker-dealer’s name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to ‘look through’ the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund’s customers. Thus, the fund would not be required to ‘look through’ the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).

67 31 U.S.C. 5318(l); H.R.Rep.No. 107-250, at 62-3 (2001)(“Section [326](a) amends 31 U.S.C. 5318 by adding a new subsection governing the identification of account holders. Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a ‘street name’ or omnibus account in the broker-dealer's name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to ‘look through’ the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund's customers. Thus, the fund would not be required to ‘look through’ the plan to identify its participants.

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Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature.68

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

**Reports to Congress.** Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

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exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.  

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

**International Cooperation.** Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (i.e., the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.

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70 H.R.Rep.No. 107-250, at 67 (2001)(“This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury's progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

“The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime”).
**Crimes.** Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, smuggling, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
expands 18 U.S.C. 1956 to cover financial transactions conducted in foreign financial institutions.71

Section 329 makes it a federal crime to corruptly administer the money laundering regulatory scheme. Offenders are punishable by imprisonment for not more than 15 years and a fine of not more than three times the amount of the bribe.

Section 5326 of title 31 authorizes the Secretary of the Treasury to impose temporary, enhanced reporting requirements upon financial institutions in areas victimized by substantial money laundering activity (geographic targeting regulations and orders). Section 353 makes it clear that the civil sanctions, criminal penalties, and prohibitions on smurfing (structuring transactions to evade reporting requirements) apply to violations of the regulations and orders issued under 31 U.S.C. 5326.72 It also extends the permissible length of the temporary geographical orders from 60 to 180 days.

Violations of the special measures and special due diligence requirements of sections 311 and 312 are subject to both civil and criminal penalties by virtue of section 363's amendments to 31 U.S.C. 5321(a) and 5322. The amendments authorize civil penalties and criminal fines of twice the amount of the transaction but not more than $1 million. Criminal offenders would be subject to a fine in the same amount.

71 “[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

“The definition of ‘financial institution’ in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of ‘commercial bank’ or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad--say to a Mexican bank--and launders them through a series of financial transactions, the government conceivably could not rely on the definition of a ‘financial institution’ in 1956(c)(6) to establish that the transaction was a ‘financial transaction’ within the meaning of 1956(c)(4)(B) (defining a ‘financial transaction’ as a transaction involving the use of a ‘financial institution’), or that it was a ‘monetary transaction’ within the meaning of 1957(f) (defining ‘monetary transaction’ as, inter alia, a transaction that would be a ‘financial transaction’ under 1956(c)(4)(B)).

“Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launders the proceeds of one of the crimes set forth on a list of ‘specified unlawful activities.’ 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),” H.R.Rep.No. 107-250, at 38 (2000).

Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.\textsuperscript{73}

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents.\textsuperscript{74} They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

\textsuperscript{73} “The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business.

“Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.

“Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive,” H.R.Rep.No. 107-250, at 54 (2001).

\textsuperscript{74} “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
• 18 U.S.C. 476 (taking impressions of tools used for obligations and securities) from 10 to 25 years;
• 18 U.S.C. 477 (possessing or selling impressions of tools used for obligations or securities) from 10 to 25 years;
• 18 U.S.C. 484 (connecting parts of different notes) from 5 to 10 years;
• 18 U.S.C. 493 (bonds and obligations of certain lending agencies) from 5 to 10 years;
• 18 U.S.C. 478 (foreign obligations or securities) from 5 to 20 years;
• 18 U.S.C. 479 (uttering counterfeit foreign obligations or securities) from 3 to 20 years;
• 18 U.S.C. 480 (possessing counterfeit foreign obligations or securities) from 1 to 20 years;
• 18 U.S.C. 481 (plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities) from 5 to 25 years;
• 18 U.S.C. 482 (foreign bank notes) from 2 to 20 years; and
• 18 U.S.C. 483 (uttering counterfeit foreign bank notes) from 1 to 20 years.

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

**Bulk Cash.** Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act’s bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting.75

The section appears to be the product of reactions to the Supreme Court’s decision in *United States v. Bajakian*, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court’s

75 “For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).
As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency – representing the proceeds of drug trafficking and other criminal offenses – is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad. . . .

Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United States without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute,” H.R.Rep.No. 107-250 at 36-7 (2001).

Section 5317 of title 31 once called for civil forfeiture of property traceable to a violation of 31 U.S.C. 5316 (reports on exporting or importing money instruments worth $10,000 or more). Section 372 of the Act recasts section 5317 to provide for civil and criminal forfeitures for violations of 31 U.S.C. 5316, of 31 U.S.C. 5313 (reports on domestic coins and currency transactions involving $10,000 or more) and of 31 U.S.C. 5324 (structuring transactions to evade reporting requirements (smurfing)).

Extraterritorial Jurisdiction. The Act makes 18 U.S.C. 1029, the federal statute condemning various crimes involving credit cards, PIN numbers and other access devices, applicable overseas if the card or device is issued by or controlled by an American bank or other entity and some article is held in or transported to or through the United States during the course of the offense, section 377. The change was part of the original Justice Department proposals. Justice explained that, “[financial crime] admits of no border, utilizing the integrated global financial network for ill purposes. This provision would apply the financial crimes prohibitions to conduct committed abroad, so long as the tools or proceeds of the crimes pass through or are in the United States,” DoJ at §408. The section, however, appears to limit the otherwise applicable extraterritorial jurisdiction implicit in section 1029, since federal courts would likely recognize extraterritorial jurisdiction over a violation of the federal statute.

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under either circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.\footnote{United States v. Bowman, 260 U.S. 94, 97-8 (1922); Ford v. United States, 273 U.S. 593, 623 (1927). For a general discussion of the extraterritorial application of federal criminal law, see, Doyle, Extraterritorial Application of American Criminal Law, CRS REP.NO. 94-166A (Mar. 13, 1999).}

**Venue.** Section 1004 relies on dicta in United States v. Cabrales, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering,\footnote{“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed,” U.S. Const. III, §2, cl.3.} in the state and district in which the monetary transaction takes place. The Supreme Court in Cabrales held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in dicta, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.\footnote{“[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,” U.S. Const. Amend. VI.}

**Forfeiture.** Forfeiture is the government confiscation of property as a consequence of crime.\footnote{See also, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnaping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.}\footnote{For general background information, see, Doyle, Crime and Forfeiture, CRS REP.NO. 97-139A (Oct. 11, 2000).} The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 et seq. (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

**Constitutional Considerations.** The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 et seq., which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the
jurisdiction of the United States, belonging to any foreign individual, foreign entity, or foreign country whom they determine to have planned, authorized, aided or engaged in an attack on the United States by a foreign country or foreign nationals. The section also permits the government to present secretly (ex parte and in camera) any classified information upon which the forfeiture was based should the decision be subject to judicial review. The Justice Department requested the section as a revival of the President’s powers in times of unconventional wars. By virtue of section 316, property owners may initiate a challenge to a confiscation by filing a claim under the rules applicable in maritime confiscations. The section permits two defenses to forfeiture – that the property is not subject to confiscation under section 106 or that the claimant is entitled to the innocent owner defense of 18 U.S.C. 983(d). The characterization of the defenses as “affirmative defense” indicates that the claimant bears the burden of proof. The innocent owner defenses of 18 U.S.C. 983(d) are probably not available in cases under section 106, since that section is explicitly

81 “This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App.U.S.C. §5(b).

“This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress's war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

“The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2).” DoJ at §159.

82 “An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
excepted from the coverage of 18 U.S.C. 983. The challenge proceedings permit the court to admit evidence, such as hearsay evidence, that would not otherwise be admissible under the Federal Rules of Evidence if the evidence is reliable and if national security might be imperiled should dictates of the Federal Rules be followed, §316(b). The section recognizes the rights of claimants to proceed alternatively under the Constitution or the Administrative Procedure Act.

The Justice Department also recommended enactment of an overlapping provision which ultimately passed as section 806 of the Act without any real discussion of the relationship of the two sections. Section 806 authorizes confiscation of all property, regardless of where it is found, of any individual, entity, or organization engaged in domestic or international terrorism (as defined in 18 U.S.C. 2331), against the United States, Americans or their property, 18 U.S.C.

83 18 U.S.C. 983(i)(2)(D).

84 “The exclusion of certain provisions of Federal law from the definition of the term ‘civil forfeiture statute’ in section 983(i) of title 18, United States Code, shall not be construed to deny an owner of property the right to contest the confiscation of assets of suspected international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C) subchapter II of chapter 5 of title 5, United States Code (commonly known as the ‘Administrative Procedure Act’).” Sec. 316(c)(1).

85 “Current law does not contain any authority tailored specifically to the confiscation of terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available current forfeiture laws require detailed tracing that is quite difficult for accounts coming through the banks of countries used by many terrorists.

‘This section increases the government's ability to strike at terrorist organizations' economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001,” DoJ, at §403. The House Report on H.R. 2975 which contained versions of both sections is no more explicit on the relation of the two sections.

86 “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
981(a)(1)(G). Section 806 as discussed below also calls for the more common confiscation of property derived from and or facilitating acts of domestic or international terrorism against the United States or its citizens. Confiscations under 806 may be challenged under the procedures of 18 U.S.C. 983, since they are not exempted there. To the extent that forfeiture under section 806 is based on international rather than domestic terrorism, claimants may also use the procedures of section 316.

Confiscation based solely on the fact that the property is owned by a criminal offender, rather than that it is derived from or facilitates some crime is fairly uncommon. It is the mark of common law forfeiture of estate. At common law, a felon forfeited all of his property. Most contemporary forfeiture statutes employ statutory forfeiture, a more familiar presence in American law,\(^{87}\) which consists of the confiscation of things whose possession is criminal, of the fruits of crime, and of the means of crime – untaxed whiskey, the drug dealer’s profits, and the rum runner’s ship.

Three characteristics set forfeiture of estate apart. The property is lost solely by reason of its ownership by a felon. All of a felon’s property is confiscated, not merely that which is related to the crime for which he is convicted. Finally, it occasions attainder which negates the felon’s right to hold property or for title to property to pass through him to his heirs. It was with this in mind, that the Framers declared that “no attainder of treason shall work corruption of blood or forfeiture exception during the life of the person attainted.”\(^{88}\) And for this reason, President Lincoln insisted that the confiscated real estate of Confederate supporters should revert their heirs at death.\(^{89}\)

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\(^{87}\) Austin v. United States, 509 U.S. 602, 611-12 (1993)(“Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture . . . . Of England’s three kinds of forfeiture, only the third took hold in the United States”).

\(^{88}\) U.S.Const. Art.III, §3, cl.2.

\(^{89}\) 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal in personam proceedings following criminal conviction as a means of accomplishing confiscation.
Neither section 106 nor 806 require conviction of the terrorist property owner. Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers. The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners. Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them. The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate

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90 Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c) (“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act”).

91 Silesian American Corp. v. Clark, 332 U.S. 469 (1947); cf., Societe Internationale v. Rogers, 357 U.S. 197, 211 (1958) (“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).

92 Zittman v. McGrath, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’”).

any presumption of remedial purposes. The same has been said of the applicability of the ex post facto clause.

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO. If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

Other Forfeiture Amendments. In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.

95 See e.g., United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.), 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994).
96 DoJ, at §403.
97 18 U.S.C. 1956(b). Cf., H.R.Rep.No. 107-250, at 54-5 (2001) (“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas. Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted

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American Bank, 191 F.3d 30 (1st Cir. 1999).

“The second provision, modeled on 18 U.S.C. 1345(b), gives the district court the power to restrain property, issue seizure warrants, or take other action necessary to ensure that a defendant in an action covered by the statute does not dissipate the assets that would be needed to satisfy a judgment.

“This section also authorizes a court, on the motion of the Government or a State or Federal regulator, to appoint a receiver to gather and protect assets needed to satisfy a judgment under sections 1956 and 957, and the forfeiture provisions in sections 981 and 982. This authority is intended to apply in three circumstances: (1) when there is a judgment in a criminal case, including an order of restitution, following a conviction for a violation of section 1956 or 1957; (2) when there is a judgment in a civil case under section 1956(b) assessing a penalty for a violation of either section 1956 or 1957; and (3) when there is a civil forfeiture judgment under section 981 or a criminal forfeiture judgment, including a personal money judgment, under section 982.

“The amendment also makes section 1956(b) applicable to violations of section 1957. It applies to conduct occurring before the effective date of the Act”).

18 U.S.C. 981(k). H.R.Rep.No. 107-250, at 57-8 (2001)(“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank's customers.

“Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank's correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

“The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”).
defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation.99

Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here.100 Section 320 enlarges this provision to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements.101 This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.102

99 Cf., H.R.Rep.No. 107-250, at 58-9 (2001) ("Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of substitute assets when the defendant has placed the property otherwise subject to forfeiture beyond the jurisdiction of the court." Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

"This section amends 21 U.S.C. 853 to make clear that a court in a criminal case may issue a repatriation order--either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. 853(e) to restrain property--so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both").


101 H.R.Rep.No. 107-250, at 56 (2001) ("This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act").

102 H.R.Rep.No. 107-250, at 59-60 (2001) ("Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country.

"Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
A fugitive may not challenge a federal forfeiture. Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in “order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.”
Alien Terrorists and Victims

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

**Border Protection.** The border protection provisions:

- authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401

- authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402

- remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404

- authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405

- authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.

- instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007

- direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418

- express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414

- add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415

- call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416

- limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
• instruct the Attorney General to report on the feasibility of using biometric scanners to help prevent terrorists and other foreign criminals from entering the country, section 1008

• authorize appropriations of $250,000 for the FBI to determine the feasibility of providing airlines with computer access to the names of suspected terrorists, section 1009

• authorize reciprocal sharing of the State Department’s visa lookout data and related information with other nations in order to prevent terrorism, drug trafficking, slave marketing, and gun running, section 413

Detention and Removal. Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity, 8 U.S.C. 1227 (a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(iv). Aliens may be inadmissible for any number of terrorism-related reasons, 8 U.S.C. 1182 (a)(3)(B). Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported.


Section 411 defines “terrorist organization” to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the Federal Register as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C.

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104 As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).
Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).


An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in “premeditated, politically motivated violence perpetrated against noncombatant targets,” or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security or endanger some individual or the general public. The Attorney General's determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

Victims. The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

- permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421\(^{105}\)
- extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422\(^{106}\)

\(^{105}\) “The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

\(^{106}\) “The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks. “The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application. “Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
• preservation of certain immigration benefits available to alien family members that would be otherwise lost as a consequence of the death of a victim of September 11, section 423\(^{107}\)

• limited easing of age restrictions on visas available to aliens under 21 years of age for those whose 21\(^{st}\) birthday occurred immediately before or soon after September 11, section 424\(^{108}\)

• temporary administrative relief for alien family members of a victim of September 11 who are not otherwise entitled to relief under the Act, section 425

the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

“Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 31.

“Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.


\(^{107}\) “Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

“The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

“The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death),” H.R.Rep.No. 107-236, at 68 (2001).

\(^{108}\) “Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien’s 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien’s 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
ATTORNEY TERMINAL HAVING OUTLINE PREPARATION CAPABILITIES FOR MANAGING TRIAL PROCEEDING

Inventors: James D. Bennett, Chicago; Lawrence M. Jarvis, Wheaton, both of Ill.

Assignee: Engate Incorporated, Chicago, Ill.

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Int. Cl. G06F 19/00

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Field of Search 364/401, 400, 409, 419.19

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Primary Examiner—Donald E. McElheny, Jr.
Attorney, Agent, or Firm—Engate Incorporated

ABSTRACT

The present invention provides attorney terminals which operate using an outline for storing, associating and managing case evidence, case law and work product for a given lawsuit at issue. Accessed through attorney terminals, the outline is structured based on a hierarchical categorization of the lawsuit into the law and fact at issue. Associated with each categorization entry in the hierarchical outline are groupings of case law, case evidence, relevance and draft discovery information for rapid access by the attorney. Each categorization entry in the tailored outline provides instant access to case law via headnotes, treatise selections, seminal cases, and preset searches. The disclosed invention also automatically: 1) tracks the use of Exhibits in a proceeding; 2) generates draft portions of a pretrial order including jury instructions; and 3) generates time-liners for analysis and use during a proceeding. Draft interrogatories, document requests and deposition or trial questions are also provided.

6 Claims, 20 Drawing Sheets
This invention appertains to toys and more particularly to a wheeled figured toy.

One of the primary objects of my invention is to provide a novel wheeled toy figure simulating the appearance of an animal, such as a rabbit, provided with automatic means for depositing candy eggs on the ground during the pulling of the toy over a surface.

Another salient object of my invention is to provide a novel wheeled toy figure so constructed that the same will not only deposit eggs as the same is being drawn over the ground, but it will also have a jumping animated appearance.

A further important object of my invention is to provide a wheeled toy embodying pivotally connected front and rear sections with means operatively connecting said sections together to produce the animated jumping effect.

A still further object of my invention is the formation of a hopper in the rear section of the figure for receiving the candy eggs with a ground wheel supporting said rear section having a dispensing notch in its periphery for receiving and carrying one of the candy eggs at a time from the hopper and for depositing such egg on the ground.

A still further important object of my invention is the provision of novel means for activating the mechanism for giving the figure the jumping or running effect from said ground wheel.

A still further object of my invention is to provide a child's toy of the above character, which will be durable and efficient in use, one that will be simple and easy to manufacture and one which can be placed upon the market at a reasonable cost.

With these and other objects in view, the invention consists in the novel construction, arrangement and formation of parts, as will be hereinafter more specifically described, claimed and illustrated in the accompanying drawing, in which drawing:

Figure 1 is a side elevational view of my novel wheeled toy, parts of the toy being shown broken away to illustrate structural detail.

Figure 2 is a top plan view of my toy.

Figure 3 is an enlarged, transverse, sectional view through the toy taken on the line 3--3 of Figure 1 looking in the direction of the arrows.

Figure 4 is a view similar to Figure 1, but taken on a smaller scale and showing a different position of the toy.

Figure 5 is a view similar to Figure 4, but showing a different position of the figure and immediately after a candy egg has been deposited on the ground.

Referring to the drawing in detail, wherein similar reference characters designate corresponding parts throughout the several views, the letter "T" generally indicates my novel toy and the same includes a front main section 10 and a rear section 11. These sections 10 and 11 are pivotally connected together by a pivot pin 12, for a purpose which will later appear.

The toy is formed to simulate the appearance of a known object such as a hen or some animal. In the drawings, for the purpose of illustration, I have shown the toy constructed to simulate the appearance of a rabbit. Hence, the front section 10 includes a body portion 13, a head 14 and forwardly projected front legs 15. An axle 16 is carried by the front legs and front ground wheels 17 are mounted on the axle. This front section 10, with the exception of the axle 15 and wheels 11, is preferably cut from a single block of wood.

The rear section 11 is shaped to simulate the hind quarters of the rabbit and hence, includes an upper main section 18 and depending rear legs 19.

In accordance with my invention, the rear section 11 includes side plates 20 secured to and held in spaced relation by a block 21. This block 21 is so formed as to provide, in conjunction with the side plates 20, a receptacle or hopper 22 for the reception of the candy eggs. The upper end of the hopper can be left partly open so as to permit the filling of the hopper with the eggs and, if desired, the opening can be closed by a suitable door. The lower end of the hopper is provided with an outlet opening 23 for the eggs.

The side plates 20 extend below the spacing block 21 and the side plates below the blocks rotatably support a rear axle 24. Keyed, or otherwise secured to the rear axle is a rear ground wheel 25 and this wheel includes circular side wheel discs 26 and a central cylindrical body or spool 27. The spool or body 27 has formed in its periphery a dispensing notch 28. Normally the spool or body 27 closes the dispensing opening 23 of the hopper, but as the rear wheel 25 rotates and the dispensing notch 28 passes the hopper, a candy egg will drop into said notch and upon continued rotation of the wheel, and as the notch passes the ground, the egg will be deposited on the ground.

Also keyed, or otherwise secured, to the rear axle 24 is a crank 29 and the outer end of the crank has pivotally connected thereto a pitman or link 30. The forward end of this link is piv-
otally connected, as at 31, to the front section 10 of the figure forwardly of, and below, the pivot 16.

The toy is adapted to be pulled over the ground by a pull-cord and during the movement of the figure over the ground the wheel 25 will be rotated and each time the dispensing notch 26 passes the hopper an egg will be picked up from said hopper and deposited upon the ground. During the turning of the rear ground wheel the crank 29 will be turned which will actuate the link 30 causing the sections 10 and 11 of the figure to pivot one on the other which will give a jumping or running effect to the rabbit.

Thus it can be seen that I have provided a novel animated figure which will give a child a maximum amount of amusement and which will deposit eggs on the ground and thus create in the minds of children the laying of eggs by an Easter rabbit.

Attention is called to the fact that the side plates 20 of the rear section 11 project forwardly of the block 21 and that these side plates receive therebetween the rear section of the body portion 13 of the front part 10 of the figure.

Changes in details may be made without departing from the spirit or the scope of my invention, but what I claim as new is:

1. A wheeled toy comprising a front and a rear section pivotally connected together, front ground wheels carried by the front section and a main rear ground wheel carried by the rear section, means operatively connecting the rear ground wheel to the front section and swinging said sections on their pivot during the travel of the toy over the ground, a hopper formed in one of said sections for the reception of candy eggs and means to activate, the main rear ground wheel for depositing one candy egg at a time on the ground from said hopper.

2. A wheeled toy shaped to simulate the appearance of an animal, or the like, comprising a front and a rear section, means pivotally connecting said sections together, front ground wheels for supporting the front section, a main rear ground wheel supporting the rear section, a crank rotatable with the rear ground wheel, a link pivotally connected to the crank and to the front section, a hopper for the reception of candy eggs in said rear section and means controlled by said rear ground wheel for receiving one candy egg at a time from the hopper and for depositing the same on the ground during the travel of the toy over the ground.

3. A wheeled toy constructed to simulate the appearance of an animal, or the like, comprising a front section, a rear section, means pivotally connecting such sections together, a front ground wheel supporting the front section, a main rear ground wheel assembly supporting the rear section, a hopper for the reception of candy eggs in said rear section having an outlet opening, a portion of said rear ground wheel assembly normally closing said opening and having a dispensing notch for movement past said opening during the rotation of said wheel assembly and receiving one candy egg at a time from the hopper and for depositing the same on the ground, a crank rotatable with the rear ground wheel assembly, and a link pivotally connecting the crank to the front section.

4. A wheeled toy constructed to simulate the appearance of an animal, or the like, comprising a body, front wheels supporting the front of the body, a rear ground wheel assembly supporting the rear of the body so that the toy can be pulled over the ground, a hopper in said body having a bottom outlet opening, said wheel assembly including a cylindrical portion normally closing said opening and having a dispensing slot movable past the opening for receiving candy eggs therefrom.

5. A wheeled toy constructed to simulate the appearance of an animal, or the like, comprising a front section formed from a single piece of material, front wheels rotatably carried by said front section, a rear section including spaced plates and a spacing block between said plates for securing the same together, said spacing block and plates forming a hopper for the reception of candy eggs, said hopper having an outlet opening, said plates extending forwardly of, and below, the block, the forward ends of the plates receiving the front section, a pivot pin connecting the forward ends of said plates to the front section, a rear ground wheel assembly rotatably mounted between the lower ends of the side plates having a cylindrical portion normally closing the opening in the hopper and provided with a dispensing notch movable past the opening for receiving candy eggs from the hopper, a crank rotatable with the rear ground wheel assembly, and a link pivotally connected to the crank and to said front section.

DANIEL E. GUMB.
TOY RABBIT

Daniel E. Gumb, Milwaukee, Wis.

Application December 22, 1943, Serial No. 515,247

5 Claims. (Cl. 46—104)

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One of the primary objects of my invention is to provide a novel wheeled toy simulating the appearance of an animal, such as a rabbit, provided with automatic means for depositing candy eggs on the ground during the pulling of the toy over a surface.

Another salient object of my invention is to provide a novel wheeled toy figure so constructed that the same will not only deposit eggs as the same is being drawn over the ground, but it will also have a jumping animated appearance.

A further important object of my invention is to provide a wheeled toy embodying pivotally connected front and rear sections with means operatively connecting said sections together to produce the animated jumping effect.

A still further object of my invention is the formation of a hopper in the rear section of the figure for receiving the candy eggs with a ground wheel supporting said rear section having a dispensing notch in its periphery for receiving and conveying one of the candy eggs at a time from the hopper and for depositing such egg on the ground.

A still further important object of my invention is the provision of novel means for actuating the mechanism for giving the figure the jumping or tumbling effect from said ground wheel.

A still further object of my invention is to provide a child's toy of the above character, which will be durable and efficient in use, one that will be simple and easy to manufacture and one which can be placed upon the market at a reasonable cost.

With these and other objects in view, the invention consists in the novel construction, arrangement and forming of parts, as will be hereinafter more specifically described, claimed and illustrated in the accompanying drawings, in which:

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The rear section 11 is shaped to simulate the hind quarters of the rabbit and hence, includes an upper main section 18 and depending rear legs 19.

In accordance with my invention, the rear section 11 includes side plates 20 secured to and held in spaced relation by a block 21. This block 21 is so formed as to provide, in conjunction with the side plates 20, a receptacle or hopper 22 for the reception of the candy eggs. The upper end of the hopper can be left partly open so as to permit the filling of the hopper with the eggs and, if desired, the opening can be closed by a suitable door. The lower end of the hopper is provided with an outlet opening 23 for the eggs.

The side plates 20 extend below the spacing block 21 and the side plates below the blocks rotatably support a rear axle 24. Keyed, or otherwise secured, to the rear axle is a rear ground wheel 25 and this wheel includes circular side wheel discs 26 and a central cylindrical body or spool 27. The spool or body 27 has formed in its periphery a dispensing notch 28. Normally the spool or body 27 closes the dispensing opening 23 of the hopper, but as the rear wheel 25 rotates and the dispensing notch 28 passes the hopper, a candy egg will drop into said notch and upon continued rotation of the wheel, and as the notch passes the ground, the egg will be deposited on the ground.

Also keyed, or otherwise secured, to the rear axle 24 is a crank 29 and the outer end of the crank has pivotally connected thereto a pitman or link 30. The forward end of this link is pivotally connected to a similar link 31. The links 30 and 31 are so formed as to produce the necessary movement of the dispensing notch 28 of the spool or body 27.
The toy is adapted to be pulled over the ground by a pull-cord and during the movement of the figure over the ground the wheel 25 will be rotated and each time the dispensing notch 28 passes the hopper an egg will be picked up from said hopper and deposited upon the ground. During the turning of the rear ground wheel the crank 29 will be turned which will actuate the link 30 causing the sections 10 and 11 of the figure to pivot one on the other which will give a jumping or running effect to the rabbit.

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2. A wheeled toy shaped to simulate the appearance of an animal, or the like, comprising a front and a rear section, means pivotally connecting said sections together, front ground wheels for supporting the front section, a main rear ground wheel supporting the rear section, a crank rotatable with the rear ground wheel, a link pivotally connected to the crank and to the front section, a hopper for the reception of candy eggs in said rear section and means controlled by said rear ground wheel for receiving one candy egg at a time from the hopper and for depositing the same on the ground during the travel of the toy over the ground.

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4. A wheeled toy constructed to simulate the appearance of an animal, or the like, comprising a body, front wheels supporting the front of the body, a rear ground wheel assembly supporting the rear of the body so that the toy can be pulled over the ground, a hopper in said body having a bottom outlet opening, said wheel assembly including a cylindrical portion normally closing said opening and having a dispensing slot moveable past the opening for receiving candy eggs therefrom.

5. A wheeled toy constructed to simulate the appearance of an animal, or the like, comprising a front section formed from a single piece of material, front wheels rotatably carried by said front section, a rear section including spaced plates and a spacing block between said plates for securing the same together, said spacing block and plates forming a hopper for the reception of candy eggs, said hopper having an outlet opening, said plates extending forwardly of, and below, the block, the forward ends of the plates receiving the front section, a pivot pin connecting the forward ends of said plates to the front section, a rear ground wheel assembly rotatably mounted between the lower ends of the side plates having a cylindrical portion normally closing the opening in the hopper and provided with a dispensing notch moveable past the opening for receiving candy eggs from the hopper, a crank rotatable with the rear ground wheel assembly, and a link pivotally connected to the crank and to said front section.

DANIEL E. GUMB,
The USA PATRIOT Act: A Legal Analysis

April 15, 2002

Charles Doyle
Senior Specialist
American Law Division
Summary

The USA PATRIOT Act passed in the wake of the September 11 terrorist attacks. It flows from a consultation draft circulated by the Department of Justice, to which Congress made substantial modifications and additions. The stated purpose of the Act is to enable law enforcement officials to track down and punish those responsible for the attacks and to protect against any similar attacks.

The Act grants federal officials greater powers to trace and intercept terrorists’ communications both for law enforcement and foreign intelligence purposes. It reinforces federal anti-money laundering laws and regulations in an effort to deny terrorists the resources necessary for future attacks. It tightens our immigration laws to close our borders to foreign terrorists and to expel those among us. Finally, it creates a few new federal crimes, such as the one outlawing terrorists’ attacks on mass transit; increases the penalties for many others; and institutes several procedural changes, such as a longer statute of limitations for crimes of terrorism.

Critics have suggested that it may go too far. The authority to monitor e-mail traffic, to share grand jury information with intelligence and immigration officers, to confiscate property, and to impose new book-keeping requirements on financial institutions, are among the features troubling to some.

The Act itself responds to some of these reservations. Many of the wiretapping and foreign intelligence amendments sunset on December 31, 2005. The Act creates judicial safeguards for e-mail monitoring and grand jury disclosures; recognizes innocent owner defenses to forfeiture; and entrusts enhanced anti-money laundering powers to those regulatory authorities whose concerns include the well being of our financial institutions.

This report, stripped of its citations and footnotes, is available in an abbreviated form as The USA PATRIOT Act: A Sketch, CRS Rep. No. RS21203. In addition, much of the information contained here may also be found under a different arrangement in a report entitled, Terrorism: Section by Section Analysis of the USA PATRIOT Act, CRS Rep. No. RL31200 (Dec. 10, 2001). A wider array of terrorism-related analysis appears on the CRS terrorism electronic briefing book page.
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The USA PATRIOT Act: A Legal Analysis

Introduction

Congress passed the USA PATRIOT Act (the Act) in response to the terrorists’ attacks of September 11, 2001. The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to further close our borders to foreign terrorists and to detain and remove those within our borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it is not without safeguards, critics contend some of its provisions go too far. Although it grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough.

ed. Oct. 24, 2001), and H.R. 3162 was sent to the President who signed it on October 26, 2001.

Criminal Investigations: Tracking and Gathering Communications

A portion of the Act addresses issues suggested originally in a Department of Justice proposal circulated in mid-September. The first of its suggestions called for amendments to federal surveillance laws, laws which govern the capture and tracking of suspected terrorists’ communications within the United States. Federal law features a three tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications.

The tiers reflected the Supreme Court’s interpretation of the Fourth Amendment’s ban on unreasonable searches and seizures. The Amendment protects private conversations, Berger v. New York, 388 U.S. 41 (1967); Katz v. United States, 389 U.S. 347 (1967). It does not cloak information, even highly personal information, for which there is no individual justifiable expectation of privacy, such as telephone company records of calls made to and from an individual's home, Smith v. Maryland, 442 U.S. 735 (1979), or bank records of an individual's financial dealings, United States v. Miller, 425 U.S. 435 (1976).

Congress responded to Berger and Katz, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications, 18 U.S.C. 2511. At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious

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4 The Department’s proposal, dated September 20, 2001, came with a brief section by section analysis. Both the proposal (Draft) and analysis (DoJ) were printed as an appendix in Administration's Draft Anti-Terrorism Act of 2001, Hearing Before the House Comm. on the Judiciary, 107th Cong., 1st Sess. 54 (2001).


6 “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,” U.S. Const. Amend. IV.

7 Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
criminal cases. When approved by senior Justice Department officials, law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.

8 “The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of” one or more predicate offense, 18 U.S.C. 2516.

9 The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement), 1751 (presidential and presidential staff assassination, kidnapping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnaping, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or naturalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations, 18 U.S.C. 2518. The court notifies the parties to any conversations seized under the order after the order expires, 18 U.S.C. 2518(8).

Below Title III, the next tier of privacy protection covers some of those matters which the Supreme Court has described as beyond the reach of the Fourth Amendment protection – telephone records, e-mail held in third party storage, and the like, 18 U.S.C. 2701-2709 (Chapter 121). Here, the law permits law enforcement access, ordinarily pursuant to a warrant or court order or under a subpoena in some cases, but in connection with any criminal investigation and without the extraordinary levels of approval or constraint that mark a Title III interception, 18 U.S.C. 2703.

Least demanding and perhaps least intrusive of all is the procedure that governs court orders approving the government’s use of trap and trace devices and pen registers, a kind of secret “caller id”, which identify the source and destination of calls made to and from a particular telephone, 18 U.S.C. 3121-3127 (Chapter 206). The orders are available based on the government’s certification, rather than a finding of the court, that the use of the device is likely to produce information relevant to the investigation of a crime, any crime, 18 U.S.C. 3123. The devices record no more than the identity of the participants in a telephone conversation, but neither the orders nor the results they produce need ever be revealed to the participants.

The Act modifies the procedures at each of the three levels. It:

offense involving counterfeiting punishable under 18 U.S.C. 471, 472, or 473; (e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States; (f) any offense including extortionate credit transactions under 18 U.S.C. 892, 893, or 894; (g) a violation of 31 U.S.C. 5322 (dealing with the reporting of currency transactions); (h) any felony violation of 18 U.S.C. 2511 and 2512 (interception and disclosure of certain communications and to certain intercepting devices); (i) any felony violation of 18 U.S.C. ch. 71 (obscenity); (j) 49 U.S.C. 60123(b) (destruction of a natural gas pipeline), 46502 (aircraft piracy); (k) 22 U.S.C. 2778 (Arms Export Control Act); (l) the location of any fugitive from justice from an offense described in this section; (m) a violation of 8 U.S.C. 1324, 1327, or 1328; (n) any felony violation of 18 U.S.C. 922, 924 (firearms); (o) any violation of 26 U.S.C. 5861 (firearms); (p) a felony violation of 18 U.S.C. 1028 (production of false identification documents), 1542 (false statements in passport applications), 1546 (fraud and misuse of visas, permits, and other documents) or a violation of 8 U.S.C. 1324, 1327, or 1328 (smuggling of aliens); (p) 229 (chemical weapons), 2332 (terrorist violence against Americans overseas), 2332a (weapons of mass destruction), 2332b (multinational terrorism), 2332d (financial transactions with countries supporting terrorism), 2339A (support of terrorist), 2332B (support of terrorist organizations); (r) any conspiracy to commit any of these, 18 U.S.C. 2516(1)(crimes added by the Act in italics). Other than telephone face to face conversations (i.e., electronic communications), the approval of senior Justice Department officials is not required and an order may be sought in any felony investigation, 18 U.S.C. 2516(3).

10 Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
• permits pen register and trap and trace orders for electronic communications (e.g., e-mail)

• authorizes nationwide execution of court orders for pen registers, trap and trace devices, and access to stored e-mail or communication records

• treats stored voice mail like stored e-mail (rather than like telephone conversations)

• permits authorities to intercept communications to and from a trespasser within a computer system (with the permission of the system’s owner)

• adds terrorist and computer crimes to Title III’s predicate offense list

• reinforces protection for those who help execute Title III, ch. 121, and ch. 206 orders

• encourages cooperation between law enforcement and foreign intelligence investigators

• establishes a claim against the U.S. for certain communications privacy violations by government personnel

• terminates the authority found in many of the these provisions and several of the foreign intelligence amendments with a sunset provision (Dec. 31, 2005).

**Pen Registers and Trap and Trace Devices.** In section 216, the Act allows court orders authorizing trap and trace devices and pen registers to be used to capture source and addressee information for computer conversations (e.g., e-mail) as well as telephone conversations, 18 U.S.C. 3121, 3123. In answer to objections that e-mail header information can be more revealing than a telephone number, it creates a detailed report to the court, 18 U.S.C. 3123(a)(3).\(^\text{11}\)

\(^{11}\)“Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public the agency shall ensure that a record will be maintained which will identify – (i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of the such device.

“(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof),” section 216(b)(1).
The USA PATRIOT Act: A Legal Analysis

April 15, 2002

Charles Doyle
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Summary

The USA PATRIOT Act passed in the wake of the September 11 terrorist attacks. It flows from a consultation draft circulated by the Department of Justice, to which Congress made substantial modifications and additions. The stated purpose of the Act is to enable law enforcement officials to track down and punish those responsible for the attacks and to protect against any similar attacks.

The Act grants federal officials greater powers to trace and intercept terrorists’ communications both for law enforcement and foreign intelligence purposes. It reinforces federal anti-money laundering laws and regulations in an effort to deny terrorists the resources necessary for future attacks. It tightens our immigration laws to close our borders to foreign terrorists and to expel those among us. Finally, it creates a few new federal crimes, such as the one outlawing terrorists’ attacks on mass transit; increases the penalties for many others; and institutes several procedural changes, such as a longer statute of limitations for crimes of terrorism.

Critics have suggested that it may go too far. The authority to monitor e-mail traffic, to share grand jury information with intelligence and immigration officers, to confiscate property, and to impose new book-keeping requirements on financial institutions, are among the features troubling to some.

The Act itself responds to some of these reservations. Many of the wiretapping and foreign intelligence amendments sunset on December 31, 2005. The Act creates judicial safeguards for e-mail monitoring and grand jury disclosures; recognizes innocent owner defenses to forfeiture; and entrusts enhanced anti-money laundering powers to those regulatory authorities whose concerns include the well being of our financial institutions.

This report, stripped of its citations and footnotes, is available in an abbreviated form as The USA PATRIOT Act: A Sketch, CRS Rep.No. RS21203. In addition, much of the information contained here may also be found under a different arrangement in a report entitled, Terrorism: Section by Section Analysis of the USA PATRIOT Act, CRS Rep.No. RL31200 (Dec. 10, 2001). A wider array of terrorism-related analysis appears on the CRS terrorism electronic briefing book page.
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The USA PATRIOT Act: A Legal Analysis

Introduction

Congress passed the USA PATRIOT Act (the Act) in response to the terrorists’ attacks of September 11, 2001. The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to further close our borders to foreign terrorists and to detain and remove those within our borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it is not without safeguards, critics contend some of its provisions go too far. Although it grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough.


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1 P.L. 107-56, 115 Stat. 272 (2001); its full title is the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT).”

2 H.R. 2975 was introduced by Representative Sensenbrenner for himself and Representatives Conyers, Hyde, Coble, Goodlatte, Jenkins, Jackson-Lee, Cannon, Meehan, Graham, Bachus, Wexler, Hostettler, Keller, Issa, Hart, Flake, Schiff, Thomas, Goss, Rangel, Berman and Lofgren; S.1510 by Senator Daschle for himself and Senators Lott, Leahy, Hatch, Graham, Shelby and Sarbanes.

3 H.R. 3004 was introduced by Representative Oxley for himself and Representatives LaFalce, Leach, Maloney, Roukema, Bentsen, Hooley, Bereuter, Baker, Bachus, King, Kelly, Gillmore, Cantor, Riley, Latourette, Green (of Wisconsin), and Grucci; and reported out of the House Financial Services Committee with amendments on October 15, 2001, H.R.Rep.No. 107-250. H.R. 3004, as reported out, included Internet gambling amendments that were not included in H.R. 2975/H.R. 3108.
ed. Oct. 24, 2001), and H.R. 3162 was sent to the President who signed it on October 26, 2001.

**Criminal Investigations: Tracking and Gathering Communications**

A portion of the Act addresses issues suggested originally in a Department of Justice proposal circulated in mid-September. The first of its suggestions called for amendments to federal surveillance laws, laws which govern the capture and tracking of suspected terrorists’ communications within the United States. Federal law features a three tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications.

The tiers reflected the Supreme Court’s interpretation of the Fourth Amendment’s ban on unreasonable searches and seizures. The Amendment protects private conversations, *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967). It does not cloak information, even highly personal information, for which there is no individual justifiable expectation of privacy, such as telephone company records of calls made to and from an individual's home, *Smith v. Maryland*, 442 U.S. 735 (1979), or bank records of an individual's financial dealings, *United States v. Miller*, 425 U.S. 435 (1976).

Congress responded to *Berger* and *Katz*, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications, 18 U.S.C. 2511. At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious

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6 “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,” *U.S. Const.* Amend. IV.

7 Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
criminal cases. When approved by senior Justice Department officials, law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.

8 “The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of” one or more predicate offense, 18 U.S.C. 2516.

9 The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement). 1751 (presidential and presidential staff assassination, kidnapping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnapping, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or naturalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations, 18 U.S.C. 2518. The court notifies the parties to any conversations seized under the order after the order expires, 18 U.S.C. 2518(8).

Below Title III, the next tier of privacy protection covers some of those matters which the Supreme Court has described as beyond the reach of the Fourth Amendment protection—telephone records, e-mail held in third party storage, and the like, 18 U.S.C. 2701-2709 (Chapter 121). Here, the law permits law enforcement access, ordinarily pursuant to a warrant or court order or under a subpoena in some cases, but in connection with any criminal investigation and without the extraordinary levels of approval or constraint that mark a Title III interception, 18 U.S.C. 2703.

Least demanding and perhaps least intrusive of all is the procedure that governs court orders approving the government’s use of trap and trace devices and pen registers, a kind of secret “caller id”, which identify the source and destination of calls made to and from a particular telephone, 18 U.S.C. 3121-3127 (Chapter 206). The orders are available based on the government's certification, rather than a finding of the court, that the use of the device is likely to produce information relevant to the investigation of a crime, any crime, 18 U.S.C. 3123. The devices record no more than the identity of the participants in a telephone conversation, but neither the orders nor the results they produce need ever be revealed to the participants.

The Act modifies the procedures at each of the three levels. It:

- offense involving counterfeiting punishable under 18 U.S.C. 471, 472, or 473; (e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States; (f) any offense including extortionate credit transactions under 18 U.S.C. 892, 893, or 894; (g) a violation of 31 U.S.C. 5322 (dealing with the reporting of currency transactions); (h) any felony violation of 18 U.S.C. 2511 and 2512 (interception and disclosure of certain communications and to certain intercepting devices); (i) any felony violation of 18 U.S.C. ch. 71 (obscenity); (j) 49 U.S.C. 60123(b) (destruction of a natural gas pipeline), 46502 (aircraft piracy); (k) 22 U.S.C. 2778 (Arms Export Control Act); (l) the location of any fugitive from justice from an offense described in this section; (m) a violation of 8 U.S.C. 1324, 1327, or 1328; (n) any felony violation of 18 U.S.C. 922, 924 (firearms); (o) any violation of 26 U.S.C. 5861 (firearms); (p) a felony violation of 18 U.S.C. 1028 (production of false identification documents), 1542 (false statements in passport applications), 1546 (fraud and misuse of visas, permits, and other documents) or a violation of 8 U.S.C. 1324, 1327, or 1328 (smuggling of aliens); (p) 229 (chemical weapons), 2332 (terrorist violence against Americans overseas), 2332a (weapons of mass destruction), 2332b (multinational terrorism), 2332d (financial transactions with countries supporting terrorism), 2339A (support of terrorist), 2332B (support of terrorist organizations); (r) any conspiracy to commit any of these, 18 U.S.C. 2516(1)(crimes added by the Act in italics). Other than telephone face to face conversations (i.e., electronic communications), the approval of senior Justice Department officials is not required and an order may be sought in any felony investigation, 18 U.S.C. 2516(3).

10 Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
• permits pen register and trap and trace orders for electronic communications (e.g., e-mail)
• authorizes nationwide execution of court orders for pen registers, trap and trace devices, and access to stored e-mail or communication records
• treats stored voice mail like stored e-mail (rather than like telephone conversations)
• permits authorities to intercept communications to and from a trespasser within a computer system (with the permission of the system’s owner)
• adds terrorist and computer crimes to Title III’s predicate offense list
• reenforces protection for those who help execute Title III, ch. 121, and ch. 206 orders
• encourages cooperation between law enforcement and foreign intelligence investigators
• establishes a claim against the U.S. for certain communications privacy violations by government personnel
• terminates the authority found in many of the these provisions and several of the foreign intelligence amendments with a sunset provision (Dec. 31, 2005).

Pen Registers and Trap and Trace Devices. In section 216, the Act allows court orders authorizing trap and trace devices and pen registers to be used to capture source and addressee information for computer conversations (e.g., e-mail) as well as telephone conversations, 18 U.S.C. 3121, 3123. In answer to objections that e-mail header information can be more revealing than a telephone number, it creates a detailed report to the court, 18 U.S.C. 3123(a)(3).11

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11 “Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public the agency shall ensure that a record will be maintained which will identify – (i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of the such device.

“(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof),” section 216(b)(1).
The use of pen registers or trap and trace devices was limited at one time to the judicial district in which the order was issued, 18 U.S.C. 3123 (2000 ed.). Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States, 18 U.S.C. 3123(b)(1)(C), 3127(2).

**Communications Records and Stored E-Mail.** With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber, 18 U.S.C. 2703(a),(b). A warrant will also suffice to seize records describing telephone and other communications transactions without customer notice, 18 U.S.C. 2703(c). In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation, officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records, 18 U.S.C. 2703(b),(c). They can obtain a limited amount of record information (subscribers’ names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena, 18 U.S.C. 2703(c)(1)(C). There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial, 18 U.S.C. 2705.

In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider’s customer records, 18 U.S.C. 2703(c)(1)(C).

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.

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12 The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” *DoJ* at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

13 Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user’s true identity... this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” *DoJ* at §107.
Previously, only a federal court in the district in which the e-mail was stored could issue the order. Under section 220, federal courts in the district where an offense under investigation occurred may issue orders applicable “without geographic limitation,” 18 U.S.C. 2703.14

The Act, in section 209, treats voice mail like e-mail, that is, subject to the warrant or court order procedure, rather than to the more demanding coverage of Title III once required, United States v. Smith, 155 F.3d 1050, 1055-56 (9th Cir. 1998).

Finally, the Act resolves a conflict between chapter 121 and the federal law governing cable companies. Government entities may have access to cable company customer records only under a court order following an adversary hearing if they can show that the records will evidence that the customer is or has engaged in criminal activity, 47 U.S.C. 511(h). When cable companies began offering telephone and other communications services the question arose whether the more demanding cable rules applied or whether law enforcement agencies were entitled to ex parte court orders under the no-notice procedures applicable to communications providers.15 The Act makes it clear that the cable rules apply when cable television viewing services are

14 Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

15 See e.g., DoJ at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement’s access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

**Electronic Surveillance.** To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202. A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(i). Yet only the interloper's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.

**Criminal Investigators' Access to Foreign Intelligence Information.** The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism. It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that “the purpose for the surveillance is to obtain foreign intelligence information,” 50 U.S.C. 1804(a)(7)(B)(2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps “the purpose” might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation

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16 18 U.S.C. 229 (chemical weapons), 2332(terrorist acts of violence committed against Americans overseas), 2332a(use of weapons of mass destruction), 2332b(acts of terrorism transcending national boundaries), 2332d(financial transactions with countries which support terrorists), 2339A(providing material support to terrorists), and 2339B(providing material support to terrorist organizations).

17 “Because service providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves as permitted under current law, they often have no way to exercise their rights to protect themselves from unauthorized attackers. Moreover, such attackers can target critical infrastructures and engage in cyberterrorism,” DoJ at §106. Elsewhere the Act defines “electronic surveillance” for purposes of the Foreign Intelligence Surveillance Act (FISA) to emphasize that the law enforcement authority for this intruder surveillance does not confer similar authority for purposes of foreign intelligence gathering, section 1003 (50 U.S.C. 1801(f)(2)).

18 For a general discussion of federal intelligence and law enforcement cooperation, see, Best, Intelligence and Law Enforcement: Countering Transnational Threats to the U.S., CRS REP.NO. RL30252 (Dec. 3, 2001).
owners were required to either end surveillance or secure an order under Title III.  

The Justice Department sought FISA surveillance and physical search authority on the basis of “a” foreign intelligence purpose. Section 218 of the Act insists that foreign intelligence gathering be a “significant purpose” for the request for the FISA surveillance or physical search order, 50 U.S.C. 1804(a)(7)(B), 1823(a)(7)(B), a more

19 Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment’s warrant clause. It is here that the “primary purpose” notion originated. In United States v. Truong Dinh Hung, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, “as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.” Subsequent case law, however, is not as clear as it might be: see e.g., United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984)(“FISA permits federal officials to obtain orders authorizing electronic surveillance ‘for the purpose of obtaining foreign intelligence information.’ The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying officials’s belief that the information sought is the type of foreign intelligence information described”); United States v. Pelton, 835 F.2d 1067, 1075-76 (4th Cir. 1987)(“We also reject Pelton’s claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial”); United States v. Sarkissian, 841 F.2d 959, 907-8 (9th Cir. 1988)(“Defendants rely on the primary purpose test articulated in United States v. Truong Dinh Hung. . . . One other court has applied the primary purpose test. Another court has rejected it . . . distinguishing Truong. A third court has declined to decide the issue. We also decline to decide the issue”); United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1991)(“Appellants attack the government's surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance”).

20 “Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” DoJ at §153.
demanding standard than the “a purpose” threshold proposed by the Justice Department, but a clear departure from the original “the purpose” entry point. FISA once described a singular foreign intelligence focus prerequisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k), 1825(k).²¹

**Protective Measures.** The Act reenforces two kinds of safeguards, one set designed to prevent abuse and the other to protect those who assist the government. The sunset clause is perhaps the best known of the Act’s safeguards. Under the direction of section 224, many of the law enforcement and foreign intelligence authorities granted by the Act expire as of December 31, 2005.²² The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter

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²¹ “(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. (2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, infra, quoting, 50 U.S.C. 1801.

²² “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210[ subpoenas for communications provider customer records], 211[access to cable company communication service records], 213[sneak and peek], 216[pen register and trap and trace device amendments], 221[trade sanctions], and 222[assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005. “(b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers' communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices).\textsuperscript{23} Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees,\textsuperscript{24} but could not recover against the United States.\textsuperscript{25} Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice's Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government's request until a court order authorizing access can be obtained.\textsuperscript{26} Another allows providers to disclose customer records to protect the provider's rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others.\textsuperscript{27}

A third section,
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

Foreign Intelligence Investigations

Although both criminal investigations and foreign intelligence investigations are conducted in the United States, criminal investigations seek information about unlawful activity; foreign intelligence investigations seek information about other countries and their citizens. Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough.

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA), something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President’s authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, United States v. United States District Court, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage

§110.

28 Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

29 Thus in the name of assisting in the execution of Title III, chapter 121, or chapter 206 order, the courts may not cite the Act as the basis for an order compelling a service provider to make system modifications or provide any other technical assistance not already required under 18 U.S.C. 2518(4), 2706, or 3124(c), see, H.R.Rep.No. 107-236, at 62-3 (2001) (emphasis added) (“This Act is not intended to affect obligations under Communications Assistance for Law Enforcement Act [which addresses law enforcement-beneficial system modifications and the compensation to be paid for the changes], nor does the act impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance”).

30 E.g., As amended by section 902 of the Act, “‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2)(language added by the Act in italics).

31 50 U.S.C. 1801 et seq.
lockers, 50 U.S.C. 1861-1863 (2000 ed.). Intelligence authorities gained narrow passages through other privacy barriers as well.\textsuperscript{32}

In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs.\textsuperscript{33} There were and still are extra


\textsuperscript{33} “As used in this subchapter: (a) ‘Foreign power’ means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

“(b) ‘Agent of a foreign power’ means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C).

“(c) ‘International terrorism’ means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnapping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

“(d) ‘Sabotage’ means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

“(e) ‘Foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans (‘‘United States persons,’’ i.e., citizens or permanent resident aliens).\textsuperscript{34} The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

- permits “roving” surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)
- increases the number of judges on the FISA court from 7 to 11
- allows application for a FISA surveillance or search order when gathering foreign intelligence is a significant reason for the application rather than the reason
- authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations
- sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses
- carries a sunset provision
- establishes a claim against the U.S. for certain communications privacy violations by government personnel
- expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

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\textsuperscript{34} Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
**FISA.** FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases.\(^{35}\) It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

**Search and Surveillance for Intelligence Purposes.** Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department’s original proposal which would have set the required expiration date for orders at one year instead of 120 days, Draft at §151.\(^{36}\)

Section 901 of the Act address a concern raised during the 106th Congress relating to the availability of the FISA orders and the effective use of information gleaned from the execution of a FISA order.\(^{37}\) It vests the Director of Central


\(^{36}\) *See also*, DoJ at §151, “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order’s minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed (50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

\(^{37}\) *See e.g.*, S.Rep.No. 106-352, at 3, 6, 7 (2000)(“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application
Intelligence with the responsibility to formulate requirements and priorities for the use of FISA to collect foreign intelligence information. He is also charged with the responsibility of assisting the Attorney General in the efficient and effective dissemination of FISA generated information (50 U.S.C. 403-3(c)).

**Pen Registers and Trap and Trace Devices for Intelligence Gathering.** Section 214 grants the request of the Department of Justice by dropping requirements which limited FISA pen register and trap and trace device orders to facilities used by foreign agents or those engaged in international terrorist or clandestine intelligence activities, 50 U.S.C. 1842(c)(3)(2000 ed.). It is enough that the order is sought as part of an investigation to protect against international terrorism or clandestine intelligence activities and is not motivated solely by an American’s exercise of his or her First Amendment rights. Elsewhere (section 505), the Act drops a similar limitation for intelligence officials’ access to telephone records, 18 U.S.C.

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Section 214 adjusts the language of the FISA pen register-trap and trace authority to permit its use to capture source and destination information relating to electronic communications (e.g., e-mail) as well as telephone communications, 50 U.S.C. 1842(d). The section makes it clear that requests for a FISA pen register-trap and trace order, like requests for other FISA orders, directed against Americans (U.S. persons) may not be based solely on activities protected by the First Amendment, 50 U.S.C. 1842, 1843.

**Third Party Cooperation and Tangible Evidence.** As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target's activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.

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39 Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise be entitled to confidentiality. Section 505, in response to the Justice Department’s suggestion, allows FBI field offices to make the requests, see DoJ at §157 (“At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports”).

40 When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court’s order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.’ This would enhance the FBI’s ability to monitor international terrorists and intelligence officers who are
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian. The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities, in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B));
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a));
- the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a));
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v; trained to thwart surveillance by rapidly changing hotel accommodations, cell phones, Internet accounts, etc., just prior to important meetings or communications. Under the current law, the government would have to return to the FISA Court for an order that named the new carrier, landlord, etc., before effecting surveillance. Under the proposed amendment, the FBI could simply present the newly discovered carrier, landlord, custodian or other person with a generic order issued by the Court and could then effect FISA coverage as soon as technically feasible,” DoJ at 152.


41 “The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigative contexts. The time and difficulty involved in getting such pleadings before the Court usually outweighs the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” DoJ at §156.

42 Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.43

**Access to Law Enforcement Information.** Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community's access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, Draft at §103.44

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43 H.R.Rep.No. 107-205, at 60-1 (2001)(“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

“The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

“Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual’s credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding--without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information”).

44 See also, DoJ at §103, “This section facilities the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, Draft at §354.45

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, Draft at §154.46

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion.47 It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its

wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions."

45 See also, DoJ at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.” Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officials

46 See also, DoJ at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”

47 Blair v. United States, 250 U.S. 273, 281 (1919)(the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

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49 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25 HARVARD JOURNAL OF LAW & PUBLIC POLICY 699, 719-20 (2002) (“There is a significant danger that the rule permitting disclosure will be treated as the de facto authorization of an expansion of the grand jury’s investigative role to encompass seeking material relevant only to matters of national security, national defense, immigration, and so forth. The grand jury’s awesome powers should not be unwittingly extended to a much wider range of issues. . . Since the grand jury operates in secret, there are no public checks on the scope of its investigations, and witnesses are not permitted to challenge its jurisdiction. Only the supervising court is in a position to keep the grand jury’s investigation within proper bounds. Requiring judicial approval of foreign intelligence and counterintelligence information disclosures would provide a natural check against the temptation to manipulate the grand jury to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6 (Nov. 2001) (“The grand jury secrecy rule is a rule of policy which has always had exceptions, and it has been frequently modified. The secrecy rule has no credible claim to constitutional stature”).
court approval, H.R.Rep.No. 107- 236, at 73 (2001). The Act, in section 203(a), instead calls for confidential notification of the court that a disclosure has occurred and the entity to whom it was made, F.R.Crim.P. 6(e)(3)(C)(iii). It also insists that the Attorney General establish implementing procedures for instances when the disclosure “identifies” Americans (U.S. persons), section 203(c).

Law enforcement officials may share Title III information with the intelligence community under the same conditions, section 203(b), although the grand jury and Title III sharing provisions differ in at least three important respects. The court need not be notified of Title III disclosures. On the other hand, the authority for sharing Title III information expires on December 31, 2005, section 224, and agencies and their personnel guilty of intentional improper disclosures may be subject to a claim for damages and disciplinary action, 18 U.S.C. 2520.

The third subsection of section 203 remains something of an enigma. It speaks in much the same language as its counterparts. It allows law enforcement officials to share information with the intelligence community, “notwithstanding any other provisions of law,” section 203(d). It either swallows the other subsections, or supplements them. Several factors argue for its classification as a supplement. Congress is unlikely to have crafted subsections (a), (b) and (c) only to completely

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50 Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

51 “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person’s official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification.\textsuperscript{52} By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.\textsuperscript{53}

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

**Increasing Institutional Capacity.** As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a

\textsuperscript{52} Duncan v. Walker, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted) (“It is our duty to give effect, if possible, to every clause and word of a statute. United States v. Menasche, 348 U.S. 528, 538-539 (1955) (quoting Montclair v. Ramsdell, 107 U.S. 147, 152 (1883)); see also Williams v. Taylor, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); Market Co. v. Hoffman, 101 U.S. 112, 115 (1879)(As early as in Bacon's Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage in any setting. Babbitt v. Sweet Home Chapter, Communities for Great Ore., 515 U.S. 687, 698 (1995); see also Ratzlaf v. United States, 510 U.S. 135, 140 (1994)”).

It is not possible to conclude that Congress intended the universal subsection (d) to apply until sunset and the grand jury and Title III subsections (a), (b), and (c) to operate thereafter, because the Title III subsection expires at the same time as the universal subsection.

\textsuperscript{53} Draft at §154, “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”
The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so,” S.Rep.No. 107-63, at 11 (2001).

Money Laundering

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture. The Act bolsters federal efforts in each area.

Regulation. Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.

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55 For a brief overview, see, Murphy, Money Laundering: Current Law and Proposals, CRS REP.NO. RS21032 (DEC. 21, 2001).

56 See e.g., 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
Records and Reports. For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler’s checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to files SARs as well, reflecting Congress’ view that the information provided the IRS may be valuable for other law enforcement purposes. This concern is likewise

58 H.R.Rep.No. 107-250, at 38-9 (2001)(“Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

“Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a ‘Safeguard Procedures Report’ which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

“While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement
reflected in section 357 which asks the Secretary of the Treasury to report on the Internal Revenue Service’s role in the administration of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311 et seq.), and what transfers of authority, if any, are appropriate.

Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action.59 Section 355 expands the immunity to cover disclosures in

authors as the various reports mandated by the Bank Secrecy Act, which can typically be retrieved electronically from a database maintained by the Treasury Department. The differential access to the two kinds of reports is made anomalous by the fact that Form 8300 elicits much the same information that is required to be disclosed by the Bank Secrecy Act. For example, just as Form 8300 seeks the name, address, and social security number of a customer who engages in a cash transaction exceeding $10,000 with a trade or business, Currency Transaction Reports (CTRs) mandated by the Bank Secrecy Act require the same information to be reported on a cash transaction exceeding $10,000 between a financial institution and its customer”.

59 “Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

“First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor from civil liability applies in arbitration, as well as judicial, proceedings. Second, it amends section 5318(g)(3) to clarify the safe harbor’s coverage of voluntary disclosures (that is, those not covered by the SAR regulatory reporting requirement). The language in section 5318(g)(3)(A) providing that ‘any financial institution that *** makes a disclosure pursuant to *** any other authority *** shall not be liable to any person’ is not intended to avoid the application of the reporting and disclosure provisions of the Federal securities laws to any person, or to insulate any issuers from private rights of actions for disclosures made under the Federal securities laws.

“Subsection [351](b) amends section 5318(g)(2) of title 31—which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed—to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee’s official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
employment references to other insured depository financial institutions provided disclosure is not done with malicious intent.\textsuperscript{60}

The Financial Crimes Enforcement Network (FinCEN), a component within the Treasury Department long responsible for these anti-money laundering reporting and record-keeping requirements, 31 C.F.R. pt. 103, was administratively created in 1990 to provide other government agencies with an “intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes,” 55 Fed.Reg. 18433 (May 2, 1990).

The Act, in section 361, makes FinCEN a creature of statute, a bureau within the Treasury Department, 31 U.S.C. 310. Section 362 charges it with the responsibility of establishing a highly secure network to allow financial institutions to file required reports electronically and to permit FinCEN to provide those institutions with alerts and other information concerning money laundering protective measures, 31 U.S.C. 310 note.

Special Measures. In extraordinary circumstances involving international financial matters, the Act grants the Secretary of the Treasury, in consultation with other appropriate regulatory authorities, the power to issue regulations and orders involving additional required “special measures” and additional “due diligence” requirements to combat money laundering. The special measure authority, available under section 311, comes to life with the determination that particular institutions, jurisdictions, types of accounts, or types of transactions pose a primary money potential wrongdoing was also reported in a SAR,” H.R.Rep.No. 107-250, at 66 (2001).

\textsuperscript{60} 31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 67 (2001).
laundering concern. These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

31 U.S.C. 5318A. The circumstances considered in the case of a suspect jurisdiction are: evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction’s banking regulation; the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’ including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate
business transactions.

“Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

“Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

“The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

“The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

“The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

“The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent’ account for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information that it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

“The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

“The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed
**Due Diligence.** Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.63

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63 See generally, H.R.Rep. No. 107-250, at 71-2 ("Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

"The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

"The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

"For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
detect and report transactions that may involve the proceeds of foreign corruption. A private bank account is defined as an account (or any combination of accounts) that requires a minimum aggregate deposit of funds or other assets of not less than $1 million; is established on behalf of one or more individuals who have a direct or beneficial ownership in the account; and is assigned to, or administered or managed by, an officer, employee or agent of a financial institution acting as a liaison between the institution and the direct or beneficial owner of the account.

“This section directs the Secretary of the Treasury, within 6 months of enactment of this bill and in consultation with appropriate Federal functional regulators, to further define and clarify, by regulation, the requirements imposed by this section”.

Or more exactly, a bank which has no physical presence in any country; a “physical presence” for a foreign bank is defined as “a place of business that – (i) is maintained by a foreign bank; (ii) is located at a fixed address (other than solely an electronic address) in a country in which the foreign bank is authorized to conduct banking activities, at which location the foreign bank – (I) employs 1 or more individuals on a full-time basis; and (II) maintains operating records relating to its banking activities; and (iii) is subject to inspection by the banking authority which licensed the foreign bank to conduct banking activities,” 31 U.S.C. 5318(j)(4).

The Act, in section 325, empowers the Secretary of the Treasury to promulgate regulations to prevent financial institutions from allowing their customers to conceal their financial activities by taking advantage of the institutions’ concentration account practices.

The Secretary of the Treasury is instructed in section 326 to issue regulations for financial institutions’ minimum new customer identification standards and record-
keeping and to recommend a means to effectively verify the identification of foreign customers.\(^{67}\)

\(^{67}\) 31 U.S.C. 5318(l); H.R.Rep.No. 107-250, at 62-3 (2001)(\textquotedblleft Section [326](a) amends 31 U.S.C. 5318 by adding a new subsection governing the identification of account holders. Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a ‘street name’ or omnibus account in the broker-dealer's name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to ‘look through’ the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund’s customers. Thus, the fund would not be required to ‘look through’ the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature.68

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

Reports to Congress. Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

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“Paragraph (6) requires that Treasury's regulations prescribed under paragraph (1) become effective within one year after enactment of this bill”.)
exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.69

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

**International Cooperation.** Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.70

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (i.e., the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.

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70 H.R.Rep.No. 107-250, at 67 (2001)(“This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury's progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime”).
Crimes. Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, smuggling, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
expands 18 U.S.C. 1956 to cover financial transactions conducted in foreign financial institutions.\textsuperscript{71}

Section 329 makes it a federal crime to corruptly administer the money laundering regulatory scheme. Offenders are punishable by imprisonment for not more than 15 years and a fine of not more than three times the amount of the bribe.

Section 5326 of title 31 authorizes the Secretary of the Treasury to impose temporary, enhanced reporting requirements upon financial institutions in areas victimized by substantial money laundering activity (geographic targeting regulations and orders). Section 353 makes it clear that the civil sanctions, criminal penalties, and prohibitions on smurfing (structuring transactions to evade reporting requirements) apply to violations of the regulations and orders issued under 31 U.S.C. 5326.\textsuperscript{72} It also extends the permissible length of the temporary geographical orders from 60 to 180 days.

Violations of the special measures and special due diligence requirements of sections 311 and 312 are subject to both civil and criminal penalties by virtue of section 363's amendments to 31 U.S.C. 5321(a) and 5322. The amendments authorize civil penalties and criminal fines of twice the amount of the transaction but not more than $1 million. Criminal offenders would be subject to a fine in the same amount.

\textsuperscript{71} “[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

“The definition of ‘financial institution’ in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of ‘commercial bank’ or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad--say to a Mexican bank--and launders them through a series of financial transactions, the government conceivably could not rely on the definition of a ‘financial institution’ in 1956(c)(6) to establish that the transaction was a ‘financial transaction’ within the meaning of 1956(c)(4)(B) (defining a ‘financial transaction’ as a transaction involving the use of a ‘financial institution’), or that it was a ‘monetary transaction’ within the meaning of 1957(f) (defining ‘monetary transaction’ as, inter alia, a transaction that would be a ‘financial transaction’ under 1956(c)(4)(B)).

“Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launders the proceeds of one of the crimes set forth on a list of ‘specified unlawful activities.’ 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),” H.R.Rep.No. 107-250, at 38 (2000).

Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.73

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents.74 They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

73 “The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business.

“Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.

“Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive,” H.R.Rep.No. 107-250, at 54 (2001).

74 “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

**Bulk Cash.** Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act’s bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting.75

The section appears to be the product of reactions to the Supreme Court’s decision in *United States v. Bajakian*, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court’s

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75 “For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).
As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency – representing the proceeds of drug trafficking and other criminal offenses – is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad. . . .

“Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United States without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

“Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute,” H.R.Rep.No. 107-250 at 36-7 (2001).
under either circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.\(^{77}\)

**Venue.** Section 1004 relies on *dicta* in *United States v. Cabrales*, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering,\(^{78}\) in the state and district in which the monetary transaction takes place. The Supreme Court in *Cabrales* held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in *dicta*, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.\(^{79}\)

**Forfeiture.** Forfeiture is the government confiscation of property as a consequence of crime.\(^{80}\) The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 et seq. (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

**Constitutional Considerations.** The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 et seq., which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the

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\(^{78}\) “[T]he trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.” *U.S.Const.* Art.III, §2, cl.3.

“[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,” *U.S.Const.* Amend. VI.

\(^{79}\) See also, *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnaping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.

\(^{80}\) For general background information, see, Doyle, *Crime and Forfeiture*, CRS REP.NO. 97-139A (Oct. 11, 2000).
jurisdiction of the United States, belonging to any foreign individual, foreign entity, or foreign country whom they determine to have planned, authorized, aided or engaged in an attack on the United States by a foreign country or foreign nationals. The section also permits the government to present secretly (ex parte and in camera) any classified information upon which the forfeiture was based should the decision be subject to judicial review. The Justice Department requested the section as a revival of the President's powers in times of unconventional wars.81 By virtue of section 316, property owners may initiate a challenge to a confiscation by filing a claim under the rules applicable in maritime confiscations. The section permits two defenses to forfeiture – that the property is not subject to confiscation under section 106 or that the claimant is entitled to the innocent owner defense of 18 U.S.C. 983(d).82 The characterization of the defenses as “affirmative defense” indicates that the claimant bears the burden of proof. The innocent owner defenses of 18 U.S.C. 983(d) are probably not available in cases under section 106, since that section is explicitly

81 “This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App.U.S.C. §5(b).

“This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress's war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

“The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2),” DoJ at §159.

82 “An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
The Justice Department also recommended enactment of an overlapping provision which ultimately passed as section 806 of the Act without any real discussion of the relationship of the two sections. Section 806 authorizes confiscation of all property, regardless of where it is found, of any individual, entity, or organization engaged in domestic or international terrorism (as defined in 18 U.S.C. 2331), against the United States, Americans or their property, 18 U.S.C.

83 18 U.S.C. 983(i)(2)(D).

84 “The exclusion of certain provisions of Federal law from the definition of the term ‘civil forfeiture statute’ in section 983(i) of title 18, United States Code, shall not be construed to deny an owner of property the right to contest the confiscation of assets of suspected international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C) subchapter II of chapter 5 of title 5, United States Code (commonly known as the ‘Administrative Procedure Act’).” Sec. 316(c)(1).

85 “Current law does not contain any authority tailored specifically to the confiscation of terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available current forfeiture laws require detailed tracing that is quite difficult for accounts coming through the banks of countries used by many terrorists.

‘This section increases the government’s ability to strike at terrorist organizations’ economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001,” DoJ, at §403. The House Report on H.R. 2975 which contained versions of both sections is no more explicit on the relation of the two sections.

86 “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
981(a)(1)(G). Section 806 as discussed below also calls for the more common confiscation of property derived from and or facilitating acts of domestic or international terrorism against the United States or its citizens. Confiscations under 806 may be challenged under the procedures of 18 U.S.C. 983, since they are not exempted there. To the extent that forfeiture under section 806 is based on international rather than domestic terrorism, claimants may also use the procedures of section 316.

Confiscation based solely on the fact that the property is owned by a criminal offender, rather than that it is derived from or facilitates some crime is fairly uncommon. It is the mark of common law forfeiture of estate. At common law, a felon forfeited all of his property. Most contemporary forfeiture statutes employ statutory forfeiture, a more familiar presence in American law, which consists of the confiscation of things whose possession is criminal, of the fruits of crime, and of the means of crime – untaxed whiskey, the drug dealer’s profits, and the rum runner’s ship.

Three characteristics set forfeiture of estate apart. The property is lost solely by reason of its ownership by a felon. All of a felon’s property is confiscated, not merely that which is related to the crime for which he is convicted. Finally, it occasions attainder which negates the felon’s right to hold property or for title to property to pass through him to his heirs. It was with this in mind, that the Framers declared that “no attainder of treason shall work corruption of blood or forfeiture exception during the life of the person attainted.” And for this reason, President Lincoln insisted that the confiscated real estate of Confederate supporters should revert their heirs at death.

of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5)(as amended by section 802 of the Act).

87 Austin v. United States, 509 U.S. 602, 611-12 (1993)(“Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture . . . . Of England’s three kinds of forfeiture, only the third took hold in the United States”).


89 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal in personam proceedings following criminal conviction as a means of accomplishing confiscation.
Neither section 106 nor 806 require conviction of the terrorist property owner.\textsuperscript{90} Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers.\textsuperscript{91} The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners.\textsuperscript{92} Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them.\textsuperscript{93} The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate

\textsuperscript{90} Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c)(“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act”).

\textsuperscript{91} \textit{Silesian American Corp. V. Clark}, 332 U.S. 469 (1947); \textit{cf., Societe Internationale v. Rogers}, 357 U.S. 197, 211 (1958)(“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).

\textsuperscript{92} \textit{Zittman v. McGrath}, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’”).

any presumption of remedial purposes. The same has been said of the applicability of the ex post facto clause.

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO. If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

Other Forfeiture Amendments. In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.

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95 See e.g., United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.), 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994).

96 DoJ, at §403.

97 18 U.S.C. 1956(b). Cf., H.R.Rep.No. 107-250, at 54-5 (2001) ("The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas.\(^8\) Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted American Bank, 191 F.3d 30 (1st Cir. 1999).

“The second provision, modeled on 18 U.S.C. 1345(b), gives the district court the power to restrain property, issue seizure warrants, or take other action necessary to ensure that a defendant in an action covered by the statute does not dissipate the assets that would be needed to satisfy a judgment.

“This section also authorizes a court, on the motion of the Government or a State or Federal regulator, to appoint a receiver to gather and protect assets needed to satisfy a judgment under sections 1956 and 957, and the forfeiture provisions in sections 981 and 982. This authority is intended to apply in three circumstances: (1) when there is a judgment in a criminal case, including an order of restitution, following a conviction for a violation of section 1956 or 1957; (2) when there is a judgment in a civil case under section 1956(b) assessing a penalty for a violation of either section 1956 or 1957; and (3) when there is a civil forfeiture judgment under section 981 or a criminal forfeiture judgment, including a personal money judgment, under section 982.

“The amendment also makes section 1956(b) applicable to violations of section 1957. It applies to conduct occurring before the effective date of the Act”).

\(^8\) 18 U.S.C. 981(k). H.R.Rep.No. 107-250, at 57-8 (2001)(“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank's customers.

“Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank's correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

“The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”).
prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here. 100 Section 320 enlarges this provision to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements. 101 This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense. 102

99 Cf., H.R.Rep.No. 107-250, at 58-9 (2001) (“Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of ‘substitute assets’ when the defendant has placed the property otherwise subject to forfeiture ‘beyond the jurisdiction of the court.’ Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

“This section amends 21 U.S.C. 853 to make clear that a court in a criminal case may issue a repatriation order—either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. 853(e) to restrain property—so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both”).


101 H.R.Rep.No. 107-250, at 56 (2001)(“This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act”).

102 H.R.Rep.No. 107-250, at 59-60 (2001)(“Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country.

“Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
A fugitive may not challenge a federal forfeiture. Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in “order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.”

to contest the restraining order could do so on the ground that 28 U.S.C. 2467 was not properly applied to the particular case, but could not oppose the restraining order on any ground that could also be raised in the proceedings pending in a foreign court. This provision prevents a litigant from taking ‘two bites at the apple’ by raising objections to the basis for the forfeiture in the Federal court that he also raised, or is entitled to raise, in the foreign court where the forfeiture action is pending. It complements the existing provision in section 2467(e) providing that the Federal court is bound by the findings of fact of the foreign court, and may not look behind such findings in determining whether to enter an order enforcing a foreign forfeiture judgment.

“This section also amends 28 U.S.C. 2467 to make clear that it is not necessary to prove that the person asserting an interest in the property received actual notice of the forfeiture proceedings. As is the case with respect to forfeitures under U.S. law, it is sufficient if the foreign nation takes steps to provide notice, in accordance with the principles of due process. See Gonzalez v. United States, 1997 WL 278123 (S.D.N.Y. 1997) (‘the [G]overnment is not required to ensure actual receipt of notice that is properly mailed’); Albajon v. Gugliotta, 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant’s identifications, and mailed after claimant released from jail, is sufficient to satisfy due process, even if claimant never received notice); United States v. Schiavo, 897 F. Supp. 644, 648 49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; due process satisfied even if he did not receive the notice).

“Finally, 28 U.S.C. 2467 is amended to authorize the enforcement of a forfeiture judgment based on any foreign offense that would constitute an offense giving rise to a civil or criminal forfeiture of the same property if the offense had been committed in the United States. This is one of two safeguards that the statute contains against the enforcement of judgments that the United States does not consider appropriate for enforcement: if the judgment is based on an act that would not constitute a crime in the United States, such as removing assets from the reach of a repressive regime, it could not be enforced. In addition, section 2467 already provides that a foreign judgment may only be enforced by a Federal court at the request of the United States, and only after the Attorney General has certified that the judgment was obtained in accordance with the principles of due process. Thus, neither a foreign Government nor a foreign private party could enforce a foreign judgment on its own under this provision.’). Note that the safeguard to which the report refers is the range of foreign offenses that will support an enforceable confiscation order, i.e., drug offenses and crimes on the money laundering predicate offense list, and that the amendment narrows that safeguard by adding additional foreign offenses, i.e., any foreign equivalent of a federal crime which would support a confiscation order.

Alien Terrorists and Victims

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

**Border Protection.** The border protection provisions:

- authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401

- authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402

- remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404

- authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405

- authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.

- instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007

- direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418

- express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414

- add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415

- call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416

- limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
• instruct the Attorney General to report on the feasibility of using biometric scanners to help prevent terrorists and other foreign criminals from entering the country, section 1008\textsuperscript{104}

• authorize appropriations of $250,000 for the FBI to determine the feasibility of providing airlines with computer access to the names of suspected terrorists, section 1009

• authorize reciprocal sharing of the State Department’s visa lookout data and related information with other nations in order to prevent terrorism, drug trafficking, slave marketing, and gun running, section 413

**Detention and Removal.** Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity, 8 U.S.C. 1227 (a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(iv). Aliens may be inadmissible for any number of terrorism-related reasons, 8 U.S.C. 1182 (a)(3)(B). Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported.


Section 411 defines “terrorist organization“ to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the Federal Register as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C.

\textsuperscript{104} As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).
Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).

Prior law made representatives of terrorist organizations designated by the Secretary under section 219 (8 U.S.C. 1189) inadmissible, 8 U.S.C. 1182(a)(3)(B)(i)(IV)(2000 ed.). And so they remain. Section 411 makes representatives of political, social or similar groups, whose public endorsements of terrorist activities undermines U.S. efforts to reduce or eliminate terrorism, inadmissible as well, 8 U.S.C. 1882(a)(3) (B)(i)(IV).

An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in “premeditated, politically motivated violence perpetrated against noncombatant targets,” or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security or endanger some individual or the general public. The Attorney General's determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

Victims. The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

- permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421
- extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422

105 “The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

106 “The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks.

“The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application.

“Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
The U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

"Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 31.

"Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.


107 "Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

"The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

"The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death)," H.R.Rep.No. 107-236, at 68 (2001).

108 "Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien’s 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien’s 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
• a denial of benefits of the Act to terrorists and their families, section 427

• authority for the Attorney General to establish evidentiary standards to implement the alien victim provisions of the Act, section 426.

Other Crimes, Penalties, & Procedures

New Crimes. The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-exisiting federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department, the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offenses for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents, 18 U.S.C. 175b. Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.

109 “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . . .” DoJ at §305.

110 The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

111 “18 U.S.C. §792 make it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2)(“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

• destruction of aircraft or their facilities, 18 U.S.C. 32;
• biological weapons offenses, 18 U.S.C. 175;
• chemical weapons offenses, 18 U.S.C. 229;
• nuclear weapons offenses, 18 U.S.C. 831;
• bombing federal buildings, 18 U.S.C. 844(f);
• destruction of an energy facility, 18 U.S.C. 1366;
• violence committed against maritime navigational facilities, 18 U.S.C. 2280;
• offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
• international terrorism, 18 U.S.C. 2232b;
• sabotage of a nuclear facility, 42 U.S.C. 2284;
• air piracy, 49 U.S.C. 46502.

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.\(^{112}\)

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D) The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

\(^{112}\) U.S. Const. Art.III, §2, cl.3 (“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . . ”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . ”); United States v. Cabrales, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from Cabrales when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnapping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999)(“By way of comparison, last Term in [Cabrales] we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).
The Justice Department sought the expansion along with the enlargement of the predicate offense list. "18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of 'material support or resources' is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill ('Federal terrorism offenses')," DoJ, at §304.

Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.115


113 The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of ‘material support or resources’ is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’),” DoJ at 306.


115 “The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill (‘Federal terrorism offenses’) is used in identifying the relevant crimes,” DoJ, at §304.

New Penalties. The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. 3571(b),(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense.\textsuperscript{117}

The proposal, however, failed to identify the critical elements that would trigger the alternative.\textsuperscript{118} Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

- for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

- for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

\textsuperscript{117} “Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersede lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,’’ DoJ, at §302.

\textsuperscript{118} “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense,” Draft at §302.
The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object of offense – see e.g., 21 U.S.C. §846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

“This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.
When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years).\textsuperscript{120} The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission),\textsuperscript{121} a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders).122

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

Other Procedural Adjustments. In other procedural adjustments designed to facilitate criminal investigations, the Act:

• increases the rewards for information in terrorism cases
• expands the Posse Comitatus Act exceptions
• authorizes “sneak and peek” search warrants
• permits nationwide and perhaps worldwide execution of warrants in terrorism cases
• eases government access to confidential information
• allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
• lengthens the statute of limitations applicable to crimes of terrorism
• clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
• adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B.123

122 It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, e.g., damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

123 When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001)(remarks of Rep. Sensenbrenner); for general background, see, Doyle, McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys, CRS REP.NO. RL30060 (Dec. 14, 2001).
Rewards. The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L. 105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism.\(^{124}\)

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

Posse Comitatus. The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.\(^{125}\)

Delayed notification of a search (sneak and peek). Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take

\(^{124}\) The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct threat assessments for federal agencies, and to reimburse federal agencies for the costs of detaining terrorist suspects overseas.

\(^{125}\) For a general discussion of the Posse Comitatus Act, see, Doyle, The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law, CRS Rep.No. 95-964 (June 1, 2000).
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, Richards v. Wisconsin, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, Wilson v. Arkansas, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, Dalia v. United States, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, cf., United States v. Miller, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, United States v. Freitas, 800 F.2d 1451, 1453 (9th Cir. 1986).126

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126 The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in United States v. New York Telephone Co., 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth
Amendment, demands that surreptitious entries be closely circumscribed,” United States v. Freitas (Freitas I), 800 F.2d 1451, 1455-456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, United States v. Freitas (Freitas II), 856 F.2d 1425 (9th Cir. 1988).

127 “No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in Dalia v. United States, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in Dalia, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property. . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. See United States v. New York Telephone Co., 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . . Although the Freitas I court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in United States v. Villegas, 899 F.2d 1324 (1999). Although the Freitas I court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in Villegas. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the Freitas I court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” United States v. Pangburn, 983 F.2d 449, 453-55 (2d Cir. 1993).

128 In Simons, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
The Fourth Amendment does not mention notice, and the Supreme Court has stated that the constitution does not categorically proscribe covert entries, which necessarily involve a delay in notice. And insofar as the August search satisfied the requirements of the Fourth Amendment, i.e., it was conducted pursuant to a warrant based on probable cause issued by a neutral and detached magistrate, we perceive no basis for concluding that the 45-day delay in notice rendered the search unconstitutional. Having concluded that the Rule 41(d) violation at issue here did not infringe on Simons' constitutional rights, we must now evaluate his argument that the violation was deliberate. . . . The district court did not address the intent issue when it ruled on Simons' motion to suppress. . . . We therefore remand for the district court to consider whether the Government intentionally and deliberately disregarded the notice provision of Rule 41(d) when it carried out the August 6, 1998 search,” 206 F.3d at 403.

129 “The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (e.g., risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (e.g., jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, i.e., in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation.130 The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

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130 Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department's initial proposal, the Department's justification does not address the question.
constitutinally “reasonable,” that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

**Nationwide terrorism search warrants.** The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either “within or outside the district,” (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases. The provision may anticipate execution both in this country and overseas. The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage.

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131 The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

132 The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

133 *United States v. Barona*, 56 F.3d 1087, 1092 (9th Cir. 1995)(“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994)(“if American law enforcement officials substantially participated in the search or if the

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” F.R.Crim.P. 41, *Advisory Committee Notes: 1990 Amendment*. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

**Terrorists’ DNA.** The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards *per se.*  

Existing federal law allowed the Attorney General to collect samples from foreign officials conducting the search were actually acting as agents for their American counterparts’); *United States v. Maturo,* 982 F.2d 57, 61 (2d Cir. 1992)(“where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials” or “where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials”); *United States v. Mitro,* 880 F.2d 1480, 1482 (1st Cir. 1989)(“where American agents participated in the foreign search or the foreign officers acted as agents for their American counterparts”); *United States v. Mount,* 757 F.2d 1315, 1318 (D.C.Cir. 1985)(“if American officials or officers participated in some significant way”); *United States v. Marzano,* 537 F.2d 257, 270 (7th Cir. 1976)(declining to adopt the “joint venture” standards, but finding level of American participation in the case before it insignificant); *United States v. Morrow,* 537 F.2d 120, 139 (5th Cir. 1976)(“if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts”); each of the decisions also suggests that evidence secured in a manner which shocked the conscience of the court would be excluded.

134 The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, see, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), *reprinted,* 78 Cong.Rec. 4982-983 (1934)(“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.)(conferring judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

135 *Roe v. Marcotte,* 193 F.3d 72 (2d Cir. 1999); *Shaffer v. Saffle,* 148 F.3d 1180 (10th Cir. 1998); *Rise v. Oregon,* 59 F.3d 1556 (9th Cir. 1995); *Jones v. Murray,* 962 F.2d 302 (4th Cir. 1992).
federal prisoners convicted of a variety of violent crimes, 42 U.S.C. 14135a. The Act enlarges the predicate offense list to include any crime of violence or any terrorism offense, section 503.136

**Access to Educational Records.** Finally, the Act calls for an ex parte court order procedure under which senior Justice Department officials may seek authorization to collect educational records relevant to an investigation or prosecution of a crime of terrorism, section 507 (as an exception to the confidentiality requirements of the General Education Provisions Act, 20 U.S.C. 1232g), section 508 (as an exception to the confidentiality requirements of the National Education Statistics Act, 20 U.S.C. 9007).

**Statute of Limitations.** Prosecution for murder in violation of federal law may be initiated at any time, 18 U.S.C. 3281. A five year statute of limitations applied for most other federal crimes before passage of the Act, with a few exceptions. Among the relevant exceptions were an eight year statute of limitations for several terrorist offenses, 18 U.S.C. 3286,137 and a ten year statute of limitations for a few arson and explosives offenses, 18 U.S.C. 3295. The Justice Department recommended the elimination of a statute of limitations in terrorism cases.138

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136 Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples form convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes.” *DoJ* at §353.


137 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

138 “This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

“This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in
connection with the September 11, 2001 terrorist attacks. The constitutionality of such retroactive applications of changes in statutes of limitations is well-settled, See, e.g., United States v. Grimes, 142 F.3d 1342, 1350-51 (11th Cir. 1998); People v. Frazer, 982 P.2d 180 (Cal. 1999).

“Existing federal law (18 U.S.C. §3282) bars prosecuting most offenses after five years. 18 U.S.C. §3286, as currently formulated, extends the limitation period for prosecution for certain offenses that may be committed by terrorists – but only to eight years. While this is a limited improvement over the five-year limitation period for most federal offenses, it is patently inadequate in relation to the catastrophic human and social costs that frequently follow from such crimes as destruction of aircraft (18 U.S.C. §32), aircraft hijackings ([49] U.S.C. §§46502, 46504-06, attempted political assassinations (18 U.S.C. §§351, 1116, 1751), or hostage taking (18 U.S.C. §1203). These are not minor acts of misconduct which can properly be forgiven or forgotten merely because the perpetrator has avoided apprehension for some period of time. Anomalously, existing law provides longer limitation periods for such offenses as bank frauds and certain artwork thefts (18 U.S.C.§§3293-94) than it does for crimes characteristically committed by terrorists.

“In many American jurisdictions, the limitation periods for prosecution for serious offenses are more permissible than those found in federal law, including a number of states which have no limitation period for the prosecution of felonies generally. While this section does not go so far, it does eliminate the limitation period for prosecution of the major crimes that are most likely to be committed by terrorists (‘Federal terrorism offenses’), as specified in section 309 of this bill,” DoJ at 301.

As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a) conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas; 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 (sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

Moreover, a judicial difference of opinion has appeared in those cases

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period.\(^{141}\) Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.\(^{142}\)

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (Grimes, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (Frazer, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

**Extraterritoriality.** Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States or elsewhere. . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.\(^{143}\)

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnapping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.

\(^{141}\) United States v. De La Matta, 266 F.3d 1275, 1286 (11th Cir. 2001); United States v. Grimes, 142 F.3d 1342, 1351 (11th Cir. 1998); United States v. Morrow, 177 F.3d 272, 294 (5th Cir. 1999); Falter v. United States, 23 F.2d 420, 425-26 (2d Cir. 1928).

\(^{142}\) People v. Frazer, 24 Cal.4th 737, 759, 982 P.2d 180, 1294, 88 Cal.Rptr.2d 312, 327 (1999).

\(^{143}\) United States v. Layton, 855 F.2d 1388 (9th Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); United States v. Benitez, 741 F.2d 1312 (11th Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.144

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

**Victims.** Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11th Victim Compensation Fund legislation before it passed the Act. Consequently, the Act’s victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 et seq., and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 et seq.

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:

• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year) (42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d)(5)), section 621(d)

• waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

• eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
• makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

• prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

• allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

• reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

• makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

• allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

• establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

Increasing Institutional Capacity. A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

- $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)

- necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)

- $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)

- $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816

- $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701

- $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)

- $5 million for DEA police training in South and Central Asia, section 1007.

**Miscellaneous.** Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might to used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act, or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b), 807.

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145 *I.e.*, Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).

The use of pen registers or trap and trace devices was limited at one time to the judicial district in which the order was issued, 18 U.S.C. 3123 (2000 ed.). Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States, 18 U.S.C. 3123(b)(1)(C), 3127(2).\(^{12}\)

**Communications Records and Stored E-Mail.** With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber, 18 U.S.C. 2703(a),(b). A warrant will also suffice to seize records describing telephone and other communications transactions without customer notice, 18 U.S.C. 2703(c). In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation, officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records, 18 U.S.C. 2703(b),(c). They can obtain a limited amount of record information (subscribers' names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena, 18 U.S.C. 2703(c)(1)(C). There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial, 18 U.S.C. 2705.

In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider’s customer records, 18 U.S.C. 2703(c)(1)(C).\(^{13}\)

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.

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\(^{12}\) The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” *DoJ* at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

\(^{13}\) Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user's true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” *DoJ* at §107.
Previously, only a federal court in the district in which the e-mail was stored could issue the order. Under section 220, federal courts in the district where an offense under investigation occurred may issue orders applicable “without geographic limitation,” 18 U.S.C. 2703.14

The Act, in section 209, treats voicemail like e-mail, that is, subject to the warrant or court order procedure, rather than to the more demanding coverage of Title III once required, United States v. Smith, 155 F.3d 1050, 1055-56 (9th Cir. 1998).

Finally, the Act resolves a conflict between chapter 121 and the federal law governing cable companies. Government entities may have access to cable company customer records only under a court order following an adversary hearing if they can show that the records will evidence that the customer is or has engaged in criminal activity, 47 U.S.C. 511(h). When cable companies began offering telephone and other communications services the question arose whether the more demanding cable rules applied or whether law enforcement agencies were entitled to ex parte court orders under the no-notice procedures applicable to communications providers.15 The Act makes it clear that the cable rules apply when cable television viewing services are

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14 Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

15 See e.g., DoJ at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement’s access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
The USA PATRIOT Act: A Legal Analysis

April 15, 2002

Charles Doyle
Senior Specialist
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The USA PATRIOT Act: A Legal Analysis

Summary

The USA PATRIOT Act passed in the wake of the September 11 terrorist attacks. It flows from a consultation draft circulated by the Department of Justice, to which Congress made substantial modifications and additions. The stated purpose of the Act is to enable law enforcement officials to track down and punish those responsible for the attacks and to protect against any similar attacks.

The Act grants federal officials greater powers to trace and intercept terrorists’ communications both for law enforcement and foreign intelligence purposes. It reinforces federal anti-money laundering laws and regulations in an effort to deny terrorists the resources necessary for future attacks. It tightens our immigration laws to close our borders to foreign terrorists and to expel those among us. Finally, it creates a few new federal crimes, such as the one outlawing terrorists’ attacks on mass transit; increases the penalties for many others; and institutes several procedural changes, such as a longer statute of limitations for crimes of terrorism.

Critics have suggested that it may go too far. The authority to monitor e-mail traffic, to share grand jury information with intelligence and immigration officers, to confiscate property, and to impose new book-keeping requirements on financial institutions, are among the features troubling to some.

The Act itself responds to some of these reservations. Many of the wiretapping and foreign intelligence amendments sunset on December 31, 2005. The Act creates judicial safeguards for e-mail monitoring and grand jury disclosures; recognizes innocent owner defenses to forfeiture; and entrusts enhanced anti-money laundering powers to those regulatory authorities whose concerns include the well being of our financial institutions.

This report, stripped of its citations and footnotes, is available in an abbreviated form as The USA PATRIOT Act: A Sketch, CRS Rep.No. RS21203. In addition, much of the information contained here may also be found under a different arrangement in a report entitled, Terrorism: Section by Section Analysis of the USA PATRIOT Act, CRS Rep.No. RL31200 (Dec. 10, 2001). A wider array of terrorism-related analysis appears on the CRS terrorism electronic briefing book page.
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1 P.L. 107-56, 115 Stat. 272 (2001); its full title is the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT).”

2 H.R. 2975 was introduced by Representative Sensenbrenner for himself and Representatives Conyers, Hyde, Coble, Goodlatte, Jenkins, Jackson-Lee, Cannon, Meehan, Graham, Bachus, Wexler, Hostettler, Keller, Issa, Hart, Flake, Schiff, Thomas, Goss, Rangel, Berman and Lofgren; S.1510 by Senator Daschle for himself and Senators Lott, Leahy, Hatch, Graham, Shelby and Sarbanes.

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ed. Oct. 24, 2001), and H.R. 3162 was sent to the President who signed it on October 26, 2001.

**Criminal Investigations: Tracking and Gathering Communications**

A portion of the Act addresses issues suggested originally in a Department of Justice proposal circulated in mid-September.\(^4\) The first of its suggestions called for amendments to federal surveillance laws, laws which govern the capture and tracking of suspected terrorists’ communications within the United States. Federal law features a three-tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications.\(^5\)

The tiers reflected the Supreme Court’s interpretation of the Fourth Amendment’s ban on unreasonable searches and seizures.\(^6\) The Amendment protects private conversations, *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967). It does not cloak information, even highly personal information, for which there is no individual justifiable expectation of privacy, such as telephone company records of calls made to and from an individual's home, *Smith v. Maryland*, 442 U.S. 735 (1979), or bank records of an individual's financial dealings, *United States v. Miller*, 425 U.S. 435 (1976).

Congress responded to *Berger* and *Katz*, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications, 18 U.S.C. 2511.\(^7\) At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious

\(^4\) The Department’s proposal, dated September 20, 2001, came with a brief section by section analysis. Both the proposal (*Draft*) and analysis (*DoJ*) were printed as an appendix in *Administration's Draft Anti-Terrorism Act of 2001, Hearing Before the House Comm. on the Judiciary*, 107th Cong., 1st Sess. 54 (2001).


\(^6\) “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,” *U.S. Const.* Amend. IV.

\(^7\) Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
criminal cases. When approved by senior Justice Department officials, law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.

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8 “The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of” one or more predicate offense, 18 U.S.C. 2516.

9 The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement). 1751 (presidential and presidential staff assassination, kidnapping, or assault). 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnapping, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or nationalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
offense involving counterfeiting punishable under 18 U.S.C. 471, 472, or 473; (e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States; (f) any offense including extortionate credit transactions under 18 U.S.C. 892, 893, or 894; (g) a violation of 31 U.S.C. 5322 (dealing with the reporting of currency transactions); (h) any felony violation of 18 U.S.C. 2511 and 2512 (interception and disclosure of certain communications and to certain intercepting devices); (i) any felony violation of 18 U.S.C. ch. 71 (obscenity); (j) 49 U.S.C. 60123(b) (destruction of a natural gas pipeline), 46502 (aircraft piracy); (k) 22 U.S.C. 2778 (Arms Export Control Act); (l) the location of any fugitive from justice from an offense described in this section; (m) a violation of 8 U.S.C. 1324, 1327, or 1328; (n) any felony violation of 18 U.S.C. 922, 924 (firearms); (o) any violation of 26 U.S.C. 5861 (firearms); (p) a felony violation of 18 U.S.C. 1028 (production of false identification documents), 1542 (false statements in passport applications), 1546 (fraud and misuse of visas, permits, and other documents) or a violation of 8 U.S.C. 1324, 1327, or 1328 (smuggling of aliens); (p) 229 (chemical weapons), 2332 (terrorist violence against Americans overseas), 2332a (weapons of mass destruction), 2332b (multinational terrorism), 2332d (financial transactions with countries supporting terrorism), 2339A (support of terrorist), 2332B (support of terrorist organizations); (r) any conspiracy to commit any of these, 18 U.S.C. 2516(1)(crimes added by the Act in italics). Other than telephone face to face conversations (i.e., electronic communications), the approval of senior Justice Department officials is not required and an order may be sought in any felony investigation, 18 U.S.C. 2516(3).

Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
permits pen register and trap and trace orders for electronic communications (e.g., e-mail)

authorizes nationwide execution of court orders for pen registers, trap and trace devices, and access to stored e-mail or communication records

treats stored voice mail like stored e-mail (rather than like telephone conversations)

permits authorities to intercept communications to and from a trespasser within a computer system (with the permission of the system’s owner)

adds terrorist and computer crimes to Title III’s predicate offense list

reenforces protection for those who help execute Title III, ch. 121, and ch. 206 orders

encourages cooperation between law enforcement and foreign intelligence investigators

establishes a claim against the U.S. for certain communications privacy violations by government personnel

terminates the authority found in many of the these provisions and several of the foreign intelligence amendments with a sunset provision (Dec. 31, 2005).

Pen Registers and Trap and Trace Devices. In section 216, the Act allows court orders authorizing trap and trace devices and pen registers to be used to capture source and addressee information for computer conversations (e.g., e-mail) as well as telephone conversations, 18 U.S.C. 3121, 3123. In answer to objections that e-mail header information can be more revealing than a telephone number, it creates a detailed report to the court, 18 U.S.C. 3123(a)(3).11

11 "Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public the agency shall ensure that a record will be maintained which will identify – (i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of the such device.

"(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof),” section 216(b)(1).
The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” DoJ at §101.

Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user's true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombing[s] – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” DoJ at §107.

Communications Records and Stored E-Mail. With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber, 18 U.S.C. 2703(a),(b). A warrant will also suffice to seize records describing telephone and other communications transactions without customer notice, 18 U.S.C. 2703(c). In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation, officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records, 18 U.S.C. 2703(b),(c). They can obtain a limited amount of record information (subscribers' names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena, 18 U.S.C. 2703(c)(1)(C). There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial, 18 U.S.C. 2705.

In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider’s customer records, 18 U.S.C. 2703(c)(1)(C).

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.

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12 The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” DoJ at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

13 Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user's true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” DoJ at §107.
Previously, only a federal court in the district in which the e-mail was stored could issue the order. Under section 220, federal courts in the district where an offense under investigation occurred may issue orders applicable “without geographic limitation,” 18 U.S.C. 2703.14

The Act, in section 209, treats voice mail like e-mail, that is, subject to the warrant or court order procedure, rather than to the more demanding coverage of Title III once required, United States v. Smith, 155 F.3d 1050, 1055-56 (9th Cir. 1998).

Finally, the Act resolves a conflict between chapter 121 and the federal law governing cable companies. Government entities may have access to cable company customer records only under a court order following an adversary hearing if they can show that the records will evidence that the customer is or has engaged in criminal activity, 47 U.S.C. 511(h). When cable companies began offering telephone and other communications services the question arose whether the more demanding cable rules applied or whether law enforcement agencies were entitled to ex parte court orders under the no-notice procedures applicable to communications providers.15 The Act makes it clear that the cable rules apply when cable television viewing services are

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14 Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

15 See e.g., DoJ at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement’s access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

**Electronic Surveillance.** To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202. A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(i). Yet only the interloper's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.

**Criminal Investigators' Access to Foreign Intelligence Information.** The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism. It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that “the purpose for the surveillance is to obtain foreign intelligence information,” 50 U.S.C. 1804(a)(7)(B)(2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps “the purpose” might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation

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16 18 U.S.C. 229 (chemical weapons), 2332(terrorist acts of violence committed against Americans overseas), 2332a(use of weapons of mass destruction), 2332b(acts of terrorism transcending national boundaries), 2332d(financial transactions with countries which support terrorists), 2339A(providing material support to terrorists), and 2339B(providing material support to terrorist organizations).

17 “Because service providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves as permitted under current law, they often have no way to exercise their rights to protect themselves from unauthorized attackers. Moreover, such attackers can target critical infrastructures and engage in cyberterrorism,” DoJ at §106. Elsewhere the Act defines “electronic surveillance” for purposes of the Foreign Intelligence Surveillance Act (FISA) to emphasize that the law enforcement authority for this intruder surveillance does not confer similar authority for purposes of foreign intelligence gathering, section 1003 (50 U.S.C. 1801(f)(2)).

Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment's warrant clause. It is here that the “primary purpose” notion originated. In United States v. Truong Dinh Hung, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, “as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.” Subsequent case law, however, is not as clear as it might be: see e.g., United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984)(“FISA permits federal officials to obtain orders authorizing electronic surveillance ‘for the purpose of obtaining foreign intelligence information.’ The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying officials’ belief that the information sought is the type of foreign intelligence information described”); United States v. Pelton, 835 F.2d 1067, 1075-76 (4th Cir. 1987)(“We also reject Pelton’s claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial”); United States v. Sarkissian, 841 F.2d 959, 907-8 (9th Cir. 1988)(“Defendants rely on the primary purpose test articulated in United States v. Truong Dinh Hung. . . . One other court has applied the primary purpose test. Another court has rejected it . . . distinguishing Truong. A third court has declined to decide the issue. We also decline to decide the issue”); United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1991)(“Appellants attack the government's surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance”).

Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” DoJ at §153.
demanding standard than the “a purpose” threshold proposed by the Justice Department, but a clear departure from the original “the purpose” entry point. FISA once described a singular foreign intelligence focus requisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k), 1825(k).

Protective Measures. The Act reinforces two kinds of safeguards, one set designed to prevent abuse and the other to protect those who assist the government. The sunset clause is perhaps the best known of the Act’s safeguards. Under the direction of section 224, many of the law enforcement and foreign intelligence authorities granted by the Act expire as of December 31, 2005. The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter

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21 “(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. (2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, infra, quoting, 50 U.S.C. 1801.

22 “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210[ subpoenas for communications provider customer records], 211[access to cable company communication service records], 213[sneak and peek], 216[pen register and trap and trace device amendments], 221[trade sanctions], and 222[assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005. “(b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers' communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices).\textsuperscript{23} Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees,\textsuperscript{24} but could not recover against the United States.\textsuperscript{25} Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice's Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government's request until a court order authorizing access can be obtained.\textsuperscript{26} Another allows providers to disclose customer records to protect the provider's rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others.\textsuperscript{27} A third section,

\textsuperscript{24} 18 U.S.C. 2520 and 2707 (2000 ed.).
\textsuperscript{26} Prior law already granted service providers immunity for disclosure of customer records in compliance with a court access order, 18 U.S.C. 2703(f).
\textsuperscript{27} “Existing law contains no provision that allows providers of electronic communications service to disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies that threaten death or serious bodily injury. This section amends 18 U.S.C. §2702 to authorize such disclosures if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.

“Current law also contains an odd disconnect: a provider may disclose the contents of the customer's communications in order to protect its rights or property but the current statute does not expressly permit a provider to voluntarily disclose non-content records (such as a subscriber's login records). 18 U.S.C. 2702(b)(5). This problem substantially hinders the ability of providers to protect themselves from cyber-terrorists and criminals. Yet the right to disclose the contents of communications necessarily implies the less intrusive ability to disclose non-content records. In order to promote the protection of our nation's critical infrastructures, this section's amendments allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems,” DoJ at
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

**Foreign Intelligence Investigations**

Although both criminal investigations and foreign intelligence investigations are conducted in the United States, criminal investigations seek information about unlawful activity; foreign intelligence investigations seek information about other countries and their citizens. Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough.

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA), something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President's authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, United States v. United States District Court, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage

§110.

28 Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

29 Thus in the name of assisting in the execution of Title III, chapter 121, or chapter 206 order, the courts may not cite the Act as the basis for an order compelling a service provider to make system modifications or provide any other technical assistance not already required under 18 U.S.C. 2518(4), 2706, or 3124(c), see, H.R.Rep.No. 107-236, at 62-3 (2001) (emphasis added) (“This Act is not intended to affect obligations under Communications Assistance for Law Enforcement Act [which addresses law enforcement-beneficial system modifications and the compensation to be paid for the changes], nor does the act impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance”).

30 *E.g.*, As amended by section 902 of the Act, “‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2)(language added by the Act in italics).

31 50 U.S.C. 1801 et seq.
In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs. There were and still are extra


33 “As used in this subchapter: (a) ‘Foreign power’ means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

(b) ‘Agent of a foreign power’ means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C).

(c) ‘International terrorism’ means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnapping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

(d) ‘Sabotage’ means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

(e) ‘Foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans (“United States persons,” i.e., citizens or permanent resident aliens). The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

- permits “roving” surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)
- increases the number of judges on the FISA court from 7 to 11
- allows application for a FISA surveillance or search order when gathering foreign intelligence is a significant reason for the application rather than the reason
- authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations
- sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses
- carries a sunset provision
- establishes a claim against the U.S. for certain communications privacy violations by government personnel
- expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to – (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States,” 50 U.S.C. 1801.

34 Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
**FISA.** FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases.\(^{35}\) It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

**Search and Surveillance for Intelligence Purposes.** Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, Draft at §151.\(^{36}\)

Section 901 of the Act address a concern raised during the 106th Congress relating to the availability of the FISA orders and the effective use of information gleaned from the execution of a FISA order.\(^{37}\) It vests the Director of Central

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\(^{36}\) See also, DoJ at §151, “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order’s minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed (50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

\(^{37}\) See e.g., S.Rep.No. 106-352, at 3, 6, 7 (2000)(“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application
Intelligence with the responsibility to formulate requirements and priorities for the use of FISA to collect foreign intelligence information. He is also charged with the responsibility of assisting the Attorney General in the efficient and effective dissemination of FISA generated information (50 U.S.C. 403-3(c)).

**Pen Registers and Trap and Trace Devices for Intelligence Gathering.** Section 214 grants the request of the Department of Justice by dropping requirements which limited FISA pen register and trap and trace device orders to facilities used by foreign agents or those engaged in international terrorist or clandestine intelligence activities, 50 U.S.C. 1842(c)(3)(2000 ed.). It is enough that the order is sought as part of an investigation to protect against international terrorism or clandestine intelligence activities and is not motivated solely by an American’s exercise of his or her First Amendment rights. Elsewhere (section 505), the Act drops a similar limitation for intelligence officials’ access to telephone records, 18 U.S.C.

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38 “When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevance, an additional factual showing that the communications device has been used to contact an ‘agent of a foreign power’ engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the ‘agent of a foreign power’ prong from the predication, and thus makes the FISA authority more closely track the criminal authority,” DoJ at §155.
Section 214 adjusts the language of the FISA pen register-trap and trace authority to permit its use to capture source and destination information relating to electronic communications (e.g., e-mail) as well as telephone communications, 50 U.S.C. 1842(d). The section makes it clear that requests for a FISA pen register-trap and trace order, like requests for other FISA orders, directed against Americans (U.S. persons) may not be based solely on activities protected by the First Amendment, 50 U.S.C. 1842, 1843.

Third Party Cooperation and Tangible Evidence. As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target's activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.40

39 Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise to be entitled to confidentiality. Section 505, in response to the Justice Department's suggestion, allows FBI field offices to make the requests, see DoJ at §157 (“At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports”).

40 When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court's order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.’ This would enhance the FBI's ability to monitor international terrorists and intelligence officers who are...
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian. The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities, in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B));
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1953(a));
- the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a));
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v);

trained to thwart surveillance by rapidly changing hotel accommodations, cell phones, Internet accounts, etc., just prior to important meetings or communications. Under the current law, the government would have to return to the FISA Court for an order that named the new carrier, landlord, etc., before effecting surveillance. Under the proposed amendment, the FBI could simply present the newly discovered carrier, landlord, custodian or other person with a generic order issued by the Court and could then effect FISA coverage as soon as technically feasible,” DoJ at 152.


41 “The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigative contexts. The time and difficulty involved in getting such pleadings before the Court usually outweighs the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” DoJ at §156.

42 Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.\(^{43}\)

**Access to Law Enforcement Information.** Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community's access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, Draft at §103.\(^{44}\)

\(^{43}\) H.R.Rep.No. 107-205, at 60-1 (2001)(“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

“The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

“Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual’s credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding--without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information”).

\(^{44}\) See also, DoJ at §103, “This section facilities the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, Draft at §354.45

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, Draft at §154.46

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion. It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its

wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions.”

45 See also, DoJ at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.” Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officers.

46 See also, DoJ at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”

47 Blair v. United States, 250 U.S. 273, 281 (1919)(the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

Critics may protest that the change could lead to the use of the grand jury for intelligence gathering purposes, or less euphemistically, to spy on Americans. The proposal was never among those scheduled to sunset, but earlier versions of the section followed the path used for most other disclosures of grand jury material: prior

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48 These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

49 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25 Harvard Journal of Law & Public Policy 699, 719-20 (2002)(“There is a significant danger that the rule permitting disclosure will be treated as the de facto authorization of an expansion of the grand jury’s investigative role to encompass seeking material relevant only to matters of national security, national defense, immigration, and so forth. The grand jury’s awesome powers should not be unwittingly extended to a much wider range of issues. . . Since the grand jury operates in secret, there are no public checks on the scope of its investigations, and witnesses are not permitted to challenge its jurisdiction. Only the supervising court is in a position to keep the grand jury’s investigation within proper bounds. Requiring judicial approval of foreign intelligence and counterintelligence information disclosures would provide a natural check against the temptation to manipulate the grand jury to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6 (Nov. 2001)(“The grand jury secrecy rule is a rule of policy which has always had exceptions, and it has been frequently modified. The secrecy rule has no credible claim to constitutional stature”).
Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

Law enforcement officials may share Title III information with the intelligence community under the same conditions, section 203(b), although the grand jury and Title III sharing provisions differ in at least three important respects. The court need not be notified of Title III disclosures. On the other hand, the authority for sharing Title III information expires on December 31, 2005, section 224, and agencies and their personnel guilty of intentional improper disclosures may be subject to a claim for damages and disciplinary action, 18 U.S.C. 2520.

The third subsection of section 203 remains something of an enigma. It speaks in much the same language as its counterparts. It allows law enforcement officials to share information with the intelligence community, “notwithstanding any other provisions of law,” section 203(d). It either swallows the other subsections, or supplements them. Several factors argue for its classification as a supplement. Congress is unlikely to have crafted subsections (a), (b) and (c) only to completely

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51 “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person’s official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification. By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

**Increasing Institutional Capacity.** As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a

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52 *Duncan v. Walker*, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted) (“It is our duty to give effect, if possible, to every clause and word of a statute. *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)); see also *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879) (As early as in Bacon's Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage in any setting. *Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687, 698 (1995); see also *Ratzlaf v. United States*, 510 U.S. 135, 140 (1994)).

53 *Draft* at §154, “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”
The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so,” S.Rep.No. 107-63, at 11 (2001).

Money Laundering

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture. The Act bolsters federal efforts in each area.

**Regulation.** Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.6

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56 See e.g., 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
Records and Reports. For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler’s checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to files SARs as well,\(^57\) reflecting Congress’ view that the information provided the IRS may be valuable for other law enforcement purposes.\(^58\) This concern is likewise

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\(^58\) H.R.Rep.No. 107-250, at 38-9 (2001) (“Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

“Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a ‘Safeguard Procedures Report’ which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

“While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement
reflected in section 357 which asks the Secretary of the Treasury to report on the Internal Revenue Service’s role in the administration of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311 et seq.), and what transfers of authority, if any, are appropriate.

Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action. 59 Section 355 expands the immunity to cover disclosures in

authorities as the various reports mandated by the Bank Secrecy Act, which can typically be retrieved electronically from a database maintained by the Treasury Department. The differential access to the two kinds of reports is made anomalous by the fact that Form 8300 elicits much the same information that is required to be disclosed by the Bank Secrecy Act. For example, just as Form 8300 seeks the name, address, and social security number of a customer who engages in a cash transaction exceeding $10,000 with a trade or business, Currency Transaction Reports (CTRs) mandated by the Bank Secrecy Act require the same information to be reported on a cash transaction exceeding $10,000 between a financial institution and its customer”.

59 “Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

“First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor from civil liability applies in arbitration, as well as judicial, proceedings. Second, it amends section 5318(g)(3) to clarify the safe harbor’s coverage of voluntary disclosures (that is, those not covered by the SAR regulatory reporting requirement). The language in section 5318(g)(3)(A) providing that ‘any financial institution that *** makes a disclosure pursuant to *** any other authority *** shall not be liable to any person’ is not intended to avoid the application of the reporting and disclosure provisions of the Federal securities laws to any person, or to insulate any issuers from private rights of actions for disclosures made under the Federal securities laws.

“Subsection [351](b) amends section 5318(g)(2) of title 31—which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed—to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee’s official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
employment references to other insured depository financial institutions provided disclosure is not done with malicious intent.\textsuperscript{60}

The Financial Crimes Enforcement Network (FinCEN), a component within the Treasury Department long responsible for these anti-money laundering reporting and record-keeping requirements, 31 C.F.R. pt. 103, was administratively created in 1990 to provide other government agencies with an “intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes,” 55 Fed.Reg. 18433 (May 2, 1990).

The Act, in section 361, makes FinCEN a creature of statute, a bureau within the Treasury Department, 31 U.S.C. 310. Section 362 charges it with the responsibility of establishing a highly secure network to allow financial institutions to file required reports electronically and to permit FinCEN to provide those institutions with alerts and other information concerning money laundering protective measures, 31 U.S.C. 310 note.

**Special Measures.** In extraordinary circumstances involving international financial matters, the Act grants the Secretary of the Treasury, in consultation with other appropriate regulatory authorities, the power to issue regulations and orders involving additional required “special measures” and additional “due diligence” requirements to combat money laundering. The special measure authority, available under section 311, comes to life with the determination that particular institutions, jurisdictions, types of accounts, or types of transactions pose a primary money

\textsuperscript{60} 31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 67 (2001).
These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

61 31 U.S.C. 5318A. The circumstances considered in the case of a suspect jurisdiction are: evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction’s banking regulation; the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

62 The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’ including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

“Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate
business transactions.

"Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

"Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

"The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

"The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

"The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

"The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent’ account for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information that it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

"The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

"The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed
**Due Diligence.** Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.63

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63 See generally, H.R.Rep.No. 107-250, at 71-2 (“Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

“The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

“The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

“For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
**General Regulatory Matters.** The Act establishes several other regulatory mechanisms directed at the activities involving U.S. financial institutions and foreign individuals or institutions. Section 313, for instance, in another restriction on correspondent accounts for foreign financial institutions, prohibits U.S. financial institutions from maintaining correspondent accounts either directly or indirectly for foreign shell banks (banks with no physical place of business\(^{64}\)) which have no affiliation with any financial institution through which their banking activities are subject to regulatory supervision.\(^{65}\)

The Act, in section 325, empowers the Secretary of the Treasury to promulgate regulations to prevent financial institutions from allowing their customers to conceal their financial activities by taking advantage of the institutions’ concentration account practices.\(^{66}\)

The Secretary of the Treasury is instructed in section 326 to issue regulations for financial institutions’ minimum new customer identification standards and record-
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keeping and to recommend a means to effectively verify the identification of foreign customers.67

67 31 U.S.C. 5318(l); H.R.Rep.No. 107-250, at 62-3 (2001)(“Section [326](a) amends 31 U.S.C. 5318 by adding a new subsection governing the identification of account holders. Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a ‘street name’ or omnibus account in the broker-dealer's name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to ‘look through’ the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund's customers. Thus, the fund would not be required to ‘look through’ the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature.68

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

Reports to Congress. Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

“Paragraph (6) requires that Treasury's regulations prescribed under paragraph (1) become effective within one year after enactment of this bill”).

exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.\(^69\)

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

**International Cooperation.** Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.\(^70\)

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (i.e., the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.

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\(^70\) H.R.Rep.No. 107-250, at 67 (2001) ("This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury's progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

"The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime").
**Crimes.** Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They prescribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, smuggling, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
The USA PATRIOT Act: A Legal Analysis

April 15, 2002

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Summary

The USA PATRIOT Act passed in the wake of the September 11 terrorist attacks. It flows from a consultation draft circulated by the Department of Justice, to which Congress made substantial modifications and additions. The stated purpose of the Act is to enable law enforcement officials to track down and punish those responsible for the attacks and to protect against any similar attacks.

The Act grants federal officials greater powers to trace and intercept terrorists’ communications both for law enforcement and foreign intelligence purposes. It reenforces federal anti-money laundering laws and regulations in an effort to deny terrorists the resources necessary for future attacks. It tightens our immigration laws to close our borders to foreign terrorists and to expel those among us. Finally, it creates a few new federal crimes, such as the one outlawing terrorists’ attacks on mass transit; increases the penalties for many others; and institutes several procedural changes, such as a longer statute of limitations for crimes of terrorism.

Critics have suggested that it may go too far. The authority to monitor e-mail traffic, to share grand jury information with intelligence and immigration officers, to confiscate property, and to impose new book-keeping requirements on financial institutions, are among the features troubling to some.

The Act itself responds to some of these reservations. Many of the wiretapping and foreign intelligence amendments sunset on December 31, 2005. The Act creates judicial safeguards for e-mail monitoring and grand jury disclosures; recognizes innocent owner defenses to forfeiture; and entrusts enhanced anti-money laundering powers to those regulatory authorities whose concerns include the well being of our financial institutions.

This report, stripped of its citations and footnotes, is available in an abbreviated form as The USA PATRIOT Act: A Sketch, CRS Rep.No. RS21203. In addition, much of the information contained here may also be found under a different arrangement in a report entitled, Terrorism: Section by Section Analysis of the USA PATRIOT Act, CRS Rep.No. RL31200 (Dec. 10, 2001). A wider array of terrorism-related analysis appears on the CRS terrorism electronic briefing book page.
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The USA PATRIOT Act: A Legal Analysis

Introduction

Congress passed the USA PATRIOT Act (the Act) in response to the terrorists’ attacks of September 11, 2001. The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to further close our borders to foreign terrorists and to detain and remove those within our borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it is not without safeguards, critics contend some of its provisions go too far. Although it grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough.


1 P.L. 107-56, 115 Stat. 272 (2001); its full title is the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT).”

2 H.R. 2975 was introduced by Representative Sensenbrenner for himself and Representatives Conyers, Hyde, Coble, Goodlatte, Jenkins, Jackson-Lee, Cannon, Meehan, Graham, Bachus, Wexler, Hostettler, Keller, Issa, Hart, Flake, Schiff, Thomas, Goss, Rangel, Berman and Lofgren; S.1510 by Senator Daschle for himself and Senators Lott, Leahy, Hatch, Graham, Shelby and Sarbanes.

3 H.R. 3004 was introduced by Representative Oxley for himself and Represenatives LaFalce, Leach, Maloney, Roukema, Bentsen, Hooley, Bereuter, Baker, Bachus, King, Kelly, Gillmore, Cantor, Riley, Latourette, Green (of Wisconsin), and Grucci; and reported out of the House Financial Services Committee with amendments on October 15, 2001, H.R.Rep.No. 107-250. H.R. 3004, as reported out, included Internet gambling amendments that were not included in H.R. 2975/H.R.3108.
ed. Oct. 24, 2001), and H.R. 3162 was sent to the President who signed it on October 26, 2001.

**Criminal Investigations: Tracking and Gathering Communications**

A portion of the Act addresses issues suggested originally in a Department of Justice proposal circulated in mid-September. The first of its suggestions called for amendments to federal surveillance laws, laws which govern the capture and tracking of suspected terrorists’ communications within the United States. Federal law features a three tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications.

The tiers reflected the Supreme Court’s interpretation of the Fourth Amendment’s ban on unreasonable searches and seizures. The Amendment protects private conversations, *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967). It does not cloak information, even highly personal information, for which there is no individual justifiable expectation of privacy, such as telephone company records of calls made to and from an individual’s home, *Smith v. Maryland*, 442 U.S. 735 (1979), or bank records of an individual’s financial dealings, *United States v. Miller*, 425 U.S. 435 (1976).

Congress responded to *Berger* and *Katz*, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications, 18 U.S.C. 2511. At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious circumstances.

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4 The Department’s proposal, dated September 20, 2001, came with a brief section by section analysis. Both the proposal (Draft) and analysis (DoJ) were printed as an appendix in *Administration’s Draft Anti-Terrorism Act of 2001, Hearing Before the House Comm. on the Judiciary*, 107th Cong., 1st Sess. 54 (2001).


6 “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,” U.S. Const. Amend. IV.

7 Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
criminal cases. When approved by senior Justice Department officials, law
enforcement officers may seek a court order authorizing them to secretly capture
conversations concerning any of a statutory list of offenses (predicate offenses), 18

8 "The Attorney General, Deputy Attorney General, Associate Attorney General, or any
Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant
Attorney General or acting Deputy Assistant Attorney General in the Criminal Division
specially designated by the Attorney General, may authorize an application to a Federal judge
of competent jurisdiction for, and such judge may grant in conformity with section 2518 of
this chapter an order authorizing or approving the interception of wire or oral communications
by the Federal Bureau of Investigation, or a Federal agency having responsibility for the
investigation of the offense as to which the application is made, when such interception may
provide or has provided evidence of one or more predicate offense, 18 U.S.C. 2516.

9 The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277
(enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear
facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch.
105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111
(destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c)
(restrictions on payments and loans to labor organizations), or any offense which involves
murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United
States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public
officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests),
844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets),
1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit
applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring
an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511
(obstruction of State or local law enforcement), 1751 (presidential and presidential staff
assassination, kidnapping, or assault), 1951 (interference with commerce by threats or
violence), 1952 (interstate and foreign travel or transportation in aid of racketeering
enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire),
1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation
to influence operations of employee benefit plan), 1955 (prohibition of business enterprises
of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary
transactions in property derived from specified unlawful activity), 659 (theft from interstate
shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse
felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252
(sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of
stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203
(hostage taking), 1029 (fraud and related activity in connection with access devices), 3146
(penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction
of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to
racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a
Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet,
or Supreme Court assassinations, kidnapping, or assault), 831 (prohibited transactions
involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175
(biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false
identification documentation), 1425 (procurement of citizenship or nationalization
unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of
naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false
statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse
of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
offense involving counterfeiting punishable under 18 U.S.C. 471, 472, or 473; (e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States; (f) any offense including extortionate credit transactions under 18 U.S.C. 892, 893, or 894; (g) a violation of 31 U.S.C. 5322 (dealing with the reporting of currency transactions); (h) any felony violation of 18 U.S.C. 2511 and 2512 (interception and disclosure of certain communications and to certain intercepting devices); (i) any felony violation of 18 U.S.C. ch. 71 (obscenity); (j) 49 U.S.C. 60123(b) (destruction of a natural gas pipeline), 46502 (aircraft piracy); (k) 22 U.S.C. 2778 (Arms Export Control Act); (l) the location of any fugitive from justice from an offense described in this section; (m) a violation of 8 U.S.C. 1324, 1327, or 1328; (n) any felony violation of 18 U.S.C. 922, 924 (firearms); (o) any violation of 26 U.S.C. 5861 (firearms); (p) a felony violation of 18 U.S.C. 1028 (production of false identification documents), 1542 (false statements in passport applications), 1546 (fraud and misuse of visas, permits, and other documents) or a violation of 8 U.S.C. 1324, 1327, or 1328 (smuggling of aliens); (p) 229 (chemical weapons), 2332 (terrorist violence against Americans overseas), 2332a (weapons of mass destruction), 2332b (multinational terrorism), 2332d (financial transactions with countries supporting terrorism), 2339A (support of terrorist), 2332B (support of terrorist organizations); (r) any conspiracy to commit any of these, 18 U.S.C. 2516(1)(crimes added by the Act in italics). Other than telephone face to face conversations (i.e., electronic communications), the approval of senior Justice Department officials is not required and an order may be sought in any felony investigation, 18 U.S.C. 2516(3).

Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
• permits pen register and trap and trace orders for electronic communications (e.g., e-mail)

• authorizes nationwide execution of court orders for pen registers, trap and trace devices, and access to stored e-mail or communication records

• treats stored voice mail like stored e-mail (rather than like telephone conversations)

• permits authorities to intercept communications to and from a trespasser within a computer system (with the permission of the system’s owner)

• adds terrorist and computer crimes to Title III’s predicate offense list

• reenforces protection for those who help execute Title III, ch. 121, and ch. 206 orders

• encourages cooperation between law enforcement and foreign intelligence investigators

• establishes a claim against the U.S. for certain communications privacy violations by government personnel

• terminates the authority found in many of the these provisions and several of the foreign intelligence amendments with a sunset provision (Dec. 31, 2005).

Pen Registers and Trap and Trace Devices. In section 216, the Act allows court orders authorizing trap and trace devices and pen registers to be used to capture source and addressee information for computer conversations (e.g., e-mail) as well as telephone conversations, 18 U.S.C. 3121, 3123. In answer to objections that e-mail header information can be more revealing than a telephone number, it creates a detailed report to the court, 18 U.S.C. 3123(a)(3).11

11“Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public the agency shall ensure that a record will be maintained which will identify – (i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of the such device.

“(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof),” section 216(b)(1).
The use of pen registers or trap and trace devices was limited at one time to the judicial district in which the order was issued, 18 U.S.C. 3123 (2000 ed.). Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States, 18 U.S.C. 3123(b)(1)(C), 3127(2).\textsuperscript{12}

**Communications Records and Stored E-Mail.** With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber, 18 U.S.C. 2703(a),(b). A warrant will also suffice to seize records describing telephone and other communications transactions without customer notice, 18 U.S.C. 2703(c). In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation, officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records, 18 U.S.C. 2703(b),(c). They can obtain a limited amount of record information (subscribers’ names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena, 18 U.S.C. 2703(c)(1)(C). There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial, 18 U.S.C. 2705.

In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider’s customer records, 18 U.S.C. 2703(c)(1)(C).\textsuperscript{13}

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.

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\textsuperscript{12} The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” DoJ at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

\textsuperscript{13} Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user’s true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” DoJ at §107.
Previously, only a federal court in the district in which the e-mail was stored could issue the order. Under section 220, federal courts in the district where an offense under investigation occurred may issue orders applicable “without geographic limitation,” 18 U.S.C. 2703.  

The Act, in section 209, treats voice mail like e-mail, that is, subject to the warrant or court order procedure, rather than to the more demanding coverage of Title III once required, United States v. Smith, 155 F.3d 1050, 1055-56 (9th Cir. 1998).

Finally, the Act resolves a conflict between chapter 121 and the federal law governing cable companies. Government entities may have access to cable company customer records only under a court order following an adversary hearing if they can show that the records will evidence that the customer is or has engaged in criminal activity, 47 U.S.C. 511(h). When cable companies began offering telephone and other communications services the question arose whether the more demanding cable rules applied or whether law enforcement agencies were entitled to ex parte court orders under the no-notice procedures applicable to communications providers. The Act makes it clear that the cable rules apply when cable television viewing services are

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14 Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

15 See e.g., DoJ at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement's access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

**Electronic Surveillance.** To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202. A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(i). Yet only the interloper's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.

**Criminal Investigators’ Access to Foreign Intelligence Information.**
The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism. It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that “the purpose for the surveillance is to obtain foreign intelligence information,” 50 U.S.C. 1804(a)(7)(B)(2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps “the purpose” might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation

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16 18 U.S.C. 229 (chemical weapons), 2332(terrorist acts of violence committed against Americans overseas), 2332a(use of weapons of mass destruction), 2332b(acts of terrorism transcending national boundaries), 2332d(financial transactions with countries which support terrorists), 2339A(providing material support to terrorists), and 2339B(providing material support to terrorist organizations).

17 “Because service providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves as permitted under current law, they often have no way to exercise their rights to protect themselves from unauthorized attackers. Moreover, such attackers can target critical infrastructures and engage in cyberterrorism,” DoJ at §106. Elsewhere the Act defines “electronic surveillance” for purposes of the Foreign Intelligence Surveillance Act (FISA) to emphasize that the law enforcement authority for this intruder surveillance does not confer similar authority for purposes of foreign intelligence gathering, section 1003 (50 U.S.C. 1801(f)(2)).

The Justice Department sought FISA surveillance and physical search authority on the basis of “a” foreign intelligence purpose. Section 218 of the Act insists that foreign intelligence gathering be a “significant purpose” for the request for the FISA surveillance or physical search order, 50 U.S.C. 1804(a)(7)(B), 1823(a)(7)(B), a more

19 Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment’s warrant clause. It is here that the “primary purpose” notion originated. In United States v. Truong Dinh Hung, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, “as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.” Subsequent case law, however, is not as clear as it might be: see e.g., United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984) (“FISA permits federal officials to obtain orders authorizing electronic surveillance ‘for the purpose of obtaining foreign intelligence information.’ The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying officials’ belief that the information sought is the type of foreign intelligence information described”); United States v. Pelton, 835 F.2d 1067, 1075-76 (4th Cir. 1987) (”We also reject Pelton’s claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial”); United States v. Sarkissian, 841 F.2d 959, 907-8 (9th Cir. 1988) (“Defendants rely on the primary purpose test articulated in United States v. Truong Dinh Hung. . . . One other court has applied the primary purpose test. Another court has rejected it . . . distinguishing Truong. A third court has declined to decide the issue. We also decline to decide the issue”); United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1991) (“Appellants attack the government's surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance”).

20 “Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” DoJ at §153.
demanding standard than the “a purpose” threshold proposed by the Justice Department, but a clear departure from the original “the purpose” entry point. FISA once described a singular foreign intelligence focus prerequisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k), 1825(k).21

Protective Measures. The Act reenforces two kinds of safeguards, one set designed to prevent abuse and the other to protect those who assist the government. The sunset clause is perhaps the best known of the Act’s safeguards. Under the direction of section 224, many of the law enforcement and foreign intelligence authorities granted by the Act expire as of December 31, 2005.22 The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter

21 “(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or prevent attacks – (A) actual or potential attacks or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. (2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, infra, quoting, 50 U.S.C. 1801.

22 “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210[ subpoenas for communications provider customer records], 211[access to cable company communication service records], 213[sneak and peek], 216[pen register and trap and trace device amendments], 221[trade sanctions], and 222[assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005. (b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers' communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices).23 Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees,24 but could not recover against the United States.25 Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice's Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government's request until a court order authorizing access can be obtained.26 Another allows providers to disclose customer records to protect the provider's rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others.27 A third section,


26 Prior law already granted service providers immunity for disclosure of customer records in compliance with a court access order, 18 U.S.C. 2703(f).

27 “Existing law contains no provision that allows providers of electronic communications service to disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies that threaten death or serious bodily injury. This section amends 18 U.S.C. §2702 to authorize such disclosures if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.

“Current law also contains an odd disconnect: a provider may disclose the contents of the customer's communications in order to protect its rights or property but the current statute does not expressly permit a provider to voluntarily disclose non-content records (such as a subscriber's login records). 18 U.S.C. 2702(b)(5). This problem substantially hinders the ability of providers to protect themselves from cyber-terrorists and criminals. Yet the right to disclose the contents of communications necessarily implies the less intrusive ability to disclose non-content records. In order to promote the protection of our nation's critical infrastructures, this section's amendments allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems,” DoJ at
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

**Foreign Intelligence Investigations**

Although both criminal investigations and foreign intelligence investigations are conducted in the United States, criminal investigations seek information about unlawful activity; foreign intelligence investigations seek information about other countries and their citizens. Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough.

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA), something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President's authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, *United States v. United States District Court*, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage

§110.

28 Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

29 Thus in the name of assisting in the execution of Title III, chapter 121, or chapter 206 order, the courts may not cite the Act as the basis for an order compelling a service provider to make system modifications or provide any other technical assistance not already required under 18 U.S.C. 2518(4), 2706, or 3124(c), see, H.R.Rep.No. 107-236, at 62-3 (2001) (emphasis added) (“This Act is not intended to affect obligations under Communications Assistance for Law Enforcement Act [which addresses law enforcement-beneficial system modifications and the compensation to be paid for the changes], nor does the act impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance”).

30 *E.g.*, As amended by section 902 of the Act, “‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2)(language added by the Act in italics).

31 50 U.S.C. 1801 *et seq.*
In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs. There were and still are extra lockers, 50 U.S.C. 1861-1863 (2000 ed.). Intelligence authorities gained narrow passages through other privacy barriers as well.\textsuperscript{32}


\textsuperscript{33} “As used in this subchapter: (a) ‘Foreign power’ means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

(b) ‘Agent of a foreign power’ means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C).

(c) ‘International terrorism’ means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnaping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

(d) ‘Sabotage ‘ means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

(e) ‘foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans (“United States persons,” i.e., citizens or permanent resident aliens). The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

- permits “roving” surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)
- increases the number of judges on the FISA court from 7 to 11
- allows application for a FISA surveillance or search order when gathering foreign intelligence is a significant reason for the application rather than the reason
- authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations
- sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses
- carries a sunset provision
- establishes a claim against the U.S. for certain communications privacy violations by government personnel
- expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to – (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States,” 50 U.S.C. 1801.

34 Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
FISA. FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases. It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

Search and Surveillance for Intelligence Purposes. Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, Draft at §151.36

Section 901 of the Act address a concern raised during the 106th Congress relating to the availability of the FISA orders and the effective use of information gleaned from the execution of a FISA order.37 It vests the Director of Central


36 See also, DOJ at §151, “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order’s minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed (50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

37 See e.g., S.Rep.No. 106-352, at 3, 6, 7 (2000)(“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application
process, as interpreted by the OIPR is administratively burdensome and, at times, extremely slow. Many applications undergo months of scrutiny before submission to the court because the OIPR prescribes standards and restrictions not imposed by the statute. . . . In particular, the OIPR has been criticized for an overly restrictive interpretation of the FISA ‘currency’ requirement. This is the issue of how recent a subject’s activities must be to support a finding of probable cause that the subject is engaged in clandestine intelligence gathering activities. . . . While existing law does not specifically address ‘past activities,’ it does not preclude, and legislative history supports, the conclusion that past activities may be part of the totality of circumstances considered by the FISC in making a probable cause determination. . . . By definition, information collected pursuant to a court order issued under the Foreign Intelligence Surveillance Act is foreign intelligence not law enforcement information. Accordingly, the Committee wants to clarify that the FISA ‘take’ can and must be shared by the Federal Bureau of Investigation with appropriate intelligence agencies. For the intelligence mission of the United States to be successful, there must be a cooperative and concerted effort among intelligence agencies. Any information collected by one agency under foreign intelligence authorities that could assist another agency in executing its lawful mission should be shared fully and promptly. Only then can the United States Government pursue aggressively important national security targets including, for example, counterterrorist and counternarcotics targets”;


38 “When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevance, an additional factual showing that the communications device has been used to contact an ‘agent of a foreign power’ engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the ‘agent of a foreign power’ prong from the predication, and thus makes the FISA authority more closely track the criminal authority,” DoJ at §155.
2709(b), and under the Right to Financial Privacy Act, 12 U.S.C. 3414(a)(5)(A), as well as the Fair Credit Reporting Act, 15 U.S.C. 1681u.\textsuperscript{39}

Section 214 adjusts the language of the FISA pen register-trap and trace authority to permit its use to capture source and destination information relating to electronic communications (\textit{e.g.}, e-mail) as well as telephone communications, 50 U.S.C. 1842(d). The section makes it clear that requests for a FISA pen register-trap and trace order, like requests for other FISA orders, directed against Americans (U.S. persons) may not be based solely on activities protected by the First Amendment, 50 U.S.C. 1842, 1843.

\textbf{Third Party Cooperation and Tangible Evidence.} As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target's activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.\textsuperscript{40}

\textsuperscript{39} Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise to be entitled to confidentiality. Section 505, in response to the Justice Department's suggestion, allows FBI field offices to make the requests, \textit{see DoJ} at §157 ("At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports").

\textsuperscript{40} When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court’s order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.’ This would enhance the FBI’s ability to monitor international terrorists and intelligence officers who are
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian. The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities, in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B);
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a);
- the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a);
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v;

trained to thwart surveillance by rapidly changing hotel accommodations, cell phones, Internet accounts, etc., just prior to important meetings or communications. Under the current law, the government would have to return to the FISA Court for an order that named the new carrier, landlord, etc., before effecting surveillance. Under the proposed amendment, the FBI could simply present the newly discovered carrier, landlord, custodian or other person with a generic order issued by the Court and could then effect FISA coverage as soon as technically feasible,” DoJ at 152.


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41 “The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigative contexts. The time and difficulty involved in getting such pleadings before the Court usually outweights the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” DoJ at §156.

42 Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.\(^{43}\)

**Access to Law Enforcement Information.** Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community’s access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, *Draft* at §103.\(^{44}\)

\(^{43}\) H.R.Rep.No. 107-205, at 60-1 (2001) (“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

“The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

“Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual’s credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding—without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information”.

\(^{44}\) See also, *DoJ* at §103, “This section facilitates the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, Draft at §354.\textsuperscript{45}

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, Draft at §154.\textsuperscript{46}

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion.\textsuperscript{47} It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions.”

\textsuperscript{45} See also, DoJ at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.”

Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officers.

\textsuperscript{46} See also, DoJ at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”

\textsuperscript{47} Blair v. United States, 250 U.S. 273, 281 (1919)(the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
affairs are conducted in private and outside the presence of the court. Only the 
attorney for the government, witnesses under examination, and a court reporter may 
attend its proceedings, F.R.Crim.P. 6(d). Matters occurring before the grand jury are 
secret and may be disclosed by the attending attorney for the government and those 
assisting the grand jury only in the performance of their duties; in presentation to a 
successor grand jury; or under court order for judicial proceedings, for inquiry into 
misconduct before the grand jury, or for state criminal proceedings, F.R.Crim.P. 6(e).

The Act, in section 203(a), allows disclosure of matters occurring before the 
grand jury to “any federal law enforcement, intelligence, protective, immigration, 
national defense, or national security” officer to assist in the performance of his 

Critics may protest that the change could lead to the use of the grand jury for 
intelligence gathering purposes, or less euphemistically, to spy on Americans. 49 The 
proposal was never among those scheduled to sunset, but earlier versions of the 
section followed the path used for most other disclosures of grand jury material: prior

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48 These officers may receive: (1) “foreign intelligence information” that is, information 
regardless whether it involves Americans or foreign nationals that “[a] relates to the ability 
of the United States to protect against – (aa) actual or potential attack or other grave hostile 
acts of a foreign power or an agent of a foreign power; (bb) sabotage or international 
terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence 
activities by an intelligence service or network of a foreign power;” or [b] “with respect to a 
foreign power or foreign territory that relates to – (aa) the national defense or security of the 
United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 
6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that 
is, [a] “information relating to the capabilities, intentions, or activities of foreign governments 
or elements thereof, foreign organizations, or foreign persons, or international terrorist 
activities” or [b] “information gathered and activities conducted, to protect against espionage, 
other intelligence activities, sabotage, or assassinations conducted on behalf of foreign 
governments or elements thereof, foreign organizations, or foreign persons, or international 

49 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on 
Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25 
HARVARD JOURNAL OF LAW & PUBLIC POLICY 699, 719-20 (2002)(“There is a significant 
danger that the rule permitting disclosure will be treated as the de facto authorization of an 
expansion of the grand jury’s investigative role to encompass seeking material relevant only 
to matters of national security, national defense, immigration, and so forth. The grand jury’s 
awesome powers should not be unwittingly extended to a much wider range of issues. . . 
Since the grand jury operates in secret, there are no public checks on the scope of its 
investigations, and witnesses are not permitted to challenge its jurisdiction. Only the 
supervising court is in a position to keep the grand jury’s investigation within proper bounds. 
Requiring judicial approval of foreign intelligence and counterintelligence information 
disclosures would provide a natural check against the temptation to manipulate the grand jury 
to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist 
Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6 
(Nov. 2001)(“The grand jury secrecy rule is a rule of policy which has always had exceptions, 
and it has been frequently modified. The secrecy rule has no credible claim to constitutional 
stature”).
Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

Law enforcement officials may share Title III information with the intelligence community under the same conditions, section 203(b), although the grand jury and Title III sharing provisions differ in at least three important respects. The court need not be notified of Title III disclosures. On the other hand, the authority for sharing Title III information expires on December 31, 2005, section 224, and agencies and their personnel guilty of intentional improper disclosures may be subject to a claim for damages and disciplinary action, 18 U.S.C. 2520.

The third subsection of section 203 remains something of an enigma. It speaks in much the same language as its counterparts. It allows law enforcement officials to share information with the intelligence community, “notwithstanding any other provisions of law,” section 203(d). It either swallows the other subsections, or supplements them. Several factors argue for its classification as a supplement. Congress is unlikely to have crafted subsections (a), (b) and (c) only to completely

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50 Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

51 “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification. By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

Increasing Institutional Capacity. As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a

52 Duncan v. Walker, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted) (“It is our duty to give effect, if possible, to every clause and word of a statute. United States v. Menasche, 348 U.S. 528, 538-539 (1955) (quoting Montclair v. Ramsdell, 107 U.S. 147, 152 (1883)); see also Williams v. Taylor, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); Market Co. v. Hoffman, 101 U.S. 112, 115 (1879)(As early as in Bacon's Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

53 Draft at §154, “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”
computerized translation capability to be used in foreign intelligence gathering.\textsuperscript{54} Section 907 instructs the Director of the Central Intelligence, in consultation with the Director of the FBI, to report on the creation of a National Virtual Translation Center. The report is to include information concerning staffing, allocation of resources, compatibility with comparable systems to be used for law enforcement purposes, and features which permit its efficient and secure use by all of the intelligence agencies.

**Money Laundering**

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture.\textsuperscript{55} The Act bolsters federal efforts in each area.

**Regulation.** Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.\textsuperscript{56}

\textsuperscript{54} “The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

“The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so,” S.Rep.No. 107-63, at 11 (2001).


\textsuperscript{56} See e.g., 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
**Records and Reports.** For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler’s checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to file SARs as well, reflecting Congress’ view that the information provided the IRS may be valuable for other law enforcement purposes. This concern is likewise

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58 H.R.Rep.No. 107-250, at 38-9 (2001) (“Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

“Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a ‘Safeguard Procedures Report’ which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

“While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement
reflected in section 357 which asks the Secretary of the Treasury to report on the Internal Revenue Service’s role in the administration of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311 et seq.), and what transfers of authority, if any, are appropriate.

Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action.59 Section 355 expands the immunity to cover disclosures in

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authorities as the various reports mandated by the Bank Secrecy Act, which can typically be retrieved electronically from a database maintained by the Treasury Department. The differential access to the two kinds of reports is made anomalous by the fact that Form 8300 elicits much the same information that is required to be disclosed by the Bank Secrecy Act. For example, just as Form 8300 seeks the name, address, and social security number of a customer who engages in a cash transaction exceeding $10,000 with a trade or business, Currency Transaction Reports (CTRs) mandated by the Bank Secrecy Act require the same information to be reported on a cash transaction exceeding $10,000 between a financial institution and its customer”.

59 “Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

“First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor from civil liability applies in arbitration, as well as judicial, proceedings. Second, it amends section 5318(g)(3) to clarify the safe harbor’s coverage of voluntary disclosures (that is, those not covered by the SAR regulatory reporting requirement). The language in section 5318(g)(3)(A) providing that ‘any financial institution that *** makes a disclosure pursuant to *** any other authority *** shall not be liable to any person’ is not intended to avoid the application of the reporting and disclosure provisions of the Federal securities laws to any person, or to insulate any issuers from private rights of actions for disclosures made under the Federal securities laws.

“Subsection [351](b) amends section 5318(g)(2) of title 31--which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed--to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee’s official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
potential wrongdoing was also reported in a SAR,” H.R.Rep.No. 107-250, at 66 (2001).

The Financial Crimes Enforcement Network (FinCEN), a component within the Treasury Department long responsible for these anti-money laundering reporting and record-keeping requirements, 31 C.F.R. pt. 103, was administratively created in 1990 to provide other government agencies with an “intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes,” 55 Fed.Reg. 18433 (May 2, 1990).

The Act, in section 361, makes FinCEN a creature of statute, a bureau within the Treasury Department, 31 U.S.C. 310. Section 362 charges it with the responsibility of establishing a highly secure network to allow financial institutions to file required reports electronically and to permit FinCEN to provide those institutions with alerts and other information concerning money laundering protective measures, 31 U.S.C. 310 note.

**Special Measures.** In extraordinary circumstances involving international financial matters, the Act grants the Secretary of the Treasury, in consultation with other appropriate regulatory authorities, the power to issue regulations and orders involving additional required “special measures” and additional “due diligence” requirements to combat money laundering. The special measure authority, available under section 311, comes to life with the determination that particular institutions, jurisdictions, types of accounts, or types of transactions pose a primary money

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60 31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 67 (2001).
laundry concern. These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’ including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate
business transactions.

"Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

"Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

"The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

"The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

"The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

"The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information that it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

"The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

"The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed
Due Diligence. Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.63

63 See generally, H.R.Rep. No. 107-250, at 71-2 (“Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

“The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

“The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

“For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
General Regulatory Matters. The Act establishes several other regulatory mechanisms directed at the activities involving U.S. financial institutions and foreign individuals or institutions. Section 313, for instance, in another restriction on correspondent accounts for foreign financial institutions, prohibits U.S. financial institutions from maintaining correspondent accounts either directly or indirectly for foreign shell banks (banks with no physical place of business) which have no affiliation with any financial institution through which their banking activities are subject to regulatory supervision.

The Act, in section 325, empowers the Secretary of the Treasury to promulgate regulations to prevent financial institutions from allowing their customers to conceal their financial activities by taking advantage of the institutions’ concentration account practices.

The Secretary of the Treasury is instructed in section 326 to issue regulations for financial institutions’ minimum new customer identification standards and record-
keeping and to recommend a means to effectively verify the identification of foreign customers.\textsuperscript{67}

\textsuperscript{67} 31 U.S.C. 5318(l); H.R.Rep.No. 107-250, at 62-3 (2001) ("Section [326](a) amends 31 U.S.C. 5318 by adding a new subsection governing the identification of account holders. Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing 'customers' in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined 'customers' and 'customer relationship' for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a 'street name' or omnibus account in the broker-dealer's name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to 'look through' the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund's customers. Thus, the fund would not be required to 'look through' the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature. 68

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

Reports to Congress. Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.  

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

**International Cooperation.** Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (*i.e.*, the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.

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70 H.R.Rep.No. 107-250, at 67 (2001)(“This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury's progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

“The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime”).
**Crimes.** Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

> This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, smuggling, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
expands 18 U.S.C. 1956 to cover financial transactions conducted in foreign financial institutions.\textsuperscript{71}

Section 329 makes it a federal crime to corruptly administer the money laundering regulatory scheme. Offenders are punishable by imprisonment for not more than 15 years and a fine of not more than three times the amount of the bribe.

Section 5326 of title 31 authorizes the Secretary of the Treasury to impose temporary, enhanced reporting requirements upon financial institutions in areas victimized by substantial money laundering activity (geographic targeting regulations and orders). Section 353 makes it clear that the civil sanctions, criminal penalties, and prohibitions on smurfing (structuring transactions to evade reporting requirements) apply to violations of the regulations and orders issued under 31 U.S.C. 5326.\textsuperscript{72} It also extends the permissible length of the temporary geographical orders from 60 to 180 days.

Violations of the special measures and special due diligence requirements of sections 311 and 312 are subject to both civil and criminal penalties by virtue of section 363's amendments to 31 U.S.C. 5321(a) and 5322. The amendments authorize civil penalties and criminal fines of twice the amount of the transaction but not more than $1 million. Criminal offenders would be subject to a fine in the same amount.

\textsuperscript{71} “[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

“The definition of ‘financial institution’ in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of ‘commercial bank’ or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad--say to a Mexican bank--and launders them through a series of financial transactions, the government conceivably could not rely on the definition of a ‘financial institution’ in 1956(c)(6) to establish that the transaction was a ‘financial transaction’ within the meaning of 1956(c)(4)(B) (defining a ‘financial transaction’ as a transaction involving the use of a ‘financial institution’), or that it was a ‘monetary transaction’ within the meaning of 1957(f) (defining ‘monetary transaction’ as, inter alia, a transaction that would be a ‘financial transaction’ under 1956(c)(4)(B)).

“Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launders the proceeds of one of the crimes set forth on a list of ‘specified unlawful activities.’ 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),” H.R.Rep.No. 107-250, at 38 (2000).

Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.73

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents.74 They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

73 “The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business.

“Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.

“Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive,” H.R.Rep.No. 107-250, at 54 (2001).

74 “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
• 18 U.S.C. 476 (taking impressions of tools used for obligations and securities) from 10 to 25 years;
• 18 U.S.C. 477 (possessing or selling impressions of tools used for obligations or securities) from 10 to 25 years;
• 18 U.S.C. 484 (connecting parts of different notes) from 5 to 10 years;
• 18 U.S.C. 493 (bonds and obligations of certain lending agencies) from 5 to 10 years;
• 18 U.S.C. 478 (foreign obligations or securities) from 5 to 20 years;
• 18 U.S.C. 479 (uttering counterfeit foreign obligations or securities) from 3 to 20 years;
• 18 U.S.C. 480 (possessing counterfeit foreign obligations or securities) from 1 to 20 years;
• 18 U.S.C. 481 (plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities) from 5 to 25 years;
• 18 U.S.C. 482 (foreign bank notes) from 2 to 20 years; and
• 18 U.S.C. 483 (uttering counterfeit foreign bank notes) from 1 to 20 years.

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

**Bulk Cash.** Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act’s bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting.75

The section appears to be the product of reactions to the Supreme Court’s decision in *United States v. Bajakian*, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court’s

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75 “For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).
As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency — representing the proceeds of drug trafficking and other criminal offenses — is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad.

Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United States without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

“Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute,” H.R.Rep.No. 107-250 at 36-7 (2001).

Section 5317 of title 31 once called for civil forfeiture of property traceable to a violation of 31 U.S.C. 5316 (reports on exporting or importing money instruments worth $10,000 or more). Section 372 of the Act recasts section 5317 to provide for civil and criminal forfeitures for violations of 31 U.S.C. 5316, of 31 U.S.C. 5313 (reports on domestic coins and currency transactions involving $10,000 or more) and of 31 U.S.C. 5324 (structuring transactions to evade reporting requirements (smurfing)).

Extraterritorial Jurisdiction. The Act makes 18 U.S.C. 1029, the federal statute condemning various crimes involving credit cards, PIN numbers and other access devices, applicable overseas if the card or device is issued by or controlled by an American bank or other entity and some article is held in or transported to or through the United States during the course of the offense, section 377. The change was part of the original Justice Department proposals. Justice explained that, “[financial crime[] admits of no border, utilizing the integrated global financial network for ill purposes. This provision would apply the financial crimes prohibitions to conduct committed abroad, so long as the tools or proceeds of the crimes pass through or are in the United States,” DoJ at §408. The section, however, appears to limit the otherwise applicable extraterritorial jurisdiction implicit in section 1029, since federal courts would likely recognize extraterritorial jurisdiction over a violation of the new statute.

76 “As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency — representing the proceeds of drug trafficking and other criminal offenses — is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad. . . .
under either circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.  

**Venue.** Section 1004 relies on *dicta* in *United States v. Cabrales*, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering, in the state and district in which the monetary transaction takes place. The Supreme Court in *Cabrales* held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in *dicta*, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.

**Forfeiture.** Forfeiture is the government confiscation of property as a consequence of crime. The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 *et seq.* (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

**Constitutional Considerations.** The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 *et seq.*, which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the

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78 “The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.” *U.S.Const.* Art.III, §2, cl.3.

“[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,” *U.S.Const.* Amend. VI.

79 See also, *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnapping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.

80 For general background information, see, Doyle, *Crime and Forfeiture*, CRS REP.NO. 97-139A (Oct. 11, 2000).
This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b) (TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App. U.S.C. §5(b).

This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress’s war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2), “DoJ at §159.

An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
excepted from the coverage of 18 U.S.C. 983. The challenge proceedings permit
the court to admit evidence, such as hearsay evidence, that would not otherwise be
admissible under the Federal Rules of Evidence if the evidence is reliable and if
national security might be imperiled should dictates of the Federal Rules be followed,
§316(b). The section recognizes the rights of claimants to proceed alternatively
under the Constitution or the Administrative Procedure Act.

The Justice Department also recommended enactment of an overlapping
 provision which ultimately passed as section 806 of the Act without any real
discussion of the relationship of the two sections. Section 806 authorizes
confiscation of all property, regardless of where it is found, of any individual, entity,
or organization engaged in domestic or international terrorism (as defined in 18
U.S.C. 2331), against the United States, Americans or their property, 18 U.S.C.

83 18 U.S.C. 983(i)(2)(D).
84 “The exclusion of certain provisions of Federal law from the definition of the term ‘civil
forfeiture statute’ in section 983(i) of title 18, United States Code, shall not be construed to
deny an owner of property the right to contest the confiscation of assets of suspected
international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C)
subchapter II of chapter 5 of title 5, United States Code (commonly known as the
‘Administrative Procedure Act”).” Sec. 316(c)(1).
85 “Current law does not contain any authority tailored specifically to the confiscation of
terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for
the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of
such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available
current forfeiture laws require detailed tracing that is quite difficult for accounts coming
through the banks of countries used by many terrorists.

‘This section increases the government's ability to strike at terrorist organizations' economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001,” DoJ, at §403. The House Report on H.R. 2975 which contained versions of both sections is no more explicit on the relation of the two sections.

86 “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
981(a)(1)(G). Section 806 as discussed below also calls for the more common confiscation of property derived from and or facilitating acts of domestic or international terrorism against the United States or its citizens. Confiscations under 806 may be challenged under the procedures of 18 U.S.C. 983, since they are not exempted there. To the extent that forfeiture under section 806 is based on international rather than domestic terrorism, claimants may also use the procedures of section 316.

Confiscation based solely on the fact that the property is owned by a criminal offender, rather than that it is derived from or facilitates some crime is fairly uncommon. It is the mark of common law forfeiture of estate. At common law, a felon forfeited all of his property. Most contemporary forfeiture statutes employ statutory forfeiture, a more familiar presence in American law, which consists of the confiscation of things whose possession is criminal, of the fruits of crime, and of the means of crime – untaxed whiskey, the drug dealer’s profits, and the rum runner’s ship.

Three characteristics set forfeiture of estate apart. The property is lost solely by reason of its ownership by a felon. All of a felon’s property is confiscated, not merely that which is related to the crime for which he is convicted. Finally, it occasions attainder which negates the felon’s right to hold property or for title to property to pass through him to his heirs. It was with this in mind, that the Framers declared that “no attainder of treason shall work corruption of blood or forfeiture exception during the life of the person attainted.” And for this reason, President Lincoln insisted that the confiscated real estate of Confederate supporters should revert their heirs at death.

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87 Austin v. United States, 509 U.S. 602, 611-12 (1993)(“Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture . . . . Of England’s three kinds of forfeiture, only the third took hold in the United States”).


89 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal in personam proceedings following criminal conviction as a means of accomplishing confiscation.
Neither section 106 nor 806 require conviction of the terrorist property owner. Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers. The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners. Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them. The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate

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90 Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c)(“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act”).

91 Silesian American Corp. V. Clark, 332 U.S. 469 (1947); cf., Societe Internationale v. Rogers, 357 U.S. 197, 211 (1958)(“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).

92 Zittman v. McGrath, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’”).

any presumption of remedial purposes.\textsuperscript{94} The same has been said of the applicability of the ex post facto clause.\textsuperscript{95}

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO.\textsuperscript{96} If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

\textbf{Other Forfeiture Amendments.} In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.\textsuperscript{97}


\textsuperscript{95} See e.g., \textit{United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.)}, 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, \textit{Landgraf v. USI Film Products}, 511 U.S. 244, 265-66 (1994).

\textsuperscript{96} \textit{DoJ}, at §403.

\textsuperscript{97} 18 U.S.C. 1956(b). \textit{Cf.}, H.R.Rep.No. 107-250, at 54-5 (2001)(“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in \textit{United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas.98 Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted

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98 18 U.S.C. 981(k). H.R.Rep. No. 107-250, at 57-8 (2001)(“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank’s customers.

“Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank’s correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

“The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”).
defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation.99

Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here.100 Section 320 enlarges this provision to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements.101 This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act.

99 C.f., H.R.Rep.No. 107-250, at 58-9 (2001) (“Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of ‘substitute assets’ when the defendant has placed the property otherwise subject to forfeiture ‘beyond the jurisdiction of the court.’ Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

“This section amends 21 U.S.C. 853 to make clear that a court in a criminal case may issue a repatriation order--either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. 853(e) to restrain property--so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both”).


101 H.R.Rep.No. 107-250, at 56 (2001) (“This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act”).

102 H.R.Rep.No. 107-250, at 59-60 (2001) (“Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country.

“Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
A fugitive may not challenge a federal forfeiture. Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in “order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.”

to contest the restraining order could do so on the ground that 28 U.S.C. 2467 was not properly applied to the particular case, but could not oppose the restraining order on any ground that could also be raised in the proceedings pending in a foreign court. This provision prevents a litigant from taking ‘two bites at the apple’ by raising objections to the basis for the forfeiture in the Federal court that he also raised, or is entitled to raise, in the foreign court where the forfeiture action is pending. It complements the existing provision in section 2467(e) providing that the Federal court is bound by the findings of fact of the foreign court, and may not look behind such findings in determining whether to enter an order enforcing a foreign forfeiture judgment.

“This section also amends 28 U.S.C. 2467 to make clear that it is not necessary to prove that the person asserting an interest in the property received actual notice of the forfeiture proceedings. As is the case with respect to forfeitures under U.S. law, it is sufficient if the foreign nation takes steps to provide notice, in accordance with the principles of due process. See Gonzalez v. United States, 1997 WL 278123 (S.D.N.Y. 1997) (‘the [G]overnment is not required to ensure actual receipt of notice that is properly mailed’); Albajon v. Gugliotta , 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant’s identifications, and mailed after claimant released from jail, is sufficient to satisfy due process, even if claimant never received notice); United States v. Schiavo , 897 F. Supp. 644, 648 49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; due process satisfied even if he did not receive the notice).

“Finally, 28 U.S.C. 2467 is amended to authorize the enforcement of a forfeiture judgment based on any foreign offense that would constitute an offense giving rise to a civil or criminal forfeiture of the same property if the offense had been committed in the United States. This is one of two safeguards that the statute contains against the enforcement of judgments that the United States does not consider appropriate for enforcement: if the judgment is based on an act that would not constitute a crime in the United States, such as removing assets from the reach of a repressive regime, it could not be enforced. In addition, section 2467 already provides that a foreign judgment may only be enforced by a Federal court at the request of the United States, and only after the Attorney General has certified that the judgment was obtained in accordance with the principles of due process. Thus, neither a foreign Government nor a foreign private party could enforce a foreign judgment on its own under this provision.”). Note that the safeguard to which the report refers is the range of foreign offenses that will support an enforceable confiscation order, i.e., drug offenses and crimes on the money laundering predicate offense list, and that the amendment narrows that safeguard by adding additional foreign offenses, i.e., any foreign equivalent of a federal crime which would support a confiscation order.

**Alien Terrorists and Victims**

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

**Border Protection.** The border protection provisions:

- authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401

- authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402

- remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404

- authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405

- authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.

- instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007

- direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418

- express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414

- add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415

- call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416

- limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
• instruct the Attorney General to report on the feasibility of using biometric scanners to help prevent terrorists and other foreign criminals from entering the country, section 1008 \(^{104}\)

• authorize appropriations of $250,000 for the FBI to determine the feasibility of providing airlines with computer access to the names of suspected terrorists, section 1009

• authorize reciprocal sharing of the State Department’s visa lookout data and related information with other nations in order to prevent terrorism, drug trafficking, slave marketing, and gun running, section 413

**Detention and Removal.** Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity, 8 U.S.C. 1227 (a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(iv). Aliens may be inadmissible for any number of terrorism-related reasons, 8 U.S.C. 1182 (a)(3)(B). Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported.


Section 411 defines “terrorist organization” to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the Federal Register as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C.

\(^{104}\) As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).
Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).

Prior law made representatives of terrorist organizations designated by the Secretary under section 219 (8 U.S.C. 1189) inadmissible, 8 U.S.C. 1182(a)(3)(B)(i)(IV)(2000 ed.). And so they remain. Section 411 makes representatives of political, social or similar groups, whose public endorsements of terrorist activities undermines U.S. efforts to reduce or eliminate terrorism, inadmissible as well, 8 U.S.C. 1882(a)(3) (B)(i)(IV).

An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in “premeditated, politically motivated violence perpetrated against noncombatant targets,” or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security or endanger some individual or the general public. The Attorney General's determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

**Victims.** The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

- permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421\(^{105}\)
- extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422\(^{106}\)

\(^{105}\) “The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

\(^{106}\) “The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks.

“The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application.

“Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
• preservation of certain immigration benefits available to alien family members that would be otherwise lost as a consequence of the death of a victim of September 11, section 423

• limited easing of age restrictions on visas available to aliens under 21 years of age for those whose 21st birthday occurred immediately before or soon after September 11, section 424

• temporary administrative relief for alien family members of a victim of September 11 who are not otherwise entitled to relief under the Act, section 425

the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

“Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 31.

“Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.


107 “Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

“The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

“The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death),” H.R.Rep.No. 107-236, at 68 (2001).

108 “Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien’s 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien’s 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
• a denial of benefits of the Act to terrorists and their families, section 427

• authority for the Attorney General to establish evidentiary standards to implement the alien victim provisions of the Act, section 426.

Other Crimes, Penalties, & Procedures

New Crimes. The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department, the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offense for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents, 18 U.S.C. 175b. Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.

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109 “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . . .” DoJ at §305.

110 The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175(b)(2).

111 “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2)(“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.\(^ {112} \)

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D). The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

112 U.S. Const. Art.III, §2, cl.3 (“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . .”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . .”); United States v. Cabrales, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from Cabrales when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnapping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999)(“By way of comparison, last Term in [Cabrales] we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).
The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of ‘material support or resources’ is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’),” \textit{DoJ}, at §304.

And it adds expert advice or assistance to the types of assistance that may not be provided under section 2339A. This last addition may encounter the same First Amendment vagueness problems some courts have found in assistance which takes the form of “training” and “personnel,” \textit{Humanitarian Law Project v. Reno}, 205 F.3d 1130, 1137-136 (9th Cir. 2000). Finally, the section announces that a prosecution for violation of section 2339A (support of terrorists) may be brought where the support is provided or where the predicate act of terrorism occurs. There may be some question whether the Constitution permits prosecution where the predicate act occurs.\textsuperscript{114}

Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.\textsuperscript{115}

Prior law, 18 U.S.C. 2325-2327, outlawed violation of Federal Trade Commission (FTC) telemarketing regulations promulgated under 15 U.S.C. 6101 \textit{et seq}. Section 1011 of the Act brings fraudulent charitable solicitations within the FTC’s regulatory authority.\textsuperscript{116}

\textsuperscript{113} The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of ‘material support or resources’ is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’),” \textit{DoJ} at 306.


\textsuperscript{115} “The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill (‘Federal terrorism offenses’) is used in identifying the relevant crimes,” \textit{DoJ}, at §304.

New Penalties. The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. §3571(b),(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense.\textsuperscript{117}

The proposal, however, failed to identify the critical elements that would trigger the alternative.\textsuperscript{118} Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

- for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

- for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

\textsuperscript{117} “Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersede lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,” DoJ, at §302.

\textsuperscript{118} “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense,” Draft at §302.
The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object of offense – see e.g., 21 U.S.C. §846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.

- for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;

- for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;

- for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;

- for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and

- for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism. Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:

- arson committed within a federal enclave, 18 U.S.C. 81;
- killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);
- destruction of communications facilities, 18 U.S.C. 1362;
- destruction of property within a federal enclave, 18 U.S.C. 1363;
- causing a train wreck, 18 U.S.C. 1922;
- providing material support to a terrorist, 18 U.S.C. 2339A;
- torture committed overseas under color of law, 18 U.S.C. 2340A;
- sabotage of a nuclear facility, 42 U.S.C. 2284;
When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years). The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission), a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

120 Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

121 “Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.

“This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders).

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

Other Procedural Adjustments. In other procedural adjustments designed to facilitate criminal investigations, the Act:

• increases the rewards for information in terrorism cases
• expands the Posse Comitatus Act exceptions
• authorizes “sneak and peek” search warrants
• permits nationwide and perhaps worldwide execution of warrants in terrorism cases
• eases government access to confidential information
• allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
• lengthens the statute of limitations applicable to crimes of terrorism
• clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
• adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B.

122 It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, e.g., damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

123 When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001)(remarks of Rep. Sensenbrenner); for general background, see, Doyle, McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys, CRS Rep.No. RL30060 (Dec. 14, 2001).
Rewards. The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L. 105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism.124

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

Posse Comitatus. The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.125

Delayed notification of a search (sneak and peek). Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take

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124 The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct threat assessments for federal agencies, and to reimburse federal agencies for the costs of detaining terrorist suspects overseas.

125 For a general discussion of the Posse Comitatus Act, see, Doyle, The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law, CRS REP.NO. 95-964 (June 1, 2000).
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, Richards v. Wisconsin, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, Wilson v. Arkansas, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, Dalia v. United States, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, cf., United States v. Miller, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, United States v. Freitas, 800 F.2d 1451, 1453 (9th Cir. 1986). 126

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126 The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in United States v. New York Telephone Co., 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth
Amendment, demands that surreptitious entries be closely circumscribed,” United States v. Freitas (Freitas I), 800 F.2d 1451, 1455-456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, United States v. Freitas (Freitas II), 856 F.2d 1425 (9th Cir. 1988).

127 “No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in Dalia v. United States, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in Dalia, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property. . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. See United States v. New York Telephone Co., 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . . Although the Freitas I court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in United States v. Villegas, 899 F.2d 1324 (1999). Although the Freitas I court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in Villegas. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the Freitas I court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” United States v. Pangburn, 983 F.2d 449, 453-55 (2d Cir. 1993).

128 In Simons, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
The Justice Department urged that the conflict be resolved with a uniform rule which permitted sneak and peek warrants under the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage.¹²⁹

The Act, in section 213, stops short of the Justice Department proposal. Characterized as a codification of the Second Circuit decision, 147 Cong.Rec. H7197 (daily ed. Oct. 23, 2001), the Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C. 3103a. Its sneak and peek authorization reaches all federal search and seizure warrants where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (e.g., risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (e.g., jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, i.e., in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation.¹³⁰ The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

¹²⁹ The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities,” DoJ at §353.

¹³⁰ Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department’s initial proposal, the Department’s justification does not address the question.
constitutionally “reasonable,” that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

**Nationwide terrorism search warrants.** The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either “within or outside the district,” (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases. The provision may anticipate execution both in this country and overseas. The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage. Neither Rule 41 nor any other provision of federal

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131 The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

132 The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

133 *United States v. Barona*, 56 F.3d 1087, 1092 (9th Cir. 1995)(“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994)(“if American law enforcement officials substantially participated in the search or if the
law apparently contemplated extraterritorial execution, cf., F.R.Crim.P.41, *Advisory Committee Notes: 1990 Amendment* (discussing a proposal for extraterritorial execution that the Supreme Court rejected). 134

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” F.R.Crim.P. 41, *Advisory Committee Notes: 1990 Amendment*. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

**Terrorists’ DNA.** The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards *per se*. 135 Existing federal law allowed the Attorney General to collect samples from foreign officials conducting the search were actually acting as agents for their American counterparts”); *United States v. Maturo*, 982 F.2d 57, 61 (2d Cir. 1992)(“where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials” or “where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials”); *United States v. Mitro*, 880 F.2d 1480, 1482 (1st Cir. 1989)(“where American agents participated in the foreign search or the foreign officers acted as agents for their American counterparts”); *United States v. Mount*, 757 F.2d 1315, 1318 (D.C.Cir. 1985)(“if American officials or officers participated in some significant way”); *United States v. Marzano*, 537 F.2d 257, 270 (7th Cir. 1976)(declining to adopt the “joint venture” standards, but finding level of American participation in the case before it insignificant); *United States v. Morrow*, 537 F.2d 120, 139 (5th Cir. 1976)(“if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts”); each of the decisions also suggests that evidence secured in a manner which shocked the conscience of the court would be excluded.

The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, see, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), reprinted, 78 Cong.Rec. 4982-983 (1934)(“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.)(conferring judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples form convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes,” DoJ at §353.

For a general discussion, see, Fischer, DNA Identification: Applications and Issues, CRS REP.NO. RL30717 (Jan. 12, 2001).

Access to Educational Records. Finally, the Act calls for an ex parte court order procedure under which senior Justice Department officials may seek authorization to collect educational records relevant to an investigation or prosecution of a crime of terrorism, section 507 (as an exception to the confidentiality requirements of the General Education Provisions Act, 20 U.S.C. 1232g), section 508 (as an exception to the confidentiality requirements of the National Education Statistics Act, 20 U.S.C. 9007).

Statute of Limitations. Prosecution for murder in violation of federal law may be initiated at any time, 18 U.S.C. 3281. A five year statute of limitations applied for most other federal crimes before passage of the Act, with a few exceptions. Among the relevant exceptions were an eight year statute of limitations for several terrorist offenses, 18 U.S.C. 3286, and a ten year statute of limitations for a few arson and explosives offenses, 18 U.S.C. 3295. The Justice Department recommended the elimination of a statute of limitations in terrorism cases.

This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

For a general discussion, see, Fischer, DNA Identification: Applications and Issues, CRS REP.NO. RL30717 (Jan. 12, 2001).
The Act takes less dramatic action in section 809. It eliminates the statute of limitations for any crime of terrorism that risks or results in a death or serious bodily injury, 18 U.S.C. 3286. In the absence of such a risk or result, all other terrorism offenses become subject to the eight year statute of limitations unless already covered by the ten year statute for explosives and arson offenses, 18 U.S.C. 3286.

Application of the statute of limitations rarely provokes a constitutional inquiry. Nevertheless, due process precludes prosecution when it can be shown that pre-indictment delay “caused substantial prejudice to [a defendant’s] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.” Moreover, a judicial difference of opinion has appeared in those cases

connection with the September 11, 2001 terrorist attacks. The constitutionality of such retroactive applications of changes in statutes of limitations is well-settled, See, e.g., United States v. Grimes, 142 F.3d 1342, 1350-51 (11th Cir. 1998); People v. Frazer, 982 P.2d 180 (Cal. 1999).

“Existing federal law (18 U.S.C. §3282) bars prosecuting most offenses after five years. 18 U.S.C. §3286, as currently formulated, extends the limitation period for prosecution for certain offenses that may be committed by terrorists – but only to eight years. While this is a limited improvement over the five-year limitation period for most federal offenses, it is patently inadequate in relation to the catastrophic human and social costs that frequently follow from such crimes as destruction of aircraft (18 U.S.C. §32), aircraft hijackings ([49] U.S.C. §§46502, 46504-06, attempted political assassinations (18 U.S.C. §§351, 1116, 1751), or hostage taking (18 U.S.C. §1203). These are not minor acts of misconduct which can properly be forgiven or forgotten merely because the perpetrator has avoided apprehension for some period of time. Anomalously, existing law provides longer limitation periods for such offenses as bank frauds and certain artwork thefts (18 U.S.C.§§3293-94) than it does for crimes characteristically committed by terrorists.

“In many American jurisdictions, the limitation periods for prosecution for serious offenses are more permissible than those found in federal law, including a number of states which have no limitation period for the prosecution of felonies generally. While this section does not go so far, it does eliminate the limitation period for prosecution of the major crimes that are most likely to be committed by terrorists (‘Federal terrorism offenses’), as specified in section 309 of this bill,” DoJ at 301.

As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 (sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period.\textsuperscript{141} Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.\textsuperscript{142}

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (\textit{Grimes}, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (\textit{Frazer}, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

\textbf{Extraterritoriality.} Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States or elsewhere. . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.\textsuperscript{143}

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnaping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.

\begin{footnotes}
\item[141] \textit{United States v. De La Matta}, 266 F.3d 1275, 1286 (11\textsuperscript{th} Cir. 2001); \textit{United States v. Grimes}, 142 F.3d 1342, 1351 (11\textsuperscript{th} Cir. 1998); \textit{United States v. Morrow}, 177 F.3d 272, 294 (5\textsuperscript{th} Cir. 1999); \textit{Falter v. United States}, 23 F.2d 420, 425-26 (2d Cir. 1928).


\item[143] \textit{United States v. Layton}, 855 F.2d 1388 (9\textsuperscript{th} Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); \textit{United States v. Benítez}, 741 F.2d 1312 (11\textsuperscript{th} Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).
\end{footnotes}
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.144

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

Victims. Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11th Victim Compensation Fund legislation before it passed the Act. Consequently, the Act’s victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 et seq., and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 et seq.

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilians capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:

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• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year) (42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d)(5)), section 621(d)

• waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

• eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
• makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

• prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

• allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

• reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

• makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

• allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

• establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

**Increasing Institutional Capacity.** A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

- $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)
- necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)
- $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)
- $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816
- $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701
- $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)
- $5 million for DEA police training in South and Central Asia, section 1007.

**Miscellaneous.** Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might to used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act, or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b), 807.146

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145 *I.e.*, Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).

Section 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

The definition of ‘financial institution’ in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of ‘commercial bank’ or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad—say to a Mexican bank—and launders them through a series of financial transactions, the government conceivably could not rely on the definition of a ‘financial institution’ in 1956(c)(6) to establish that the transaction was a ‘financial transaction’ within the meaning of 1956(c)(4)(B) (defining a ‘financial transaction’ as a transaction involving the use of a ‘financial institution’), or that it was a ‘monetary transaction’ within the meaning of 1957(f) (defining ‘monetary transaction’ as, inter alia, a transaction that would be a ‘financial transaction’ under 1956(c)(4)(B)).

Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launders the proceeds of one of the crimes set forth on a list of ‘specified unlawful activities.’ 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),” H.R.Rep.No. 107-250, at 38 (2000).

71 “[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.73

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents.74 They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

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73 "The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business. “Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another. “Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive,” H.R.Rep.No. 107-250, at 54 (2001).

74 “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual, 31 U.S.C. 5332(a)(2).

- 18 U.S.C. 476 (taking impressions of tools used for obligations and securities) from 10 to 25 years;
- 18 U.S.C. 477 (possessing or selling impressions of tools used for obligations or securities) from 10 to 25 years;
- 18 U.S.C. 484 (connecting parts of different notes) from 5 to 10 years;
- 18 U.S.C. 493 (bonds and obligations of certain lending agencies) from 5 to 10 years;
- 18 U.S.C. 478 (foreign obligations or securities) from 5 to 20 years;
- 18 U.S.C. 479 (uttering counterfeit foreign obligations or securities) from 3 to 20 years;
- 18 U.S.C. 480 (possessing counterfeit foreign obligations or securities) from 1 to 20 years;
- 18 U.S.C. 481 (plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities) from 5 to 25 years;
- 18 U.S.C. 482 (foreign bank notes) from 2 to 20 years; and
- 18 U.S.C. 483 (uttering counterfeit foreign bank notes) from 1 to 20 years.

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

**Bulk Cash.** Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act’s bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting. 75

The section appears to be the product of reactions to the Supreme Court’s decision in United States v. Bajakian, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court’s

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75 “For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).
As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency—representing the proceeds of drug trafficking and other criminal offenses—is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad.

Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United States without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

“Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute,” H.R.Rep.No. 107-250 at 36-7 (2001).

Extraterritorial Jurisdiction. The Act makes 18 U.S.C. 1029, the federal statute condemning various crimes involving credit cards, PIN numbers and other access devices, applicable overseas if the card or device is issued by or controlled by an American bank or other entity and some article is held in or transported to or through the United States during the course of the offense, section 377. The change was part of the original Justice Department proposals. Justice explained that, “[financial crime] admits of no border, utilizing the integrated global financial network for ill purposes. This provision would apply the financial crimes prohibitions to conduct committed abroad, so long as the tools or proceeds of the crimes pass through or are in the United States,” DoJ at §408. The section, however, appears to limit the otherwise applicable extraterritorial jurisdiction implicit in section 1029, since federal courts would likely recognize extraterritorial jurisdiction over a violation of the statute.

Section 5317 of title 31 once called for civil forfeiture of property traceable to a violation of 31 U.S.C. 5316 (reports on exporting or importing money instruments worth $10,000 or more). Section 372 of the Act recasts section 5317 to provide for civil and criminal forfeitures for violations of 31 U.S.C. 5316, of 31 U.S.C. 5313 (reports on domestic coins and currency transactions involving $10,000 or more) and of 31 U.S.C. 5324 (structuring transactions to evade reporting requirements (smurfing)).
under either circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.77

**Venue.** Section 1004 relies on *dicta* in *United States v. Cabrales*, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering,78 in the state and district in which the monetary transaction takes place. The Supreme Court in *Cabrales* held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in *dicta*, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.79

**Forfeiture.** Forfeiture is the government confiscation of property as a consequence of crime.80 The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 et seq. (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

**Constitutional Considerations.** The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 et seq., which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the

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78 “The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed,” *U.S.Const.* Art.III, §2, cl.3.

79 “[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,” *U.S.Const.* Amend. VI.

80 See also *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnaping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.

80 For general background information, see, Doyle, *Crime and Forfeiture*, CRS REP.NO. 97-139A (Oct. 11, 2000).
This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during times of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App.U.S.C. §5(b).

This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress's war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2),” DoJ at §159.

An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
excepted from the coverage of 18 U.S.C. 983. The challenge proceedings permit the court to admit evidence, such as hearsay evidence, that would not otherwise be admissible under the Federal Rules of Evidence if the evidence is reliable and if national security might be imperiled should dictates of the Federal Rules be followed, §316(b). The section recognizes the rights of claimants to proceed alternatively under the Constitution or the Administrative Procedure Act.

The Justice Department also recommended enactment of an overlapping provision which ultimately passed as section 806 of the Act without any real discussion of the relationship of the two sections. Section 806 authorizes confiscation of all property, regardless of where it is found, of any individual, entity, or organization engaged in domestic or international terrorism (as defined in 18 U.S.C. 2331), against the United States, Americans or their property, 18 U.S.C.

§316(b). The section recognizes the rights of claimants to proceed alternatively under the Constitution or the Administrative Procedure Act.

83 18 U.S.C. 983(i)(2)(D).

84 “The exclusion of certain provisions of Federal law from the definition of the term ‘civil forfeiture statute’ in section 983(i) of title 18, United States Code, shall not be construed to deny an owner of property the right to contest the confiscation of assets of suspected international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C) subchapter II of chapter 5 of title 5, United States Code (commonly known as the ‘Administrative Procedure Act’).” Sec. 316(c)(1).

85 “Current law does not contain any authority tailored specifically to the confiscation of terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available current forfeiture laws require detailed tracing that is quite difficult for accounts coming through the banks of countries used by many terrorists.

‘This section increases the government's ability to strike at terrorist organizations' economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001,’” DoJ, at §403. The House Report on H.R. 2975 which contained versions of both sections is no more explicit on the relation of the two sections.

86 “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5)(as amended by section 802 of the Act).

87 Austin v. United States, 509 U.S. 602, 611-12 (1993)(“Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture . . . of England’s three kinds of forfeiture, only the third took hold in the United States”).


89 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal in personam proceedings following criminal conviction as a means of accomplishing confiscation.
 Neither section 106 nor 806 require conviction of the terrorist property owner.\footnote{Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c)(“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act”).} Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers.\footnote{Silesian American Corp. V. Clark, 332 U.S. 469 (1947); cf., Societe Internationale v. Rogers, 357 U.S. 197, 211 (1958)(“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).} The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners.\footnote{Zittman v. McGrath, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’”).} Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them.\footnote{United States v. Bajakajian, 524 U.S. 321, 337 (1998); Austin v. United States, 509 U.S. 602, 622 (1993).} The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate
any presumption of remedial purposes.\textsuperscript{94} The same has been said of the applicability of the ex post facto clause.\textsuperscript{95}

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO.\textsuperscript{96} If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

\textit{Other Forfeiture Amendments.} In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.\textsuperscript{97}

\textsuperscript{94} United States v. Ursery, 518 U.S. 267, 278 (1996).

\textsuperscript{95} See e.g., United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.), 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994).

\textsuperscript{96} DoJ, at §403.

\textsuperscript{97} 18 U.S.C. 1956(b). Cf., H.R.Rep.No. 107-250, at 54-5 (2001)(“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas.\textsuperscript{98} Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted

\textsuperscript{98} 18 U.S.C. 981(k). H.R.Rep.No. 107-250, at 57-8 (2001)(“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank’s customers.

Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank’s correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”).
defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation.\textsuperscript{99}

Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here.\textsuperscript{100} Section 320 enlarges this provisions to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements.\textsuperscript{101} This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.\textsuperscript{102}

\textsuperscript{99} Cf., H.R.Rep.No. 107-250, at 58-9 (2001) (“Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of ‘substitute assets’ when the defendant has placed the property otherwise subject to forfeiture ‘beyond the jurisdiction of the court.’ Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

“This section amends 21 U.S.C. 853 to make clear that a court in a criminal case may issue a repatriation order--either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. 853(e) to restrain property--so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both”).

\textsuperscript{100} 18 U.S.C. 981(a)(1)(B).

\textsuperscript{101} H.R.Rep.No. 107-250, at 56 (2001)(“This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act”).

\textsuperscript{102} H.R.Rep.No. 107-250, at 59-60 (2001)(“Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country.

“Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
A fugitive may not challenge a federal forfeiture. Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in “order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.”

to contest the restraining order could do so on the ground that 28 U.S.C. 2467 was not properly applied to the particular case, but could not oppose the restraining order on any ground that could also be raised in the proceedings pending in a foreign court. This provision prevents a litigant from taking ‘two bites at the apple’ by raising objections to the basis for the forfeiture in the Federal court that he also raised, or is entitled to raise, in the foreign court where the forfeiture action is pending. It complements the existing provision in section 2467(e) providing that the Federal court is bound by the findings of fact of the foreign court, and may not look behind such findings in determining whether to enter an order enforcing a foreign forfeiture judgment.

“This section also amends 28 U.S.C. 2467 to make clear that it is not necessary to prove that the person asserting an interest in the property received actual notice of the forfeiture proceedings. As is the case with respect to forfeitures under U.S. law, it is sufficient if the foreign nation takes steps to provide notice, in accordance with the principles of due process. See Gonzalez v. United States, 1997 WL 278123 (S.D.N.Y. 1997) (‘the [G]overnment is not required to ensure actual receipt of notice that is properly mailed’); Albajon v. Gugliotta, 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant’s identifications, and mailed after claimant released from jail, is sufficient to satisfy due process, even if claimant never received notice); United States v. Schiavo, 897 F. Supp. 644, 648 49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; due process satisfied even if he did not receive the notice).

“Finally, 28 U.S.C. 2467 is amended to authorize the enforcement of a forfeiture judgment based on any foreign offense that would constitute an offense giving rise to a civil or criminal forfeiture of the same property if the offense had been committed in the United States. This is one of two safeguards that the statute contains against the enforcement of judgments that the United States does not consider appropriate for enforcement: if the judgment is based on an act that would not constitute a crime in the United States, such as removing assets from the reach of a repressive regime, it could not be enforced. In addition, section 2467 already provides that a foreign judgment may only be enforced by a Federal court at the request of the United States, and only after the Attorney General has certified that the judgment was obtained in accordance with the principles of due process. Thus, neither a foreign Government nor a foreign private party could enforce a foreign judgment on its own under this provision.”). Note that the safeguard to which the report refers is the range of foreign offenses that will support an enforceable confiscation order, i.e., drug offenses and crimes on the money laundering predicate offense list, and that the amendment narrows that safeguard by adding additional foreign offenses, i.e., any foreign equivalent of a federal crime which would support a confiscation order.

Alien Terrorists and Victims

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

Border Protection. The border protection provisions:

• authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401

• authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402

• remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404

• authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405

• authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.

• instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007

• direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418

• express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414

• add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415

• call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416

• limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).
Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).


An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(vi), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in “premeditated, politically motivated violence perpetrated against noncombatant targets,” or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security or endanger some individual or the general public. The Attorney General's determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

VICTIMS. The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

- permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421
- extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422

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105 "The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

106 "The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks. The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application. "Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

“Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 31.

“Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.


107 “Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

“The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

“The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death),” H.R.Rep.No. 107-236, at 68 (2001).

108 “Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien’s 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien’s 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
• a denial of benefits of the Act to terrorists and their families, section 427

• authority for the Attorney General to establish evidentiary standards to implement the alien victim provisions of the Act, section 426.

Other Crimes, Penalties, & Procedures

New Crimes. The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department, the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offenses for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents, 18 U.S.C. 175b. Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.

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109 “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . . .” DoJ at §305.

110 The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

111 “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2)(“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.112

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D). The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

112 U.S.Const. Art.III, §2, cl.3 (“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . . .”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . . .”); United States v. Cabrales, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from Cabrales when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnapping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999)(“By way of comparison, last Term in Cabrales we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).
The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of ‘material support or resources’ is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’),” DoJ at §304.


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115 “The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill (‘Federal terrorism offenses’) is used in identifying the relevant crimes,” DoJ, at §304.

New Penalties. The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. §3571(b),(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense.\textsuperscript{117}

The proposal, however, failed to identify the critical elements that would trigger the alternative.\textsuperscript{118} Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

- for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

- for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

\textsuperscript{117} “Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersede lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,”DoJ, at §302.

\textsuperscript{118} “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense,” Draft at §302.
• for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;

• for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;

• for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;

• for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and

• for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism. Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:

• arson committed within a federal enclave, 18 U.S.C. 81;
• killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);
• destruction of communications facilities, 18 U.S.C. 1362;
• destruction of property within a federal enclave, 18 U.S.C. 1363;
• causing a train wreck, 18 U.S.C. 1922;
• providing material support to a terrorist, 18 U.S.C. 2339A;
• torture committed overseas under color of law, 18 U.S.C. 2340A;
• sabotage of a nuclear facility, 42 U.S.C. 2284;

119 “The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §§846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

“This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.
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• interfering with a flight crew within U.S. special aircraft jurisdiction, 49 U.S.C. 46504;
• carrying a weapon or explosive abroad an aircraft within U.S. special aircraft jurisdiction, 49 U.S.C. 46505; and
• sabotage of interstate gas pipeline facilities, 49 U.S.C. 60123.

When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years). The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission), a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

120 Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

121 “Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.

“This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders).\textsuperscript{122}

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

**Other Procedural Adjustments.** In other procedural adjustments designed to facilitate criminal investigations, the Act:

- increases the rewards for information in terrorism cases
- expands the Posse Comitatus Act exceptions
- authorizes “sneak and peek” search warrants
- permits nationwide and perhaps worldwide execution of warrants in terrorism cases
- eases government access to confidential information
- allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
- lengthens the statute of limitations applicable to crimes of terrorism
- clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
- adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B.\textsuperscript{123}

\textsuperscript{122} It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, \textit{e.g.}, damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

\textsuperscript{123} When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001)(remarks of Rep. Sensenbrenner); for general background, \textit{see}, Doyle, \textit{McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys}, CRS Rep.No. RL30060 (Dec. 14, 2001).
**Rewards.** The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L.105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism.\(^{124}\)

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

**Posse Comitatus.** The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.\(^{125}\)

**Delayed notification of a search (sneak and peek).** Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take

\(^{124}\) The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct threat assessments for federal agencies, and to reimburse federal agencies for the costs of detaining terrorist suspects overseas.

\(^{125}\) For a general discussion of the Posse Comitatus Act, see, Doyle, *The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law*, CRS REP.NO. 95-964 (June 1, 2000).
The district court held that a search warrant permitting agents to observe, but not seize tangible property, was impermissible under Rule 41. That holding conflicts with language in United States v. New York Telephone Co., 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . We hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, Richards v. Wisconsin, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, Wilson v. Arkansas, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, Dalia v. United States, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, cf., United States v. Miller, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, United States v. Freitas, 800 F.2d 1451, 1453 (9th Cir. 1986).126

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The Second Circuit was less convinced and preferred to hold sneak and peek searches to the demands of Rule 41, United States v. Pangburn, 983 F.2d 449 (2d Cir. 1993). The Fourth Circuit was, if anything, less convinced. Moreover, the facts in the case demonstrate the potential impact of the issue on computer privacy, United States v. Simons, 206 F.3d 392 (4th Cir. 2000).

Amendment, demands that surreptitious entries be closely circumscribed,” United States v. Freitas (Freitas I), 800 F.2d 1451, 1455-456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, United States v. Freitas (Freitas II), 856 F.2d 1425 (9th Cir. 1988).

“...No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in Dalia v. United States, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in Dalia, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property. . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. See United States v. New York Telephone Co., 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . .Although the Freitas I court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in United States v. Villegas, 899 F.2d 1324 (1999). Although the Freitas I court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in Villegas. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the Freitas I court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” United States v. Pangburn, 983 F.2d 449, 453-55 (2d Cir. 1993).

127 In Simons, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
The Justice Department urged that the conflict be resolved with a uniform rule which permitted sneak and peek warrants under the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage.\textsuperscript{129}

The Act, in section 213, stops short of the Justice Department proposal. Characterized as a codification of the Second Circuit decision, 147 Cong. Rec. H7197 (daily ed. Oct. 23, 2001), the Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C. 3103a. Its sneak and peek authorization reaches all federal search and seizure warrants where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (\textit{e.g.}, risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (\textit{e.g.}, jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, \textit{i.e.}, in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation.\textsuperscript{130} The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

\textsuperscript{129} The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities,” DoJ at §353.

\textsuperscript{130} Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department’s initial proposal, the Department’s justification does not address the question.
constitutionally “reasonable,” that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

**Nationwide terrorism search warrants.** The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either “within or outside the district,” (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases. The provision may anticipate execution both in this country and overseas. The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage.

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131 The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

132 The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” *DoJ* at §351.

133 *United States v. Barona*, 56 F.3d 1087, 1092 (9th Cir. 1995)(“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994)(“if American law enforcement officials substantially participated in the search or if the
law apparently contemplated extraterritorial execution, cf., F.R.Crim.P.41, Advisory Committee Notes: 1990 Amendment (discussing a proposal for extraterritorial execution that the Supreme Court rejected). 134

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” F.R.Crim.P. 41, Advisory Committee Notes: 1990 Amendment. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

**Terrorists’ DNA.** The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards per se. 135 Existing federal law allowed the Attorney General to collect samples from foreign officials conducting the search were actually acting as agents for their American counterparts); United States v. Maturo, 982 F.2d 57, 61 (2d Cir. 1992) (“where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials” or “where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials”); United States v. Mitro, 880 F.2d 1480, 1482 (1st Cir. 1989) (“where American agents participated in the foreign search or the foreign officers acted as agents for their American counterparts”); United States v. Mount, 757 F.2d 1315, 1318 (D.C.Cir. 1985) (“if American officials or officers participated in some significant way”); United States v. Marzano, 537 F.2d 120, 139 (5th Cir. 1976) (“if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts”); each of the decisions also suggests that evidence secured in a manner which shocked the conscience of the court would be excluded.

134 The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, see, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), reprinted, 78 Cong.Rec. 4982-983 (1934) (“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.) (confering judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

135 Roe v. Marcotte, 193 F.3d 72 (2d Cir. 1999); Shaffer v. Saffle, 148 F.3d 1180 (10th Cir. 1998); Rise v. Oregon, 59 F.3d 1556 (9th Cir. 1995); Jones v. Murray, 962 F.2d 302 (4th Cir. 1992).
Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples from convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes,” DoJ at §353.


Access to Educational Records. Finally, the Act calls for an ex parte court order procedure under which senior Justice Department officials may seek authorization to collect educational records relevant to an investigation or prosecution of a crime of terrorism, section 507 (as an exception to the confidentiality requirements of the General Education Provisions Act, 20 U.S.C. 1232g), section 508 (as an exception to the confidentiality requirements of the National Education Statistics Act, 20 U.S.C. 9007).

Statute of Limitations. Prosecution for murder in violation of federal law may be initiated at any time, 18 U.S.C. 3281. A five year statute of limitations applied for most other federal crimes before passage of the Act, with a few exceptions. Among the relevant exceptions were an eight year statute of limitations for several terrorist offenses, 18 U.S.C. 3286, and a ten year statute of limitations for a few arson and explosives offenses, 18 U.S.C. 3295. The Justice Department recommended the elimination of a statute of limitations in terrorism cases.

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137 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (terrorist violence against Americans overseas), 2332 (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

138 “This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

“This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in
The Act takes less dramatic action in section 809. It eliminates the statute of limitations for any crime of terrorism\textsuperscript{139} that risks or results in a death or serious bodily injury, 18 U.S.C. 3286. In the absence of such a risk or result, all other terrorism offenses become subject to the eight year statute of limitations unless already covered by the ten year statute for explosives and arson offenses, 18 U.S.C. 3286.

Application of the statute of limitations rarely provokes a constitutional inquiry. Nevertheless, due process precludes prosecution when it can be shown that pre-indictment delay "caused substantial prejudice to [a defendant's] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused."\textsuperscript{140} Moreover, a judicial difference of opinion has appeared in those cases

\textsuperscript{139} As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 (sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period.\textsuperscript{141} Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.\textsuperscript{142}

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (\textit{Grimes}, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (\textit{Frazer}, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

\textbf{Extraterritoriality.} Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States or elsewhere. . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.\textsuperscript{143}

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnapping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.

\textsuperscript{141} \textit{United States v. De La Matta}, 266 F.3d 1275, 1286 (11\textsuperscript{th} Cir. 2001); \textit{United States v. Grimes}, 142 F.3d 1342, 1351 (11\textsuperscript{th} Cir. 1998); \textit{United States v. Morrow}, 177 F.3d 272, 294 (5\textsuperscript{th} Cir. 1999); \textit{Falter v. United States}, 23 F.2d 420, 425-26 (2d Cir. 1928).

\textsuperscript{142} \textit{People v. Frazer}, 24 Cal.4th 737, 759, 982 P.2d 180, 1294, 88 Cal.Rptr.2d 312, 327 (1999).

\textsuperscript{143} \textit{United States v. Layton}, 855 F.2d 1388 (9\textsuperscript{th} Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); \textit{United States v. Benítez}, 741 F.2d 1312 (11\textsuperscript{th} Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.  

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

Victims. Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11th Victim Compensation Fund legislation before it passed the Act. Consequently, the Act’s victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 et seq., and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 et seq.

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:

• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year)(42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d) (5)), section 621(d)

• waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

• eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
• makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

• prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

• allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

• reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

• makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

• allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

• establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

**Increasing Institutional Capacity.** A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

• $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)

• necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)

• $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)

• $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816

• $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701

• $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)

• $5 million for DEA police training in South and Central Asia, section 1007.

Miscellaneous. Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might be used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act,145 or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b), 807.146

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145 *I.e.*, Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).

ed. Oct. 24, 2001), and H.R. 3162 was sent to the President who signed it on October 26, 2001.

**Criminal Investigations: Tracking and Gathering Communications**

A portion of the Act addresses issues suggested originally in a Department of Justice proposal circulated in mid-September. The first of its suggestions called for amendments to federal surveillance laws, laws which govern the capture and tracking of suspected terrorists’ communications within the United States. Federal law features a three tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications.

The tiers reflected the Supreme Court’s interpretation of the Fourth Amendment’s ban on unreasonable searches and seizures. The Amendment protects private conversations, *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967). It does not cloak information, even highly personal information, for which there is no individual justifiable expectation of privacy, such as telephone company records of calls made to and from an individual's home, *Smith v. Maryland*, 442 U.S. 735 (1979), or bank records of an individual's financial dealings, *United States v. Miller*, 425 U.S. 435 (1976).

Congress responded to *Berger* and *Katz*, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications, 18 U.S.C. 2511. At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious

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4 The Department’s proposal, dated September 20, 2001, came with a brief section by section analysis. Both the proposal (Draft) and analysis (DoJ) were printed as an appendix in *Administration's Draft Anti-Terrorism Act of 2001, Hearing Before the House Comm. on the Judiciary*, 107th Cong., 1st Sess. 54 (2001).


6 “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,” *U.S. Const.* Amend. IV.

7 Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
criminal cases. When approved by senior Justice Department officials, law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.

8 The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of’ one or more predicate offense, 18 U.S.C. 2516.

9 The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement), 1751 (presidential and presidential staff assassination, kidnapping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnapping, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or naturalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations, 18 U.S.C. 2518. The court notifies the parties to any conversations seized under the order after the order expires, 18 U.S.C. 2518(8).

Below Title III, the next tier of privacy protection covers some of those matters which the Supreme Court has described as beyond the reach of the Fourth Amendment protection – telephone records, e-mail held in third party storage, and the like, 18 U.S.C. 2701-2709 (Chapter 121). Here, the law permits law enforcement access, ordinarily pursuant to a warrant or court order or under a subpoena in some cases, but in connection with any criminal investigation and without the extraordinary levels of approval or constraint that mark a Title III interception, 18 U.S.C. 2703.

Least demanding and perhaps least intrusive of all is the procedure that governs court orders approving the government’s use of trap and trace devices and pen registers, a kind of secret “caller id”, which identify the source and destination of calls made to and from a particular telephone, 18 U.S.C. 3121-3127 (Chapter 206). The orders are available based on the government's certification, rather than a finding of the court, that the use of the device is likely to produce information relevant to the investigation of a crime, any crime, 18 U.S.C. 3123. The devices record no more than the identity of the participants in a telephone conversation, but neither the orders nor the results they produce need ever be revealed to the participants.

The Act modifies the procedures at each of the three levels. It:

offense involving counterfeiting punishable under 18 U.S.C. 471, 472, or 473; (e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States; (f) any offense including extortionate credit transactions under 18 U.S.C. 892, 893, or 894; (g) a violation of 31 U.S.C. 5322 (dealing with the reporting of currency transactions); (h) any felony violation of 18 U.S.C. 2511 and 2512 (interception and disclosure of certain communications and to certain intercepting devices); (i) any felony violation of 18 U.S.C. ch. 71 (obscenity); (j) 49 U.S.C. 60123(b) (destruction of a natural gas pipeline), 46502 (aircraft piracy); (k) 22 U.S.C. 2778 (Arms Export Control Act); (l) the location of any fugitive from justice from an offense described in this section; (m) a violation of 8 U.S.C. 1324, 1327, or 1328; (n) any felony violation of 18 U.S.C. 922, 924 (firearms); (o) any violation of 26 U.S.C. 5861 (firearms); (p) a felony violation of 18 U.S.C. 1028 (production of false identification documents), 1542 (false statements in passport applications), 1546 (fraud and misuse of visas, permits, and other documents) or a violation of 8 U.S.C. 1324, 1327, or 1328 (smuggling of aliens); (p) 229 (chemical weapons), 2332 (terrorist violence against Americans overseas), 2332a (weapons of mass destruction), 2332b (multinational terrorism), 2332d (financial transactions with countries supporting terrorism), 2339A (support of terrorist), 2332B (support of terrorist organizations); (r) any conspiracy to commit any of these, 18 U.S.C. 2516(1)(crimes added by the Act in italics). Other than telephone face to face conversations (i.e., electronic communications), the approval of senior Justice Department officials is not required and an order may be sought in any felony investigation, 18 U.S.C. 2516(3).

10 Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
permits pen register and trap and trace orders for electronic communications (e.g., e-mail)

• authorizes nationwide execution of court orders for pen registers, trap and trace devices, and access to stored e-mail or communication records

• treats stored voice mail like stored e-mail (rather than like telephone conversations)

• permits authorities to intercept communications to and from a trespasser within a computer system (with the permission of the system’s owner)

• adds terrorist and computer crimes to Title III’s predicate offense list

• reinforces protection for those who help execute Title III, ch. 121, and ch. 206 orders

• encourages cooperation between law enforcement and foreign intelligence investigators

• establishes a claim against the U.S. for certain communications privacy violations by government personnel

• terminates the authority found in many of the these provisions and several of the foreign intelligence amendments with a sunset provision (Dec. 31, 2005).

Pen Registers and Trap and Trace Devices. In section 216, the Act allows court orders authorizing trap and trace devices and pen registers to be used to capture source and addressee information for computer conversations (e.g., e-mail) as well as telephone conversations, 18 U.S.C. 3121, 3123. In answer to objections that e-mail header information can be more revealing than a telephone number, it creates a detailed report to the court, 18 U.S.C. 3123(a)(3).

11 “Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public the agency shall ensure that a record will be maintained which will identify – (i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of the such device.

“(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof),” section 216(b)(1).
The use of pen registers or trap and trace devices was limited at one time to the judicial district in which the order was issued, 18 U.S.C. 3123 (2000 ed.). Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States, 18 U.S.C. 3123(b)(1)(C), 3127(2).12

Communications Records and Stored E-Mail. With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber, 18 U.S.C. 2703(a),(b). A warrant will also suffice to seize records describing telephone and other communications transactions without customer notice, 18 U.S.C. 2703(c). In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation, officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records, 18 U.S.C. 2703(b),(c). They can obtain a limited amount of record information (subscribers’ names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena, 18 U.S.C. 2703(c)(1)(C). There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial, 18 U.S.C. 2705.

In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider’s customer records, 18 U.S.C. 2703(c)(1)(C).13

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.

12 The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” DoJ at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

13 Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user’s true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigations such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” DoJ at §107.
Previously, only a federal court in the district in which the e-mail was stored could issue the order. Under section 220, federal courts in the district where an offense under investigation occurred may issue orders applicable “without geographic limitation,” 18 U.S.C. 2703.14

The Act, in section 209, treats voice mail like e-mail, that is, subject to the warrant or court order procedure, rather than to the more demanding coverage of Title III once required, United States v. Smith, 155 F.3d 1050, 1055-56 (9th Cir. 1998).

Finally, the Act resolves a conflict between chapter 121 and the federal law governing cable companies. Government entities may have access to cable company customer records only under a court order following an adversary hearing if they can show that the records will evidence that the customer is or has engaged in criminal activity, 47 U.S.C. 511(h). When cable companies began offering telephone and other communications services the question arose whether the more demanding cable rules applied or whether law enforcement agencies were entitled to ex parte court orders under the no-notice procedures applicable to communications providers.15 The Act makes it clear that the cable rules apply when cable television viewing services are

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14 Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

15 See e.g., DoJ at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement’s access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

**Electronic Surveillance.** To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202. A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(i). Yet only the interloper's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.

**Criminal Investigators' Access to Foreign Intelligence Information.** The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism. It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that “the purpose for the surveillance is to obtain foreign intelligence information,” 50 U.S.C. 1804(a)(7)(B)(2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps “the purpose” might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation

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16 18 U.S.C. 229 (chemical weapons), 2332(terrorist acts of violence committed against Americans overseas), 2332a(use of weapons of mass destruction), 2332b(acts of terrorism transcending national boundaries), 2332d(financial transactions with countries which support terrorists), 2339A(providing material support to terrorists), and 2339B(providing material support to terrorist organizations).

17 “Because service providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves as permitted under current law, they often have no way to exercise their rights to protect themselves from unauthorized attackers. Moreover, such attackers can target critical infrastructures and engage in cyberterrorism,” DoJ at §106. Elsewhere the Act defines “electronic surveillance” for purposes of the Foreign Intelligence Surveillance Act (FISA) to emphasize that the law enforcement authority for this intruder surveillance does not confer similar authority for purposes of foreign intelligence gathering, section 1003 (50 U.S.C. 1801(f)(2)).

18 For a general discussion of federal intelligence and law enforcement cooperation, see, Best, Intelligence and Law Enforcement: Countering Transnational Threats to the U.S., CRS REP.NO. RL30252 (Dec. 3, 2001).
The Justice Department sought FISA surveillance and physical search authority on the basis of “a” foreign intelligence purpose. Section 218 of the Act insists that foreign intelligence gathering be a “significant purpose” for the request for the FISA surveillance or physical search order, 50 U.S.C. 1804(a)(7)(B), 1823(a)(7)(B), a more
demanding standard than the “a purpose” threshold proposed by the Justice Department, but a clear departure from the original “the purpose” entry point. FISA once described a singular foreign intelligence focus prerequisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k), 1825(k).21

Protective Measures. The Act reenforces two kinds of safeguards, one set designed to prevent abuse and the other to protect those who assist the government. The sunset clause is perhaps the best known of the Act’s safeguards. Under the direction of section 224, many of the law enforcement and foreign intelligence authorities granted by the Act expire as of December 31, 2005.22 The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter

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21 “(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. (2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, infra, quoting, 50 U.S.C. 1801.

22 “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210[ subpoenas for communications provider customer records], 211[access to cable company communication service records], 213 [sneak and peek], 216[ pen register and trap and trace device amendments], 221[trade sanctions], and 222[assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005. “(b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers’ communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices). Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees, but could not recover against the United States. Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice's Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government's request until a court order authorizing access can be obtained. Another allows providers to disclose customer records to protect the provider's rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others. A third section,

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26 Prior law already granted service providers immunity for disclosure of customer records in compliance with a court access order, 18 U.S.C. 2703(f).
27 “Existing law contains no provision that allows providers of electronic communications service to disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies that threaten death or serious bodily injury. This section amends 18 U.S.C. §2702 to authorize such disclosures if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.

“Current law also contains an odd disconnect: a provider may disclose the *contents* of the customer's communications in order to protect its rights or property but the current statute does not expressly permit a provider to voluntarily disclose *non-content* records (such as a subscriber's login records). 18 U.S.C. 2702(b)(5). This problem substantially hinders the ability of providers to protect themselves from cyber-terrorists and criminals. Yet the right to disclose the contents of communications necessarily implies the less intrusive ability to disclose non-content records. In order to promote the protection of our nation's critical infrastructures, this section's amendments allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems,” *DoJ* at
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

§110.

28 Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

29 Thus in the name of assisting in the execution of Title III, chapter 121, or chapter 206 order, the courts may not cite the Act as the basis for an order compelling a service provider to make system modifications or provide any other technical assistance not already required under 18 U.S.C. 2518(4), 2706, or 3124(c), see, H.R.Rep.No. 107-236, at 62-3 (2001) (emphasis added) (“This Act is not intended to affect obligations under Communications Assistance for Law Enforcement Act [which addresses law enforcement-beneficial system modifications and the compensation to be paid for the changes], nor does the act impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance”).

30 E.g., As amended by section 902 of the Act, “‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2)(language added by the Act in italics).

31 50 U.S.C. 1801 et seq.
In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs. There were and still are extra


33 “As used in this subchapter: (a) ‘Foreign power’ means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

(b) ‘Agent of a foreign power’ means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C).

(c) ‘International terrorism’ means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnapping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

(d) ‘Sabotage’ means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

(e) ‘Foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans ("United States persons," i.e., citizens or permanent resident aliens).\textsuperscript{34} The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

- permits “roving” surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)

- increases the number of judges on the FISA court from 7 to 11

- allows application for a FISA surveillance or search order when gathering foreign intelligence is \textit{a significant} reason for the application rather than \textit{the} reason

- authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations

- sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses

- carries a sunset provision

- establishes a claim against the U.S. for certain communications privacy violations by government personnel

- expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to – (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States,” 50 U.S.C. 1801.

\textsuperscript{34} Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
FISA. FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases. It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

**Search and Surveillance for Intelligence Purposes.** Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, Draft at §151.36

Section 901 of the Act address a concern raised during the 106th Congress relating to the availability of the FISA orders and the effective use of information gleaned from the execution of a FISA order.37 It vests the Director of Central

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36 *See also, DoJ at §151, “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”*

37 *See e.g., S.Rep.No. 106-352, at 3, 6, 7 (2000)(“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application*
process, as interpreted by the OIPR is administratively burdensome and, at times, extremely slow. Many applications undergo months of scrutiny before submission to the court because the OIPR prescribes standards and restrictions not imposed by the statute. . . . In particular, the OIPR has been criticized for an overly restrictive interpretation of the FISA ‘currency’ requirement. This is the issue of how recent a subject’s activities must be to support a finding of probable cause that the subject is engaged in clandestine intelligence gathering activities. . . . While existing law does not specifically address "past activities," it does not preclude, and legislative history supports, the conclusion that past activities may be part of the totality of circumstances considered by the FISC in making a probable cause determination. . . . By definition, information collected pursuant to a court order issued under the Foreign Intelligence Surveillance Act is foreign intelligence not law enforcement information. Accordingly, the Committee wants to clarify that the FISA ‘take’ can and must be shared by the Federal Bureau of Investigation with appropriate intelligence agencies. For the intelligence mission of the United States to be successful, there must be a cooperative and concerted effort among intelligence agencies. Any information collected by one agency under foreign intelligence authorities that could assist another agency in executing its lawful mission should be shared fully and promptly. Only then can the United States Government pursue aggressively important national security targets including, for example, counterterrorist and counternarcotics targets”); see also, 147 Cong.Rec. S799-803 (daily ed. Feb. 24, 2000)(remarks of Sens. Specter, Torricelli and Biden).

38 “When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevance, an additional factual showing that the communications device has been used to contact an ‘agent of a foreign power’ engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the ‘agent of a foreign power’ prong from the predication, and thus makes the FISA authority more closely track the criminal authority,” DoJ at §155.
Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise entitle to confidentiality. Section 505, in response to the Justice Department's suggestion, allows FBI field offices to make the requests, see DoJ at §157 (“At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports”).

**Third Party Cooperation and Tangible Evidence.** As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target's activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.40

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39 Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise be entitled to confidentiality. Section 505, in response to the Justice Department's suggestion, allows FBI field offices to make the requests, see DoJ at §157 (“At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports”).

40 When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court's order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.’ This would enhance the FBI's ability to monitor international terrorists and intelligence officers who are
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian. The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities, in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B));
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a));
- the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a));
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v;

trained to thwart surveillance by rapidly changing hotel accommodations, cell phones, Internet accounts, etc., just prior to important meetings or communications. Under the current law, the government would have to return to the FISA Court for an order that named the new carrier, landlord, etc., before effecting surveillance. Under the proposed amendment, the FBI could simply present the newly discovered carrier, landlord, custodian or other person with a generic order issued by the Court and could then effect FISA coverage as soon as technically feasible.” DoJ at 152.


41 "The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigative contexts. The time and difficulty involved in getting such pleadings before the Court usually outweighs the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” DoJ at §156.

42 Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.\textsuperscript{43}

**Access to Law Enforcement Information.** Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community’s access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, Draft at §103.\textsuperscript{44}

\textsuperscript{43} H.R.Rep.No. 107-205, at 60-1 (2001) (‘‘This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

“The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

“Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual’s credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding--without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information’’).

\textsuperscript{44} See also, DoJ at §103, “This section facilities the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, Draft at §354.45

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, Draft at §154.46

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion.47 It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions.”

45 See also, DoJ at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.” Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officers

46 See also, DoJ at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”

47 Blair v. United States, 250 U.S. 273, 281 (1919)(the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
affairs are conducted in private and outside the presence of the court. Only the
attorney for the government, witnesses under examination, and a court reporter may
attend its proceedings, F.R.Crim.P. 6(d). Matters occurring before the grand jury are
secret and may be disclosed by the attending attorney for the government and those
assisting the grand jury only in the performance of their duties; in presentation to a
successor grand jury; or under court order for judicial proceedings, for inquiry into
misconduct before the grand jury, or for state criminal proceedings, F.R.Crim.P. 6(e).

The Act, in section 203(a), allows disclosure of matters occurring before the
grand jury to “any federal law enforcement, intelligence, protective, immigration,
national defense, or national security” officer to assist in the performance of his

Critics may protest that the change could lead to the use of the grand jury for
intelligence gathering purposes, or less euphemistically, to spy on Americans. 49 The
proposal was never among those scheduled to sunset, but earlier versions of the
section followed the path used for most other disclosures of grand jury material: prior

48 These officers may receive: (1) “foreign intelligence information” that is, information
regardless whether it involves Americans or foreign nationals that “[a] relates to the ability
of the United States to protect against – (aa) actual or potential attack or other grave hostile
acts of a foreign power or an agent of a foreign power; (bb) sabotage or international
terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence
activities by an intelligence service or network of a foreign power;” or [b] “with respect to a
foreign power or foreign territory that relates to – (aa) the national defense or security of the
United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P.
6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that
is, [a] “information relating to the capabilities, intentions, or activities of foreign governments
or elements thereof, foreign organizations, or foreign persons, or international terrorist
activities” or [b] “information gathered and activities conducted, to protect against espionage,
other intelligence activities, sabotage, or assassinations conducted on behalf of foreign
governments or elements thereof, foreign organizations, or foreign persons, or international
terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in
italics).

49 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on
Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25
HARVARD JOURNAL OF LAW & PUBLIC POLICY 699, 719-20 (2002)(“There is a significant
danger that the rule permitting disclosure will be treated as the de facto authorization of an
expansion of the grand jury’s investigative role to encompass seeking material relevant only
to matters of national security, national defense, immigration, and so forth. The grand jury’s
awesome powers should not be unwittingly extended to a much wider range of issues. .
Since the grand jury operates in secret, there are no public checks on the scope of its
investigations, and witnesses are not permitted to challenge its jurisdiction. Only the
supervising court is in a position to keep the grand jury’s investigation within proper bounds.
Requiring judicial approval of foreign intelligence and counterintelligence information
disclosures would provide a natural check against the temptation to manipulate the grand jury
to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist
Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6
(Nov. 2001)(“The grand jury secrecy rule is a rule of policy which has always had exceptions,
and it has been frequently modified. The secrecy rule has no credible claim to constitutional
stature”)}
court approval, H.R.Rep.No. 107-236, at 73 (2001). The Act, in section 203(a), instead calls for confidential notification of the court that a disclosure has occurred and the entity to whom it was made, F.R.Crim.P. 6(e)(3)(C)(iii). It also insists that the Attorney General establish implementing procedures for instances when the disclosure “identifies” Americans (U.S. persons), section 203(c).

Law enforcement officials may share Title III information with the intelligence community under the same conditions, section 203(b), although the grand jury and Title III sharing provisions differ in at least three important respects. The court need not be notified of Title III disclosures. On the other hand, the authority for sharing Title III information expires on December 31, 2005, section 224, and agencies and their personnel guilty of intentional improper disclosures may be subject to a claim for damages and disciplinary action, 18 U.S.C. 2520.

The third subsection of section 203 remains something of an enigma. It speaks in much the same language as its counterparts. It allows law enforcement officials to share information with the intelligence community, “notwithstanding any other provisions of law,” section 203(d). It either swallows the other subsections, or supplements them. Several factors argue for its classification as a supplement. Congress is unlikely to have crafted subsections (a), (b) and (c) only to completely

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50 Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

51 “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification. By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

**Increasing Institutional Capacity.** As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a

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52 *Duncan v. Walker*, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted) (“It is our duty to give effect, if possible, to every clause and word of a statute. *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)); see also *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879) (As early as in Bacon's Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage. By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language."

53 *Draft at §154*, “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”
The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so,” S.Rep.No. 107-63, at 11 (2001).

Money Laundering

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture. The Act bolsters federal efforts in each area.

Regulation. Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.

54 “The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

55 For a brief overview, see, Murphy, Money Laundering: Current Law and Proposals, CRS REP.NO. RS21032 (DEC. 21, 2001).

56 See e.g., 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”}).
Records and Reports. For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department's Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler's checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to files SARs as well,\(^{57}\) reflecting Congress’ view that the information provided the IRS may be valuable for other law enforcement purposes.\(^{58}\) This concern is likewise

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58 H.R.Rep.No. 107-250, at 38-9 (2001) (“Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

“Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a ‘Safeguard Procedures Report’ which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

“While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement
reflected in section 357 which asks the Secretary of the Treasury to report on the
Internal Revenue Service’s role in the administration of the Currency and Foreign
Transaction Reporting Act (31 U.S.C. 5311 et seq.), and what transfers of authority,
if any, are appropriate.

Sections 351 and 355 address the liability for disclosure of suspicious activity
reports (SARs). Prior to the Act, federal law prohibited financial institutions and their
officers and employees from tipping off any of the participants in a suspicious
transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the
institutions and their officers and employees from liability for filing the reports and for
failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section
351 makes changes in both the immunity and the proscription. It adds government
officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A).
It allows, but does not require, institutions to reveal SAR information in the context
of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B).
Finally, it makes clear that the immunity does not extend to immunity from
governmental action.59 Section 355 expands the immunity to cover disclosures in

59 “Subsection (a) of section [351] makes certain technical and clarifying amendments to 31
U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial
institutions that disclose possible violations of law or regulation from civil liability for
reporting their suspicions and for not alerting those identified in the reports. The safe harbor
is directed at Suspicious Activity Reports and similar reports to the government and
regulatory authorities under the Bank Secrecy Act.

“First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor
from civil liability applies in arbitration, as well as judicial, proceedings. Second, it amends
section 5318(g)(3) to clarify the safe harbor's coverage of voluntary disclosures (that is, those
not covered by the SAR regulatory reporting requirement). The language in section
5318(g)(3)(A) providing that ‘any financial institution that *** makes a disclosure pursuant
to *** any other authority *** shall not be liable to any person’ is not intended to avoid the
application of the reporting and disclosure provisions of the Federal securities laws to any
person, or to insulate any issuers from private rights of actions for disclosures made under the
Federal securities laws.

“Subsection [351](b) amends section 5318(g)(2) of title 31—which currently prohibits
notification of any person involved in a transaction reported in a SAR that a SAR has been
filed—to clarify (1) that any government officer or employee who learns that a SAR has been
filed may not disclose that fact to any person identified in the SAR, except as necessary to
fulfill the officer or employee's official duties, and (2) that disclosure by a financial institution
of potential wrongdoing in a written employment reference provided in response to a request
from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance
Act, or in a written termination notice or employment reference provided in accordance with
the rules of a securities self-regulatory organization, is not prohibited simply because the
employment references to other insured depository financial institutions provided disclosure is not done with malicious intent.\textsuperscript{60}

The Financial Crimes Enforcement Network (FinCEN), a component within the Treasury Department long responsible for these anti-money laundering reporting and record-keeping requirements, 31 C.F.R. pt. 103, was administratively created in 1990 to provide other government agencies with an “intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes,” 55 Fed.Reg. 18433 (May 2, 1990).

The Act, in section 361, makes FinCEN a creature of statute, a bureau within the Treasury Department, 31 U.S.C. 310. Section 362 charges it with the responsibility of establishing a highly secure network to allow financial institutions to file required reports electronically and to permit FinCEN to provide those institutions with alerts and other information concerning money laundering protective measures, 31 U.S.C. 310 note.

**Special Measures.** In extraordinary circumstances involving international financial matters, the Act grants the Secretary of the Treasury, in consultation with other appropriate regulatory authorities, the power to issue regulations and orders involving additional required “special measures” and additional “due diligence” requirements to combat money laundering. The special measure authority, available under section 311, comes to life with the determination that particular institutions, jurisdictions, types of accounts, or types of transactions pose a primary money

\textsuperscript{60} 31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 66 (2001).
These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

31 U.S.C. 5318A. The circumstances considered in the case of a suspect jurisdiction are: evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction’s banking regulation; the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’” including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

“Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate
business transactions.

“Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

“Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

“The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

“The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

“The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

“The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information that it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

“The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

“The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed
**Due Diligence.** Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.63

63 See generally, H.R.Rep.No. 107-250, at 71-2 (“Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

“The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

“The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

“For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
detect and report transactions that may involve the proceeds of foreign corruption. A private
bank account is defined as an account (or any combination of accounts) that requires a
minimum aggregate deposit of funds or other assets of not less than $1 million; is established
on behalf of one or more individuals who have a direct or beneficial ownership in the account;
and is assigned to, or administered or managed by, an officer, employee or agent of a financial
institution acting as a liaison between the institution and the direct or beneficial owner of the
account.

"This section directs the Secretary of the Treasury, within 6 months of enactment of this
bill and in consultation with appropriate Federal functional regulators, to further define and
clarify, by regulation, the requirements imposed by this section").

Or more exactly, a bank which has no physical presence in any country; a “physical
presence” for a foreign bank is defined as “a place of business that – (i) is maintained by a
foreign bank; (ii) is located at a fixed address (other than solely an electronic address) in a
country in which the foreign bank is authorized to conduct banking activities, at which
location the foreign bank – (I) employs 1 or more individuals on a full-time basis; and (II)
maintains operating records relating to its banking activities; and (iii) is subject to inspection
by the banking authority which licensed the foreign bank to conduct banking activities,” 31


The Act does not define “concentration accounts,” although the House Financial Services
Committee report provides some incite into the section’s intent, H.R.Rep.No. 107-250, at 72-3
(2001) (“This section gives the Secretary of the Treasury discretionary authority to prescribe
regulations governing the maintenance of concentration accounts by financial institutions, to
ensure that these accounts are not used to prevent association of the identity of an individual
customer with the movement of funds of which the customer is the direct or beneficial owner.
If promulgated, the regulations are required to prohibit financial institutions from allowing
clients to direct transactions into, out of, or through the concentration accounts of the
institution; prohibit financial institutions and their employees from informing customers of the
existence of, or means of identifying, the concentration accounts of the institution; and to
establish written procedures governing the documentation of all transactions involving a
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keeping and to recommend a means to effectively verify the identification of foreign customers.\footnote{31 U.S.C. 5318(l); H.R.Rep.No. 107-250, at 62-3 (2001) ("Section [326](a) amends 31 U.S.C. 5318 by adding a new subsection governing the identification of account holders. Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a 'street name' or omnibus account in the broker-dealer's name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to 'look through' the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund's customers. Thus, the fund would not be required to 'look through' the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical. Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).}
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature.68

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

Reports to Congress. Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

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exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.\textsuperscript{69}

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

**International Cooperation.** Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.\textsuperscript{70}

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (\textit{i.e.}, the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.


\textsuperscript{70} H.R.Rep.No. 107-250, at 67 (2001) ("This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury's progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

"The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime".)
**Crimes.** Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, smuggling, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
Section 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

The definition of ‘financial institution’ in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of ‘commercial bank’ or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad--say to a Mexican bank--and launders them through a series of financial transactions, the government conceivably could not rely on the definition of a ‘financial institution’ in 1956(c)(6) to establish that the transaction was a ‘financial transaction’ within the meaning of 1956(c)(4)(B) (defining a ‘financial transaction’ as a transaction involving the use of a ‘financial institution’), or that it was a ‘monetary transaction’ within the meaning of 1957(f) (defining ‘monetary transaction’ as, inter alia, a transaction that would be a ‘financial transaction’ under 1956(c)(4)(B)).

Similarly, money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launders the proceeds of one of the crimes set forth on a list of ‘specified unlawful activities.’ 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),” H.R.Rep.No. 107-250, at 38 (2000).

Section 329 makes it a federal crime to corruptly administer the money laundering regulatory scheme. Offenders are punishable by imprisonment for not more than 15 years and a fine of not more than three times the amount of the bribe.

Section 5326 of title 31 authorizes the Secretary of the Treasury to impose temporary, enhanced reporting requirements upon financial institutions in areas victimized by substantial money laundering activity (geographic targeting regulations and orders). Section 353 makes it clear that the civil sanctions, criminal penalties, and prohibitions on smurfing (structuring transactions to evade reporting requirements) apply to violations of the regulations and orders issued under 31 U.S.C. 5326. It also extends the permissible length of the temporary geographical orders from 60 to 180 days.

Violations of the special measures and special due diligence requirements of sections 311 and 312 are subject to both civil and criminal penalties by virtue of section 363’s amendments to 31 U.S.C. 5321(a) and 5322. The amendments authorize civil penalties and criminal fines of twice the amount of the transaction but not more than $1 million. Criminal offenders would be subject to a fine in the same amount.

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71 “[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960. 73

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents. 74 They increase the maximum terms of imprisonment for violation of:

• 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
• 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
• 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

73 “The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business. “Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another. “Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive,” H.R.Rep.No. 107-250, at 54 (2001).

74 “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual, 31 U.S.C. 5332(a)(2).

- 18 U.S.C. 476 (taking impressions of tools used for obligations and securities) from 10 to 25 years;
- 18 U.S.C. 477 (possessing or selling impressions of tools used for obligations or securities) from 10 to 25 years;
- 18 U.S.C. 484 (connecting parts of different notes) from 5 to 10 years;
- 18 U.S.C. 493 (bonds and obligations of certain lending agencies) from 5 to 10 years;
- 18 U.S.C. 478 (foreign obligations or securities) from 5 to 20 years;
- 18 U.S.C. 479 (uttering counterfeit foreign obligations or securities) from 3 to 20 years;
- 18 U.S.C. 480 (possessing counterfeit foreign obligations or securities) from 1 to 20 years;
- 18 U.S.C. 481 (plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities) from 5 to 25 years;
- 18 U.S.C. 482 (foreign bank notes) from 2 to 20 years; and
- 18 U.S.C. 483 (uttering counterfeit foreign bank notes) from 1 to 20 years.

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

**Bulk Cash.** Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act’s bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting. ⁷⁵

The section appears to be the product of reactions to the Supreme Court’s decision in *United States v. Bajakian*, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court’s

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⁷⁵ “For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).
As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency — representing the proceeds of drug trafficking and other criminal offenses — is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad.

“Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United State without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

“Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute,” H.R.Rep.No. 107-250 at 36-7 (2001).

Extraterritorial Jurisdiction. The Act makes 18 U.S.C. 1029, the federal statute condemning various crimes involving credit cards, PIN numbers and other access devices, applicable overseas if the card or device is issued by or controlled by an American bank or other entity and some article is held in or transported to or through the United States during the course of the offense, section 377. The change was part of the original Justice Department proposals. Justice explained that, “[financial crime] admits of no border, utilizing the integrated global financial network for ill purposes. This provision would apply the financial crimes prohibitions to conduct committed abroad, so long as the tools or proceeds of the crimes pass through or are in the United States,” DoJ at §408. The section, however, appears to limit the otherwise applicable extraterritorial jurisdiction implicit in section 1029, since federal courts would likely recognize extraterritorial jurisdiction over a violation of section 5317 of title 31 once called for civil forfeiture of property traceable to a violation of 31 U.S.C. 5316 (reports on exporting or importing money instruments worth $10,000 or more). Section 372 of the Act recasts section 5317 to provide for civil and criminal forfeitures for violations of 31 U.S.C. 5316, of 31 U.S.C. 5313 (reports on domestic coins and currency transactions involving $10,000 or more) and of 31 U.S.C. 5324 (structuring transactions to evade reporting requirements (smurfing)).
under either circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.  

**Venue.** Section 1004 relies on dicta in United States v. Cabrales, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering, in the state and district in which the monetary transaction takes place. The Supreme Court in Cabrales held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in dicta, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.

**Forfeiture.** Forfeiture is the government confiscation of property as a consequence of crime. The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 et seq. (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

**Constitutional Considerations.** The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 et seq., which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the

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78 “The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed,” U.S.Const. Art.III, §2, cl.3.

79 “[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,” U.S.Const. Amend. VI.

80 See also, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnaping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.

80 For general background information, see, Doyle, Crime and Forfeiture, CRS REP.NO. 97-139A (Oct. 11, 2000).
jurisdiction of the United States, belonging to any foreign individual, foreign entity, or foreign country whom they determine to have planned, authorized, aided or engaged in an attack on the United States by a foreign country or foreign nationals. The section also permits the government to present secretly (ex parte and in camera) any classified information upon which the forfeiture was based should the decision be subject to judicial review. The Justice Department requested the section as a revival of the President’s powers in times of unconventional wars. By virtue of section 316, property owners may initiate a challenge to a confiscation by filing a claim under the rules applicable in maritime confiscations. The section permits two defenses to forfeiture – that the property is not subject to confiscation under section 106 or that the claimant is entitled to the innocent owner defense of 18 U.S.C. 983(d). The characterization of the defenses as “affirmative defense” indicates that the claimant bears the burden of proof. The innocent owner defenses of 18 U.S.C. 983(d) are probably not available in cases under section 106, since that section is explicitly

81 “This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App.U.S.C. §5(b). 

“This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress's war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

“The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2),” DoJ at §159.

82 “An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
excepted from the coverage of 18 U.S.C. 983. The challenge proceedings permit the court to admit evidence, such as hearsay evidence, that would not otherwise be admissible under the Federal Rules of Evidence if the evidence is reliable and if national security might be imperiled should dictates of the Federal Rules be followed, §316(b). The section recognizes the rights of claimants to proceed alternatively under the Constitution or the Administrative Procedure Act.

The Justice Department also recommended enactment of an overlapping provision which ultimately passed as section 806 of the Act without any real discussion of the relationship of the two sections. Section 806 authorizes confiscation of all property, regardless of where it is found, of any individual, entity, or organization engaged in domestic or international terrorism (as defined in 18 U.S.C. 2331), against the United States, Americans or their property, 18 U.S.C.

83 18 U.S.C. 983(i)(2)(D).

84 “The exclusion of certain provisions of Federal law from the definition of the term ‘civil forfeiture statute’ in section 983(i) of title 18, United States Code, shall not be construed to deny an owner of property the right to contest the confiscation of assets of suspected international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C) subchapter II of chapter 5 of title 5, United States Code (commonly known as the ‘Administrative Procedure Act’).” Sec. 316(c)(1).

85 “Current law does not contain any authority tailored specifically to the confiscation of terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available current forfeiture laws require detailed tracing that is quite difficult for accounts coming through the banks of countries used by many terrorists.

“This section increases the government's ability to strike at terrorist organizations' economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001,” DoJ, at §403. The House Report on H.R. 2975 which contained versions of both sections is no more explicit on the relation of the two sections.

86 “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
Section 806 as discussed below also calls for the more common confiscation of property derived from and or facilitating acts of domestic or international terrorism against the United States or its citizens. Confiscations under 806 may be challenged under the procedures of 18 U.S.C. 983, since they are not exempted there. To the extent that forfeiture under section 806 is based on international rather than domestic terrorism, claimants may also use the procedures of section 316.

Confiscation based solely on the fact that the property is owned by a criminal offender, rather than that it is derived from or facilitates some crime is fairly uncommon. It is the mark of common law forfeiture of estate. At common law, a felon forfeited all of his property. Most contemporary forfeiture statutes employ statutory forfeiture, a more familiar presence in American law,87 which consists of the confiscation of things whose possession is criminal, of the fruits of crime, and of the means of crime – untaxed whiskey, the drug dealer’s profits, and the rum runner’s ship.

Three characteristics set forfeiture of estate apart. The property is lost solely by reason of its ownership by a felon. All of a felon’s property is confiscated, not merely that which is related to the crime for which he is convicted. Finally, it occasions attainder which negates the felon’s right to hold property or for title to property to pass through him to his heirs. It was with this in mind, that the Framers declared that “no attainder of treason shall work corruption of blood or forfeiture exception during the life of the person attainted.”88 And for this reason, President Lincoln insisted that the confiscated real estate of Confederate supporters should revert their heirs at death.89

87 Austin v. United States, 509 U.S. 602, 611-12 (1993)(“Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture . . . . Of England’s three kinds of forfeiture, only the third took hold in the United States”).


89 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal in personam proceedings following criminal conviction as a means of accomplishing confiscation.
Neither section 106 nor 806 require conviction of the terrorist property owner.\footnote{Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c)(“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act”).} Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers.\footnote{\textit{Silesian American Corp. v. Clark}, 332 U.S. 469 (1947); cf., \textit{Societe Internationale v. Rogers}, 357 U.S. 197, 211 (1958)(“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).} The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners.\footnote{\textit{Zittman v. McGrath}, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’”).} Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them.\footnote{\textit{United States v. Bajakajian}, 524 U.S. 321, 337 (1998); \textit{Austin v. United States}, 509 U.S. 602, 622 (1993).} The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate
any presumption of remedial purposes.\textsuperscript{94} The same has been said of the applicability of the ex post facto clause.\textsuperscript{95}

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO.\textsuperscript{96} If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

\textbf{Other Forfeiture Amendments.} In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.\textsuperscript{97}


\textsuperscript{95} See e.g., \textit{United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.)}, 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, \textit{Landgraf v. USI Film Products}, 511 U.S. 244, 265-66 (1994).

\textsuperscript{96} DoJ, at §403.

\textsuperscript{97} 18 U.S.C. 1956(b). \textit{ Cf. H.R.Rep.No. 107-250, at 54-5 (2001)}(“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas.\textsuperscript{98} Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted

\hspace{1cm} \textsuperscript{98} 18 U.S.C. 981(k). H.R.Rep.No. 107-250, at 57-8 (2001)(“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank's customers.

Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank's correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests“).
defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation. 99

Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here. 100 Section 320 enlarges this provisions to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements. 101 This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense. 102

99 Cf., H.R.Rep.No. 107-250, at 58-9 (2001) (“Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of ‘substitute assets’ when the defendant has placed the property otherwise subject to forfeiture ‘beyond the jurisdiction of the court.’ Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

“This section amends 21 U.S.C. 853 to make clear that a court in a criminal case may issue a repatriation order—either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. 853(e) to restrain property—so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both”).


101 H.R.Rep.No. 107-250, at 56 (2001)(“This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act”).

102 H.R.Rep.No. 107-250, at 59-60 (2001)(“Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country.

“Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
A fugitive may not challenge a federal forfeiture. Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in “order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.”

to contest the restraining order could do so on the ground that 28 U.S.C. 2467 was not properly applied to the particular case, but could not oppose the restraining order on any ground that could also be raised in the proceedings pending in a foreign court. This provision prevents a litigant from taking ‘two bites at the apple’ by raising objections to the basis for the forfeiture in the Federal court that he also raised, or is entitled to raise, in the foreign court where the forfeiture action is pending. It complements the existing provision in section 2467(e) providing that the Federal court is bound by the findings of fact of the foreign court, and may not look behind such findings in determining whether to enter an order enforcing a foreign forfeiture judgment.

“This section also amends 28 U.S.C. 2467 to make clear that it is not necessary to prove that the person asserting an interest in the property received actual notice of the forfeiture proceedings. As is the case with respect to forfeitures under U.S. law, it is sufficient if the foreign nation takes steps to provide notice, in accordance with the principles of due process. See Gonzalez v. United States, 1997 WL 278123 (S.D.N.Y. 1997) (‘the [G]overnment is not required to ensure actual receipt of notice that is properly mailed’); Albajon v. Gugliotta, 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant's identifications, and mailed after claimant released from jail, is sufficient to satisfy due process, even if claimant never received notice); United States v. Schiavo, 897 F. Supp. 644, 648-49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; due process satisfied even if he did not receive the notice).

“Finally, 28 U.S.C. 2467 is amended to authorize the enforcement of a forfeiture judgment based on any foreign offense that would constitute an offense giving rise to a civil or criminal forfeiture of the same property if the offense had been committed in the United States. This is one of two safeguards that the statute contains against the enforcement of judgments that the United States does not consider appropriate for enforcement: if the judgment is based on an act that would not constitute a crime in the United States, such as removing assets from the reach of a repressive regime, it could not be enforced. In addition, section 2467 already provides that a foreign judgment may only be enforced by a Federal court at the request of the United States, and only after the Attorney General has certified that the judgment was obtained in accordance with the principles of due process. Thus, neither a foreign Government nor a foreign private party could enforce a foreign judgment on its own under this provision.”). Note that the safeguard to which the report refers is the range of foreign offenses that will support an enforceable confiscation order, i.e., drug offenses and crimes on the money laundering predicate offense list, and that the amendment narrows that safeguard by adding additional foreign offenses, i.e., any foreign equivalent of a federal crime which would support a confiscation order.

Alien Terrorists and Victims

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

Border Protection. The border protection provisions:

- authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401
- authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402
- remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404
- authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405
- authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.
- instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007
- direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418
- express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414
- add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415
- call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416
- limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).
Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).


An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in “premeditated, politically motivated violence perpetrated against noncombatant targets,” or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien’s release would threaten national security or endanger some individual or the general public. The Attorney General’s determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

**Victims.** The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

- permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421105
- extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422106

105 “The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

106 “The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks.

“The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application.

“Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by
September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001
diversity visa program has already been exceeded, the alien shall be counted under the 2002
program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks,
the spouse and children of the alien shall still be eligible for permanent residence under the
program. The ceiling placed on the number of diversity immigrants shall not be exceeded in
any case.

“Under the Act, in the case of an alien who was issued an immigrant visa that expires
before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result
of the terrorist attacks, the validity shall be extended until December 31.

“Under the Act, in the case of an alien who was granted parole that expired on or after
September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct
result of the terrorist attacks, the parole is extended an additional 90 days.

“Under the Act, in the case of an alien granted voluntary departure that expired between
September 11 and October 11, 2001, voluntary departure is extended an additional 30 days,”

107 “Current law provides that an alien who was the spouse of a U.S. citizen for at least 2
years before the citizen died shall remain eligible for immigrant status as an immediate
relative. This also applies to the children of the alien. The Act provides that if the citizen died
as a direct result of the terrorist attacks, the 2 year requirement is waived.

“The Act provides that if an alien spouse, child, or unmarried adult son or daughter had
been the beneficiary of an immigrant visa petition filed by a permanent resident who died as
a direct result of the terrorist attacks, the alien will still be eligible for permanent residence.
In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent
resident who died as a direct result of the terrorist attacks was present in the U.S. on
September 11 but had not yet been petitioned for permanent residence, the alien can
self-petition for permanent residence.

“The Act provides that an alien spouse or child of an alien who 1) died as a direct result
of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an
applicant for adjustment of status for an employment-based immigrant visa, may have his or
her application for adjustment adjudicated despite the death (if the application was filed prior

108 “Under current law, certain visas are only available to an alien until the alien’s 21st
birthday. The Act provides that an alien whose 21st birthday occurs this September and who
is a beneficiary for a petition or application filed on or before September 11 shall be
considered to remain a child for 90 days after the alien’s 21st birthday. For an alien whose
21st birthday occurs after this September, (and who had a petition for application filed on his
or her behalf on or before September 11) the alien shall be considered to remain a child for
• a denial of benefits of the Act to terrorists and their families, section 427

• authority for the Attorney General to establish evidentiary standards to implement the alien victim provisions of the Act, section 426.

Other Crimes, Penalties, & Procedures

New Crimes. The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department, the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offenses for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents, 18 U.S.C. 175b. Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.

*109* “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . .” DoJ at §305.

*110* The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

*111* “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2) (“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.\(^\text{112}\)

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D). The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

\(^{112}\)U.S. Const. Art.III, §2, cl.3 ("The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . ."); Amend. IV ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . ."); United States v. Cabrales, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from Cabrales when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnapping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999)("By way of comparison, last Term in [Cabrales] we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense").
The Justice Department sought the expansion along with the enlargement of the predicate offense list, "18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of 'material support or resources' is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill ('Federal terrorism offenses')," DoJ at 306.

Finally, the section announces that a prosecution for violation of section 2339A (support of terrorists) may be brought where the support is provided or where the predicate act of terrorism occurs. There may be some question whether the Constitution permits prosecution where the predicate act occurs.114

Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.115


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115 “The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill (‘Federal terrorism offenses’) is used in identifying the relevant crimes,” DoJ, at §304.

New Penalties. The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. 3571(b), (c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense. 117

The proposal, however, failed to identify the critical elements that would trigger the alternative. 118 Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

- for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

- for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

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117 “Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. 3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersede lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,” DoJ, at §302.

118 “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense,” Draft at §302.
The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object of the offense – see e.g., 21 U.S.C. §846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.

- for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;
- for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;
- for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;
- for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and
- for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism. Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:

- arson committed within a federal enclave, 18 U.S.C. 81;
- killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);
- destruction of communications facilities, 18 U.S.C. 1362;
- destruction of property within a federal enclave, 18 U.S.C. 1363;
- causing a train wreck, 18 U.S.C. 1922;
- providing material support to a terrorist, 18 U.S.C. 2339A;
- torture committed overseas under color of law, 18 U.S.C. 2340A;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

119 “The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

“This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.
• interfering with a flight crew within U.S. special aircraft jurisdiction, 49 U.S.C. 46504;
• carrying a weapon or explosive abroad an aircraft within U.S. special aircraft jurisdiction, 49 U.S.C. 46505; and
• sabotage of interstate gas pipeline facilities, 49 U.S.C. 60123.

When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years).²²¹ The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission),²²¹ a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

¹²⁰ Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

¹²¹ “Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.

“This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders).\textsuperscript{122}

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

**Other Procedural Adjustments.** In other procedural adjustments designed to facilitate criminal investigations, the Act:

- increases the rewards for information in terrorism cases
- expands the Posse Comitatus Act exceptions
- authorizes “sneak and peek” search warrants
- permits nationwide and perhaps worldwide execution of warrants in terrorism cases
- eases government access to confidential information
- allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
- lengthens the statute of limitations applicable to crimes of terrorism
- clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
- adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B.\textsuperscript{123}

\textsuperscript{122} It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, e.g., damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

\textsuperscript{123} When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001)(remarks of Rep. Sensenbrenner); for general background, see, Doyle, *McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys*, CRS REP.NO. RL30060 (Dec. 14, 2001).
Rewards. The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L.105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism.\(^{124}\)

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

Posse Comitatus. The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.\(^{125}\)

Delayed notification of a search (sneak and peek). Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take

\(^{124}\) The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct threat assessments for federal agencies, and to reimburse federal agencies for the costs of detaining terrorist suspects overseas.

\(^{125}\) For a general discussion of the Posse Comitatus Act, see, Doyle, The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law, CRS REP.NO. 95-964 (June 1, 2000).
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, *Richards v. Wisconsin*, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, *Wilson v. Arkansas*, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, *Dalia v. United States*, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, *cf.*, *United States v. Miller*, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, *United States v. Freitas*, 800 F.2d 1451, 1453 (9th Cir. 1986).\footnote{The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in *United States v. New York Telephone Co.*, 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth}
The Second Circuit was less convinced and preferred to hold sneak and peek searches to the demands of Rule 41, United States v. Pangburn, 983 F.2d 449 (2d Cir. 1993).127 The Fourth Circuit was, if anything, less convinced. Moreover, the facts in the case demonstrate the potential impact of the issue on computer privacy, United States v. Simons, 206 F.3d 392 (4th Cir. 2000).128

Amendment, demands that surreptitious entries be closely circumscribed,” United States v. Freitas (Freitas I), 800 F.2d 1451, 1455-456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, United States v. Freitas (Freitas II), 856 F.2d 1425 (9th Cir. 1988).

127 “No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in Dalia v. United States, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in Dalia, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property. . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. See United States v. New York Telephone Co., 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . . Although the Freitas I court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in United States v. Villegas, 899 F.2d 1324 (1999). Although the Freitas I court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in Villegas. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the Freitas I court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” United States v. Pangburn, 983 F.2d 449, 453-55 (2d Cir. 1993).

128 In Simons, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
The Justice Department urged that the conflict be resolved with a uniform rule which permitted sneak and peek warrants under the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage.  

The Act, in section 213, stops short of the Justice Department proposal. Characterized as a codification of the Second Circuit decision, 147 Cong.Rec. H7197 (daily ed. Oct. 23, 2001), the Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C. 3103a. Its sneak and peek authorization reaches all federal search and seizure warrants where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (e.g., risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (e.g., jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, i.e., in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation. The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

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129 “The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities,” DoJ at §353.

130 Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department’s initial proposal, the Department’s justification does not address the question.
constitutionally “reasonable,” that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

**Nationwide terrorism search warrants.** The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either “within or outside the district,” (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases. The provision may anticipate execution both in this country and overseas. The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage. Neither Rule 41 nor any other provision of federal

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131 The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

132 The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

133 *United States v. Barona*, 56 F.3d 1087, 1092 (9th Cir. 1995)(“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994)(“if American law enforcement officials substantially participated in the search or if the

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” F.R.Crim.P. 41, *Advisory Committee Notes: 1990 Amendment*. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

**Terrorists’ DNA.** The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards *per se.*

Existing federal law allowed the Attorney General to collect samples from foreign officials conducting the search were actually acting as agents for their American counterparts’); *United States v. Maturo*, 982 F.2d 57, 61 (2d Cir. 1992)(“where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials” or “where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials”); *United States v. Mitro*, 880 F.2d 1480, 1482 (1st Cir. 1989)(“where American agents participated in the foreign search or the foreign officers acted as agents for their American counterparts”); *United States v. Mount*, 757 F.2d 1315, 1318 (D.C.Cir. 1985)(“if American officials or officers participated in some significant way”); *United States v. Marzano*, 537 F.2d 120, 139 (5th Cir. 1976)(“if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts”); each of the decisions also suggests that evidence secured in a manner which shocked the conscience of the court would be excluded.

134 The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, *see*, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), *reprinted*, 78 Cong.Rec. 4982-983 (1934)(“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.)(conferring judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

federal prisoners convicted of a variety of violent crimes, 42 U.S.C. 14135a. The Act enlarges the predicate offense list to include any crime of violence or any terrorism offense, section 503.\textsuperscript{136}

**Access to Educational Records.** Finally, the Act calls for an ex parte court order procedure under which senior Justice Department officials may seek authorization to collect educational records relevant to an investigation or prosecution of a crime of terrorism, section 507 (as an exception to the confidentiality requirements of the General Education Provisions Act, 20 U.S.C. 1232g), section 508 (as an exception to the confidentiality requirements of the National Education Statistics Act, 20 U.S.C. 9007).

**Statute of Limitations.** Prosecution for murder in violation of federal law may be initiated at any time, 18 U.S.C. 3281. A five year statute of limitations applied for most other federal crimes before passage of the Act, with a few exceptions. Among the relevant exceptions were an eight year statute of limitations for several terrorist offenses, 18 U.S.C. 3286,\textsuperscript{137} and a ten year statute of limitations for a few arson and explosives offenses, 18 U.S.C. 3295. The Justice Department recommended the elimination of a statute of limitations in terrorism cases.\textsuperscript{138}

\textsuperscript{136} Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples form convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes,” DoJ at §353.


\textsuperscript{137} 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

\textsuperscript{138} “This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

“This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in
The Act takes less dramatic action in section 809. It eliminates the statute of limitations for any crime of terrorism that risks or results in a death or serious bodily injury, 18 U.S.C. 3286. In the absence of such a risk or result, all other terrorism offenses become subject to the eight year statute of limitations unless already covered by the ten year statute for explosives and arson offenses, 18 U.S.C. 3286.

Application of the statute of limitations rarely provokes a constitutional inquiry. Nevertheless, due process precludes prosecution when it can be shown that pre-indictment delay “caused substantial prejudice to [a defendant’s] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.” Moreover, a judicial difference of opinion has appeared in those cases connection with the September 11, 2001 terrorist attacks. The constitutionality of such retroactive applications of changes in statutes of limitations is well-settled, See, e.g., United States v. Grimes, 142 F.3d 1342, 1350-51 (11th Cir. 1998); People v. Frazer, 982 P.2d 180 (Cal. 1999).

“Existing federal law (18 U.S.C. §3282) bars prosecuting most offenses after five years. 18 U.S.C. §3286, as currently formulated, extends the limitation period for prosecution for certain offenses that may be committed by terrorists – but only to eight years. While this is a limited improvement over the five-year limitation period for most federal offenses, it is patently inadequate in relation to the catastrophic human and social costs that frequently follow from such crimes as destruction of aircraft (18 U.S.C. §32), aircraft hijackings ([49] U.S.C. §§46502, 46504-06, attempted political assassinations (18 U.S.C. §§351, 1116, 1751), or hostage taking (18 U.S.C. §1203). These are not minor acts of misconduct which can properly be forgiven or forgotten merely because the perpetrator has avoided apprehension for some period of time. Anomalously, existing law provides longer limitation periods for such offenses as bank frauds and certain artwork thefts (18 U.S.C.§§3293-94) than it does for crimes characteristically committed by terrorists.

“In many American jurisdictions, the limitation periods for prosecution for serious offenses are more permissible than those found in federal law, including a number of states which have no limitation period for the prosecution of felonies generally. While this section does not go so far, it does eliminate the limitation period for prosecution of the major crimes that are most likely to be committed by terrorists (‘Federal terrorism offenses’), as specified in section 309 of this bill,” DoJ at 301.

As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 (sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period.\textsuperscript{141} Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.\textsuperscript{142}

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (\textit{Grimes}, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (\textit{Frazer}, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

\textbf{Extraterritoriality.} Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States or elsewhere. . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.\textsuperscript{143}

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnapping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.

\textsuperscript{141} \textit{United States v. De La Matta}, 266 F.3d 1275, 1286 (11th Cir. 2001); \textit{United States v. Grimes}, 142 F.3d 1342, 1351 (11th Cir. 1998); \textit{United States v. Morrow}, 177 F.3d 272, 294 (5th Cir. 1999); \textit{Falter v. United States}, 23 F.2d 420, 425-26 (2d Cir. 1928).

\textsuperscript{142} \textit{People v. Frazer}, 24 Cal.4th 737, 759, 982 P.2d 180, 1294, 88 Cal.Rptr.2d 312, 327 (1999).

\textsuperscript{143} \textit{United States v. Layton}, 855 F.2d 1388 (9th Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); \textit{United States v. Benitez}, 741 F.2d 1312 (11th Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.  

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

Victims. Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11th Victim Compensation Fund legislation before it passed the Act. Consequently, the Act’s victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 et seq., and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 et seq.

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:

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• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year)(42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d)(5)), section 621(d)

• waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

• eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
• makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

• prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

• allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

• reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

• makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

• allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603(a)(1)), section 624(b)

• establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603(c)), section 624(c)

Increasing Institutional Capacity. A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

- $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)

- Necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)

- $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)

- $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816

- $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701

- $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)

- $5 million for DEA police training in South and Central Asia, section 1007.

**Miscellaneous.** Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might be used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act, or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b), 807.

\textsuperscript{145} \textit{i.e.}, Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).

\textsuperscript{146} For a general discussion of trade sanctions legislation, see, Jurenas, \textit{Exempting Food and Agriculture Products from U.S. Economic Sanctions: Status and Implementation}, CRS ISSUE BRIEF IB100061.
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

**Electronic Surveillance.** To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202. A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(i). Yet only the interloper's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.

**Criminal Investigators’ Access to Foreign Intelligence Information.** The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism. It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that “the purpose for the surveillance is to obtain foreign intelligence information,” 50 U.S.C. 1804(a)(7)(B)(2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps “the purpose” might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation

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16 18 U.S.C. 229 (chemical weapons), 2332(terrorist acts of violence committed against Americans overseas), 2332a(use of weapons of mass destruction), 2332b(acts of terrorism transcending national boundaries), 2332d(financial transactions with countries which support terrorists), 2339A(providing material support to terrorists), and 2339B(providing material support to terrorist organizations).

17 “Because service providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves as permitted under current law, they often have no way to exercise their rights to protect themselves from unauthorized attackers. Moreover, such attackers can target critical infrastructures and engage in cyberterrorism,” DoJ at §106. Elsewhere the Act defines “electronic surveillance” for purposes of the Foreign Intelligence Surveillance Act (FISA) to emphasize that the law enforcement authority for this intruder surveillance does not confer similar authority for purposes of foreign intelligence gathering, section 1003 (50 U.S.C. 1801(f)(2)).

Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment's warrant clause. It is here that the “primary purpose” notion originated. In United States v. Truong Dinh Hung, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, “as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.” Subsequent case law, however, is not as clear as it might be: see e.g., United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984) (“FISA permits federal officials to obtain orders authorizing electronic surveillance ‘for the purpose of obtaining foreign intelligence information.’ The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying officials’ belief that the information sought is the type of foreign intelligence information described”); United States v. Pelton, 835 F.2d 1067, 1075-76 (4th Cir. 1987) (“We also reject Pelton’s claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial”); United States v. Sarkissian, 841 F.2d 959, 907-8 (9th Cir. 1988) (“Defendants rely on the primary purpose test articulated in United States v. Truong Dinh Hung. . . . One other court has applied the primary purpose test. Another court has rejected it . . . distinguishing Truong. A third court has declined to decide the issue. We also decline to decide the issue”); United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1991) (“Appellants attack the government’s surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance”).

20 “Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” DoJ at §153.
demanding standard than the “a purpose” threshold proposed by the Justice Department, but a clear departure from the original “the purpose” entry point. FISA once described a singular foreign intelligence focus prerequisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k), 1825(k).21

**Protective Measures.** The Act reinforces two kinds of safeguards, one set designed to prevent abuse and the other to protect those who assist the government. The sunset clause is perhaps the best known of the Act’s safeguards. Under the direction of section 224, many of the law enforcement and foreign intelligence authorities granted by the Act expire as of December 31, 2005.22 The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter

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21 “(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. (2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, infra, quoting, 50 U.S.C. 1801.

22 “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210[subpoenas for communications provider customer records], 211[access to cable company communication service records], 213[sneak and peek], 216[pen register and trap and trace device amendments], 221[trade sanctions], and 222[assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005. “(b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect," section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers' communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices).\textsuperscript{23} Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees,\textsuperscript{24} but could not recover against the United States.\textsuperscript{25} Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice's Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government's request until a court order authorizing access can be obtained.\textsuperscript{26} Another allows providers to disclose customer records to protect the provider's rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others.\textsuperscript{27} A third section,

\begin{itemize}
  \item \textsuperscript{23} 18 U.S.C. 2511, 2701, and 3121 (2000 ed.), respectively.
  \item \textsuperscript{24} 18 U.S.C. 2520 and 2707 (2000 ed.).
  \item \textsuperscript{26} Prior law already granted service providers immunity for disclosure of customer records in compliance with a court access order, 18 U.S.C. 2703(f).
  \item \textsuperscript{27} “Existing law contains no provision that allows providers of electronic communications service to disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies that threaten death or serious bodily injury. This section amends 18 U.S.C. §2702 to authorize such disclosures if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.
  
  “Current law also contains an odd disconnect: a provider may disclose the contents of the customer's communications in order to protect its rights or property but the current statute does not expressly permit a provider to voluntarily disclose non-content records (such as a subscriber's login records). 18 U.S.C. 2702(b)(5). This problem substantially hinders the ability of providers to protect themselves from cyber-terrorists and criminals. Yet the right to disclose the contents of communications necessarily implies the less intrusive ability to disclose non-content records. In order to promote the protection of our nation's critical infrastructures, this section's amendments allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems,” DoJ at
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

Foreign Intelligence Investigations

Although both criminal investigations and foreign intelligence investigations are conducted in the United States, criminal investigations seek information about unlawful activity; foreign intelligence investigations seek information about other countries and their citizens. Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough.

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA), something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President's authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, United States v. United States District Court, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage

§110.

28 Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

29 Thus in the name of assisting in the execution of Title III, chapter 121, or chapter 206 order, the courts may not cite the Act as the basis for an order compelling a service provider to make system modifications or provide any other technical assistance not already required under 18 U.S.C. 2518(4), 2706, or 3124(c), see, H.R.Rep.No. 107-236, at 62-3 (2001) (emphasis added) (“This Act is not intended to affect obligations under Communications Assistance for Law Enforcement Act [which addresses law enforcement-beneficial system modifications and the compensation to be paid for the changes], nor does the act impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance”).

30 E.g., As amended by section 902 of the Act, “‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2)(language added by the Act in italics).

31 50 U.S.C. 1801 et seq.
In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs. There were and still are extra

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33 “As used in this subchapter: (a) ‘Foreign power’ means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

(b) ‘Agent of a foreign power’ means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person’s presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C).

(c) ‘International terrorism’ means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnapping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

(d) ‘Sabotage’ means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

(e) ‘Foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans ("United States persons," i.e., citizens or permanent resident aliens). The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

- permits “roving” surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)

- increases the number of judges on the FISA court from 7 to 11

- allows application for a FISA surveillance or search order when gathering foreign intelligence is a significant reason for the application rather than the reason

- authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations

- sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses

- carries a sunset provision

- establishes a claim against the U.S. for certain communications privacy violations by government personnel

- expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to – (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States,” 50 U.S.C. 1801.

34 Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
**FISA.** FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases.\(^{35}\) It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

**Search and Surveillance for Intelligence Purposes.** Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, Draft at §151.\(^{36}\)

Section 901 of the Act address a concern raised during the 106th Congress relating to the availability of the FISA orders and the effective use of information gleaned from the execution of a FISA order.\(^{37}\) It vests the Director of Central

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\(^{36}\) See also, DoJ at §151, “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order’s minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed (50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

\(^{37}\) See e.g., S.Rep.No. 106-352, at 3, 6, 7 (2000)(“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application
Intelligence with the responsibility to formulate requirements and priorities for the use of FISA to collect foreign intelligence information. He is also charged with the responsibility of assisting the Attorney General in the efficient and effective dissemination of FISA generated information (50 U.S.C. 403-3(c)).

**Pen Registers and Trap and Trace Devices for Intelligence Gathering.** Section 214 grants the request of the Department of Justice by dropping requirements which limited FISA pen register and trap and trace device orders to facilities used by foreign agents or those engaged in international terrorist or clandestine intelligence activities, 50 U.S.C. 1842(c)(3)(2000 ed.). It is enough that the order is sought as part of an investigation to protect against international terrorism or clandestine intelligence activities and is not motivated solely by an American’s exercise of his or her First Amendment rights. Elsewhere (section 505), the Act drops a similar limitation for intelligence officials’ access to telephone records, 18 U.S.C.

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38 “When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevance, an additional factual showing that the communications device has been used to contact an ‘agent of a foreign power’ engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the ‘agent of a foreign power’ prong from the predication, and thus makes the FISA authority more closely track the criminal authority,” DoJ at §155.
Section 214 adjusts the language of the FISA pen register-trap and trace authority to permit its use to capture source and destination information relating to electronic communications (e.g., e-mail) as well as telephone communications, 50 U.S.C. 1842(d). The section makes it clear that requests for a FISA pen register-trap and trace order, like requests for other FISA orders, directed against Americans (U.S. persons) may not be based solely on activities protected by the First Amendment, 50 U.S.C. 1842, 1843.

Third Party Cooperation and Tangible Evidence. As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target's activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.40

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39 Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise to be entitled to confidentiality. Section 505, in response to the Justice Department's suggestion, allows FBI field offices to make the requests, see DoJ at §157 (“At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports’.

40 When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court's order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.’ This would enhance the FBI's ability to monitor international terrorists and intelligence officers who are
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian. The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities, in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B);
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a);
- the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a);
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v;

trained to thwart surveillance by rapidly changing hotel accommodations, cell phones, Internet accounts, etc., just prior to important meetings or communications. Under the current law, the government would have to return to the FISA Court for an order that named the new carrier, landlord, etc., before effecting surveillance. Under the proposed amendment, the FBI could simply present the newly discovered carrier, landlord, custodian or other person with a generic order issued by the Court and could then effect FISA coverage as soon as technically feasible,” DoJ at 152.


41 “The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigative contexts. The time and difficulty involved in getting such pleadings before the Court usually outweighs the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” DoJ at §156.

42 Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.\(^43\)

**Access to Law Enforcement Information.** Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community’s access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, *Draft* at §103.\(^44\)

\(^43\) H.R.Rep.No. 107-205, at 60-1 (2001)(“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

“The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

“Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual’s credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding--without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information”).

\(^44\) See also, *DoJ* at §103, “This section facilitates the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, Draft at §354. 45

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, Draft at §154. 46

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion. 47 It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its

wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions.”

45 See also, DoJ at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.” Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officers

46 See also, DoJ at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”

47 Blair v. United States, 250 U.S. 273, 281 (1919)(the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

The Act, in section 203(a), allows disclosure of matters occurring before the grand jury to “any federal law enforcement, intelligence, protective, immigration, national defense, or national security” officer to assist in the performance of his official duties, F.R.Crim.P. 6(e)(3)(C)(i)(V).

Critics may protest that the change could lead to the use of the grand jury for intelligence gathering purposes, or less euphemistically, to spy on Americans. The proposal was never among those scheduled to sunset, but earlier versions of the section followed the path used for most other disclosures of grand jury material: prior

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48 These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

49 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25 Harvard Journal of Law & Public Policy 699, 719-20 (2002)(“There is a significant danger that the rule permitting disclosure will be treated as the de facto authorization of an expansion of the grand jury’s investigative role to encompass seeking material relevant only to matters of national security, national defense, immigration, and so forth. The grand jury’s awesome powers should not be unwittingly extended to a much wider range of issues. . . Since the grand jury operates in secret, there are no public checks on the scope of its investigations, and witnesses are not permitted to challenge its jurisdiction. Only the supervising court is in a position to keep the grand jury’s investigation within proper bounds. Requiring judicial approval of foreign intelligence and counterintelligence information disclosures would provide a natural check against the temptation to manipulate the grand jury to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6 (Nov. 2001)(“The grand jury secrecy rule is a rule of policy which has always had exceptions, and it has been frequently modified. The secrecy rule has no credible claim to constitutional stature”).
Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

Law enforcement officials may share Title III information with the intelligence community under the same conditions, section 203(b), although the grand jury and Title III sharing provisions differ in at least three important respects. The court need not be notified of Title III disclosures. On the other hand, the authority for sharing Title III information expires on December 31, 2005, section 224, and agencies and their personnel guilty of intentional improper disclosures may be subject to a claim for damages and disciplinary action, 18 U.S.C. 2520.

The third subsection of section 203 remains something of an enigma. It speaks in much the same language as its counterparts. It allows law enforcement officials to share information with the intelligence community, “notwithstanding any other provisions of law,” section 203(d). It either swallows the other subsections, or supplements them. Several factors argue for its classification as a supplement. Congress is unlikely to have crafted subsections (a), (b) and (c) only to completely

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50 Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

51 “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person’s official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification. By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

**Increasing Institutional Capacity.** As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a

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52 *Duncan v. Walker*, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted) (“It is our duty to give effect, if possible, to every clause and word of a statute. *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)); see also *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879)(As early as in Bacon's Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

53 Draft at §154, “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”
computerized translation capability to be used in foreign intelligence gathering. Section 907 instructs the Director of the Central Intelligence, in consultation with the Director of the FBI, to report on the creation of a National Virtual Translation Center. The report is to include information concerning staffing, allocation of resources, compatibility with comparable systems to be used for law enforcement purposes, and features which permit its efficient and secure use by all of the intelligence agencies.

**Money Laundering**

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture. The Act bolsters federal efforts in each area.

**Regulation.** Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.

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54 “The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

“The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so,” S.Rep.No. 107-63, at 11 (2001).


56 See e.g., 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
Records and Reports. For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler’s checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to files SARs as well, reflecting Congress’ view that the information provided the IRS may be valuable for other law enforcement purposes. This concern is likewise

58 H.R.Rep.No. 107-250, at 38-9 (2001) (“Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

“Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a ‘Safeguard Procedures Report’ which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

“While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement
authorities as the various reports mandated by the Bank Secrecy Act, which can typically be retrieved electronically from a database maintained by the Treasury Department. The differential access to the two kinds of reports is made anomalous by the fact that Form 8300 elicits much the same information that is required to be disclosed by the Bank Secrecy Act. For example, just as Form 8300 seeks the name, address, and social security number of a customer who engages in a cash transaction exceeding $10,000 with a trade or business, Currency Transaction Reports (CTRs) mandated by the Bank Secrecy Act require the same information to be reported on a cash transaction exceeding $10,000 between a financial institution and its customer”.

Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action. Section 355 expands the immunity to cover disclosures in

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59 “Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

“First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor applies in arbitration, as well as judicial, proceedings. Second, it amends section 5318(g)(3) to clarify the safe harbor’s coverage of voluntary disclosures (that is, those not covered by the SAR regulatory reporting requirement). The language in section 5318(g)(3)(A) providing that ‘any financial institution that *** makes a disclosure pursuant to *** any other authority *** shall not be liable to any person’ is not intended to avoid the application of the reporting and disclosure provisions of the Federal securities laws to any person, or to insulate any issuers from private rights of actions for disclosures made under the Federal securities laws.

“Subsection [351](b) amends section 5318(g)(2) of title 31--which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed--to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee’s official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
employment references to other insured depository financial institutions provided disclosure is not done with malicious intent.\textsuperscript{60}

The Financial Crimes Enforcement Network (FinCEN), a component within the Treasury Department long responsible for these anti-money laundering reporting and record-keeping requirements, 31 C.F.R. pt. 103, was administratively created in 1990 to provide other government agencies with an “intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes,” 55 Fed.Reg. 18433 (May 2, 1990).

The Act, in section 361, makes FinCEN a creature of statute, a bureau within the Treasury Department, 31 U.S.C. 310. Section 362 charges it with the responsibility of establishing a highly secure network to allow financial institutions to file required reports electronically and to permit FinCEN to provide those institutions with alerts and other information concerning money laundering protective measures, 31 U.S.C. 310 note.

**Special Measures.** In extraordinary circumstances involving international financial matters, the Act grants the Secretary of the Treasury, in consultation with other appropriate regulatory authorities, the power to issue regulations and orders involving additional required “special measures” and additional “due diligence” requirements to combat money laundering. The special measure authority, available under section 311, comes to life with the determination that particular institutions, jurisdictions, types of accounts, or types of transactions pose a primary money

\textsuperscript{60}31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 67 (2001).
These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

61 31 U.S.C. 5318A. The circumstances considered in the case of a suspect jurisdiction are: evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction’s banking regulation; the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

62 The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’ including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

“Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate
business transactions.

“Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

“Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

“The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

“The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

“The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

“The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent’ account for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information that it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

“The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

“The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed
**Due Diligence.** Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.63

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63 See generally, H.R.Rep. No. 107-250, at 71-2 (“Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

“The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

“The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

“For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
**General Regulatory Matters.** The Act establishes several other regulatory mechanisms directed at the activities involving U.S. financial institutions and foreign individuals or institutions. Section 313, for instance, in another restriction on correspondent accounts for foreign financial institutions, prohibits U.S. financial institutions from maintaining correspondent accounts either directly or indirectly for foreign shell banks (banks with no physical place of business\textsuperscript{64}) which have no affiliation with any financial institution through which their banking activities are subject to regulatory supervision.\textsuperscript{65}

The Act, in section 325, empowers the Secretary of the Treasury to promulgate regulations to prevent financial institutions from allowing their customers to conceal their financial activities by taking advantage of the institutions’ concentration account practices.\textsuperscript{66}

The Secretary of the Treasury is instructed in section 326 to issue regulations for financial institutions’ minimum new customer identification standards and record-

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64 Or more exactly, a bank which has no physical presence in any country; a “physical presence” for a foreign bank is defined as “a place of business that – (i) is maintained by a foreign bank; (ii) is located at a fixed address (other than solely an electronic address) in a country in which the foreign bank is authorized to conduct banking activities, at which location the foreign bank – (I) employs 1 or more individuals on a full-time basis; and (II) maintains operating records relating to its banking activities; and (iii) is subject to inspection by the banking authority which licensed the foreign bank to conduct banking activities,” 31 U.S.C. 5318(j)(4).


66 The Act does not define “concentration accounts,” although the House Financial Services Committee report provides some incite into the section’s intent, H.R.Rep.No. 107-250, at 72-3 (2001)(“This section gives the Secretary of the Treasury discretionary authority to prescribe regulations governing the maintenance of concentration accounts by financial institutions, to ensure that these accounts are not used to prevent association of the identity of an individual customer with the movement of funds of which the customer is the direct or beneficial owner. If promulgated, the regulations are required to prohibit financial institutions from allowing clients to direct transactions into, out of, or through the concentration accounts of the institution; prohibit financial institutions and their employees from informing customers of the existence of, or means of identifying, the concentration accounts of the institution; and to establish written procedures governing the documentation of all transactions involving a concentration account.”)
keeping and to recommend a means to effectively verify the identification of foreign customers.67

67 31 U.S.C. 5318(l); H.R.Rep.No. 107-250, at 62-3 (2001) (“Section [326](a) amends 31 U.S.C. 5318 by adding a new subsection governing the identification of account holders. Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a ‘street name’ or omnibus account in the broker-dealer’s name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to ‘look through’ the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund’s customers. Thus, the fund would not be required to ‘look through’ the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature.  

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

Reports to Congress. Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

“Paragraph (6) requires that Treasury's regulations prescribed under paragraph (1) become effective within one year after enactment of this bill”).

exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.\(^{69}\)

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

**International Cooperation.** Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.\(^{70}\)

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (*i.e.*, the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.

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\(^{70}\) H.R.Rep.No. 107-250, at 67 (2001)(“This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury's progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

“The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime”).
**Crimes.** Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, smuggling, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
Section 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

Section 329 makes it a federal crime to corruptly administer the money laundering regulatory scheme. Offenders are punishable by imprisonment for not more than 15 years and a fine of not more than three times the amount of the bribe.

Section 5326 of title 31 authorizes the Secretary of the Treasury to impose temporary, enhanced reporting requirements upon financial institutions in areas victimized by substantial money laundering activity (geographic targeting regulations and orders). Section 353 makes it clear that the civil sanctions, criminal penalties, and prohibitions on smurfing (structuring transactions to evade reporting requirements) apply to violations of the regulations and orders issued under 31 U.S.C. 5326. It also extends the permissible length of the temporary geographical orders from 60 to 180 days.

Violations of the special measures and special due diligence requirements of sections 311 and 312 are subject to both civil and criminal penalties by virtue of section 363's amendments to 31 U.S.C. 5321(a) and 5322. The amendments authorize civil penalties and criminal fines of twice the amount of the transaction but not more than $1 million. Criminal offenders would be subject to a fine in the same amount.

71 “[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

“The definition of ‘financial institution’ in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of ‘commercial bank’ or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad—say to a Mexican bank—and launders them through a series of financial transactions, the government conceivably could not rely on the definition of a ‘financial institution’ in 1956(c)(6) to establish that the transaction was a ‘financial transaction’ within the meaning of 1956(c)(4)(B) (defining a ‘financial transaction’ as a transaction involving the use of a ‘financial institution’), or that it was a ‘monetary transaction’ within the meaning of 1957(f) (defining ‘monetary transaction’ as, inter alia, a transaction that would be a ‘financial transaction’ under 1956(c)(4)(B)).

“Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launders the proceeds of one of the crimes set forth on a list of ‘specified unlawful activities.’ 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),” H.R.Rep.No. 107-250, at 38 (2000).

Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.73

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents.74 They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

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73 "The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business.

Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.

Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive," H.R.Rep.No. 107-250, at 54 (2001).

74 "This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
• 18 U.S.C. 476 (taking impressions of tools used for obligations and securities) from 10 to 25 years;
• 18 U.S.C. 477 (possessing or selling impressions of tools used for obligations or securities) from 10 to 25 years;
• 18 U.S.C. 484 (connecting parts of different notes) from 5 to 10 years;
• 18 U.S.C. 493 (bonds and obligations of certain lending agencies) from 5 to 10 years;
• 18 U.S.C. 478 (foreign obligations or securities) from 5 to 20 years;
• 18 U.S.C. 479 (uttering counterfeit foreign obligations or securities) from 3 to 20 years;
• 18 U.S.C. 480 (possessing counterfeit foreign obligations or securities) from 1 to 20 years;
• 18 U.S.C. 481 (plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities) from 5 to 25 years;
• 18 U.S.C. 482 (foreign bank notes) from 2 to 20 years; and
• 18 U.S.C. 483 (uttering counterfeit foreign bank notes) from 1 to 20 years.

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

**Bulk Cash.** Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act’s bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting.75

The section appears to be the product of reactions to the Supreme Court’s decision in United States v. Bajakian, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court’s

75 “For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).
As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency – representing the proceeds of drug trafficking and other criminal offenses – is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad. . . .

Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United States without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

“Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute,” H.R.Rep.No. 107-250 at 36-7 (2001).

Extraterritorial Jurisdiction. The Act makes 18 U.S.C. 1029, the federal statute condemning various crimes involving credit cards, PIN numbers and other access devices, applicable overseas if the card or device is issued by or controlled by an American bank or other entity and some article is held in or transported to or through the United States during the course of the offense, section 377. The change was part of the original Justice Department proposals. Justice explained that, “[financial crime] admits of no border, utilizing the integrated global financial network for ill purposes. This provision would apply the financial crimes prohibitions to conduct committed abroad, so long as the tools or proceeds of the crimes pass through or are in the United States,” DoJ at §408. The section, however, appears to limit the otherwise applicable extraterritorial jurisdiction implicit in section 1029, since federal courts would likely recognize extraterritorial jurisdiction over a violation

Section 5317 of title 31 once called for civil forfeiture of property traceable to a violation of 31 U.S.C. 5316 (reports on exporting or importing money instruments worth $10,000 or more). Section 372 of the Act recasts section 5317 to provide for civil and criminal forfeitures for violations of 31 U.S.C. 5316, of 31 U.S.C. 5313 (reports on domestic coins and currency transactions involving $10,000 or more) and of 31 U.S.C. 5324 (structuring transactions to evade reporting requirements (smurfing)).
under *either* circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.\(^{77}\)

**Venue.** Section 1004 relies on *dicta* in *United States v. Cabrales*, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering,\(^{78}\) in the state and district in which the monetary transaction takes place. The Supreme Court in *Cabrales* held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in *dicta*, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.\(^{79}\)

**Forfeiture.** Forfeiture is the government confiscation of property as a consequence of crime.\(^{80}\) The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 *et seq.* (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

**Constitutional Considerations.** The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 *et seq.*, which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the

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\(^{78}\) “The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.” *U.S.Const.* Art.III, §2, cl.3.

“[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,” *U.S.Const.* Amend. VI.

\(^{79}\) See also, *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnaping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.

\(^{80}\) For general background information, see, Doyle, *Crime and Forfeiture*, CRS REP.NO. 97-139A (Oct. 11, 2000).
jurisdiction of the United States, belonging to any foreign individual, foreign entity, or foreign country whom they determine to have planned, authorized, aided or engaged in an attack on the United States by a foreign country or foreign nationals. The section also permits the government to present secretly (ex parte and in camera) any classified information upon which the forfeiture was based should the decision be subject to judicial review. The Justice Department requested the section as a revival of the President’s powers in times of unconventional wars. By virtue of section 316, property owners may initiate a challenge to a confiscation by filing a claim under the rules applicable in maritime confiscations. The section permits two defenses to forfeiture – that the property is not subject to confiscation under section 106 or that the claimant is entitled to the innocent owner defense of 18 U.S.C. 983(d). The characterization of the defenses as “affirmative defense” indicates that the claimant bears the burden of proof. The innocent owner defenses of 18 U.S.C. 983(d) are probably not available in cases under section 106, since that section is explicitly

81 “This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App.U.S.C. §5(b).

“This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress's war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

“The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2),” DoJ at §159.

82 “An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
The challenge proceedings permit the court to admit evidence, such as hearsay evidence, that would not otherwise be admissible under the Federal Rules of Evidence if the evidence is reliable and if national security might be imperiled should dictates of the Federal Rules be followed, §316(b). The section recognizes the rights of claimants to proceed alternatively under the Constitution or the Administrative Procedure Act.

The Justice Department also recommended enactment of an overlapping provision which ultimately passed as section 806 of the Act without any real discussion of the relationship of the two sections. Section 806 authorizes confiscation of all property, regardless of where it is found, of any individual, entity, or organization engaged in domestic or international terrorism (as defined in 18 U.S.C. 2331), against the United States, Americans or their property, 18 U.S.C.

83 18 U.S.C. 983(i)(2)(D).

84 “The exclusion of certain provisions of Federal law from the definition of the term ‘civil forfeiture statute’ in section 983(i) of title 18, United States Code, shall not be construed to deny an owner of property the right to contest the confiscation of assets of suspected international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C) subchapter II of chapter 5 of title 5, United States Code (commonly known as the ‘Administrative Procedure Act’).” Sec. 316(c)(1).

85 “Current law does not contain any authority tailored specifically to the confiscation of terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available current forfeiture laws require detailed tracing that is quite difficult for accounts coming through the banks of countries used by many terrorists.

‘This section increases the government's ability to strike at terrorist organizations' economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001,” DoJ, at §403. The House Report on H.R. 2975 which contained versions of both sections is no more explicit on the relation of the two sections.

86 “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which they operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
Confiscation based solely on the fact that the property is owned by a criminal offender, rather than that it is derived from or facilitates some crime is fairly uncommon. It is the mark of common law forfeiture of estate. At common law, a felon forfeited all of his property. Most contemporary forfeiture statutes employ statutory forfeiture, a more familiar presence in American law, which consists of the confiscation of things whose possession is criminal, of the fruits of crime, and of the means of crime – untaxed whiskey, the drug dealer’s profits, and the rum runner’s ship.

Three characteristics set forfeiture of estate apart. The property is lost solely by reason of its ownership by a felon. All of a felon’s property is confiscated, not merely that which is related to the crime for which he is convicted. Finally, it occasions attainder which negates the felon’s right to hold property or for title to property to pass through him to his heirs. It was with this in mind, that the Framers declared that “no attainder of treason shall work corruption of blood or forfeiture exception during the life of the person attainted.” And for this reason, President Lincoln insisted that the confiscated real estate of Confederate supporters should revert their heirs at death.

87 Austin v. United States, 509 U.S. 602, 611-12 (1993)(“Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture . . . . Of England’s three kinds of forfeiture, only the third took hold in the United States”).


89 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal in personam proceedings following criminal conviction as a means of accomplishing confiscation.
Neither section 106 nor 806 require conviction of the terrorist property owner. Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers. The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners. Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them. The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate

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90 Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c)(“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act”).

91 Silesian American Corp. V. Clark, 332 U.S. 469 (1947); cf., Societe Internationale v. Rogers, 357 U.S. 197, 211 (1958)(“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).

92 Zittman v. McGrath, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’”).

any presumption of remedial purposes. The same has been said of the applicability of the ex post facto clause.

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO. If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

**Other Forfeiture Amendments.** In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.

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95 See e.g., United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.), 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994).

96 DoJ, at §403.

97 18 U.S.C. 1956(b). Cf. H.R.Rep.No. 107-250, at 54-5 (2001)(“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas. Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted American Bank, 191 F.3d 30 (1st Cir. 1999).

“The second provision, modeled on 18 U.S.C. 1345(b), gives the district court the power to restrain property, issue seizure warrants, or take other action necessary to ensure that a defendant in an action covered by the statute does not dissipate the assets that would be needed to satisfy a judgment.

“This section also authorizes a court, on the motion of the Government or a State or Federal regulator, to appoint a receiver to gather and protect assets needed to satisfy a judgment under sections 1956 and 957, and the forfeiture provisions in sections 981 and 982. This authority is intended to apply in three circumstances: (1) when there is a judgment in a criminal case, including an order of restitution, following a conviction for a violation of section 1956 or 1957; (2) when there is a judgment in a civil case under section 1956(b) assessing a penalty for a violation of either section 1956 or 1957; and (3) when there is a civil forfeiture judgment under section 981 or a criminal forfeiture judgment, including a personal money judgment, under section 982.

“The amendment also makes section 1956(b) applicable to violations of section 1957. It applies to conduct occurring before the effective date of the Act”.

18 U.S.C. 981(k). H.R.Rep.No. 107-250, at 57-8 (2001)(“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank's customers.

“Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank’s correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

“The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”).
defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation.99

Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here.100 Section 320 enlarges this provision to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements.101 This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.102

99 Cf., H.R.Rep.No. 107-250, at 58-9 (2001) (“Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of ‘substitute assets’ when the defendant has placed the property otherwise subject to forfeiture ‘beyond the jurisdiction of the court.’ Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

“This section amends 21 U.S.C. 853 to make clear that a court in a criminal case may issue a repatriation order--either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. 853(e) to restrain property--so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both”).


101 H.R.Rep.No. 107-250, at 56 (2001)(“This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act”).

102 H.R.Rep.No. 107-250, at 59-60 (2001)(“Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country.

“Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
A fugitive may not challenge a federal forfeiture. Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in “order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.”

to contest the restraining order could do so on the ground that 28 U.S.C. 2467 was not properly applied to the particular case, but could not oppose the restraining order on any ground that could also be raised in the proceedings pending in a foreign court. This provision prevents a litigant from taking ‘two bites at the apple’ by raising objections to the basis for the forfeiture in the Federal court that he also raised, or is entitled to raise, in the foreign court where the forfeiture action is pending. It complements the existing provision in section 2467(e) providing that the Federal court is bound by the findings of fact of the foreign court, and may not look behind such findings in determining whether to enter an order enforcing a foreign forfeiture judgment.

“This section also amends 28 U.S.C. 2467 to make clear that it is not necessary to prove that the person asserting an interest in the property received actual notice of the forfeiture proceedings. As is the case with respect to forfeitures under U.S. law, it is sufficient if the foreign nation takes steps to provide notice, in accordance with the principles of due process. See Gonzalez v. United States, 1997 WL 278123 (S.D.N.Y. 1997) (‘the [G]overnment is not required to ensure actual receipt of notice that is properly mailed’); Albajon v. Gugliotta, 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant’s identifications, and mailed after claimant released from jail, is sufficient to satisfy due process, even if claimant never received notice); United States v. Schiavo, 897 F. Supp. 644, 648 49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; due process satisfied even if he did not receive the notice).

“Finally, 28 U.S.C. 2467 is amended to authorize the enforcement of a forfeiture judgment based on any foreign offense that would constitute an offense giving rise to a civil or criminal forfeiture of the same property if the offense had been committed in the United States. This is one of two safeguards that the statute contains against the enforcement of judgments that the United States does not consider appropriate for enforcement: if the judgment is based on an act that would not constitute a crime in the United States, such as removing assets from the reach of a repressive regime, it could not be enforced. In addition, section 2467 already provides that a foreign judgment may only be enforced by a Federal court at the request of the United States, and only after the Attorney General has certified that the judgment was obtained in accordance with the principles of due process. Thus, neither a foreign Government nor a foreign private party could enforce a foreign judgment on its own under this provision.”). Note that the safeguard to which the report refers is the range of foreign offenses that will support an enforceable confiscation order, i.e., drug offenses and crimes on the money laundering predicate offense list, and that the amendment narrows that safeguard by adding additional foreign offenses, i.e., any foreign equivalent of a federal crime which would support a confiscation order.

Alien Terrorists and Victims

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

Border Protection. The border protection provisions:

• authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401

• authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402

• remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404

• authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405

• authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.

• instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007

• direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418

• express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414

• add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415

• call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416

• limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
• instruct the Attorney General to report on the feasibility of using biometric scanners to help prevent terrorists and other foreign criminals from entering the country, section 1008

• authorize appropriations of $250,000 for the FBI to determine the feasibility of providing airlines with computer access to the names of suspected terrorists, section 1009

• authorize reciprocal sharing of the State Department’s visa lookout data and related information with other nations in order to prevent terrorism, drug trafficking, slave marketing, and gun running, section 413

**Detention and Removal.** Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity, 8 U.S.C. 1227 (a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(iv). Aliens may be inadmissible for any number of terrorism-related reasons, 8 U.S.C. 1182(a)(3)(B). Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported.


Section 411 defines “terrorist organization” to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the Federal Register as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C.

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104 As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).
Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).


An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in “premeditated, politically motivated violence perpetrated against noncombatant targets,” or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security or endanger some individual or the general public. The Attorney General's determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

**Victims.** The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

- permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421;
- extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422.

105 “The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

106 “The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks.

“The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application.

“Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
...preservation of certain immigration benefits available to alien family members that would be otherwise lost as a consequence of the death of a victim of September 11, section 423\textsuperscript{107}

• limited easing of age restrictions on visas available to aliens under 21 years of age for those whose 21\textsuperscript{st} birthday occurred immediately before or soon after September 11, section 424\textsuperscript{108}

• temporary administrative relief for alien family members of a victim of September 11 who are not otherwise entitled to relief under the Act, section 425

the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

“Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 31.

“Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.


\textsuperscript{107} “Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

“The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

“The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death),” H.R.Rep.No. 107-236, at 68 (2001).

\textsuperscript{108} “Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien’s 21\textsuperscript{st} birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien’s 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
• a denial of benefits of the Act to terrorists and their families, section 427

• authority for the Attorney General to establish evidentiary standards to implement the alien victim provisions of the Act, section 426.

Other Crimes, Penalties, & Procedures

New Crimes. The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department,\(^\text{109}\) the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offense for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents, 18 U.S.C. 175b.\(^\text{110}\) Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.\(^\text{111}\)

\(^{109}\) “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . . .” DoJ at §305.

\(^{110}\) The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

\(^{111}\) “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2)(“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

• destruction of aircraft or their facilities, 18 U.S.C. 32;
• biological weapons offenses, 18 U.S.C. 175;
• chemical weapons offenses, 18 U.S.C. 229;
• nuclear weapons offenses, 18 U.S.C. 831;
• bombing federal buildings, 18 U.S.C. 844(f);
• destruction of an energy facility, 18 U.S.C. 1366;
• violence committed against maritime navigational facilities, 18 U.S.C. 2280;
• offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
• international terrorism, 18 U.S.C. 2232b;
• sabotage of a nuclear facility, 42 U.S.C. 2284;
• air piracy, 49 U.S.C. 46502.

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.112

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D) The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

112 U.S. Const. Art.III, §2, cl.3 ("The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . ."); Amend. IV ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . ."); United States v. Cabrales, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from Cabrales when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnapping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999)("By way of comparison, last Term in Cabrales we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense").
The Justice Department sought the expansion along with the enlargement of the predicate offense list, "18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of ‘material support or resources’ is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’)," DoJ at §304.

Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.


113 The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of ‘material support or resources’ is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’),” DoJ at 306.


115 “The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill (‘Federal terrorism offenses’) is used in identifying the relevant crimes,” DoJ, at §304.

New Penalties. The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. 3571(b),(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense.\(^{117}\)

The proposal, however, failed to identify the critical elements that would trigger the alternative.\(^{118}\) Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

- for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

- for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

\(^{117}\) “Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersede lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,”DoJ, at §302.

\(^{118}\) “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense,” Draft at §302.
• for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;

• for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;

• for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;

• for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and

• for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism. Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:

• arson committed within a federal enclave, 18 U.S.C. 81;
• killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);
• destruction of communications facilities, 18 U.S.C. 1362;
• destruction of property within a federal enclave, 18 U.S.C. 1363;
• causing a train wreck, 18 U.S.C. 1922;
• providing material support to a terrorist, 18 U.S.C. 2339A;
• torture committed overseas under color of law, 18 U.S.C. 2340A;
• sabotage of a nuclear facility, 42 U.S.C. 2284;

119 The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §§846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

“This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.
• interfering with a flight crew within U.S. special aircraft jurisdiction, 49 U.S.C. 46504;
• carrying a weapon or explosive abroad an aircraft within U.S. special aircraft jurisdiction, 49 U.S.C. 46505; and
• sabotage of interstate gas pipeline facilities, 49 U.S.C. 60123.

When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years). The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission), a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

120 Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

121 “Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.

“This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders).122

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

**Other Procedural Adjustments.** In other procedural adjustments designed to facilitate criminal investigations, the Act:

- increases the rewards for information in terrorism cases
- expands the Posse Comitatus Act exceptions
- authorizes “sneak and peek” search warrants
- permits nationwide and perhaps worldwide execution of warrants in terrorism cases
- eases government access to confidential information
- allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
- lengthens the statute of limitations applicable to crimes of terrorism
- clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
- adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B.123

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122 It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, e.g., damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

123 When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001)(remarks of Rep. Sensenbrenner); for general background, see, Doyle, McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys, CRS REP.NO. RL30060 (Dec. 14, 2001).
Rewards. The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L.105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism.124

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

**Posse Comitatus.** The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.125

**Delayed notification of a search (sneak and peek).** Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take

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124 The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct threat assessments for federal agencies, and to reimburse federal agencies for the costs of detaining terrorist suspects overseas.

125 For a general discussion of the Posse Comitatus Act, see, Doyle, *The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law*, CRS Rep.No. 95-964 (June 1, 2000).
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, Richards v. Wisconsin, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, Wilson v. Arkansas, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, Dalia v. United States, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, cf., United States v. Miller, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, United States v. Freitas, 800 F.2d 1451, 1453 (9th Cir. 1986).126

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126 "The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in United States v. New York Telephone Co., 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth
Amendment, demands that surreptitious entries be closely circumscribed,” United States v. Freitas (Freitas I), 800 F.2d 1451, 1455-456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, United States v. Freitas (Freitas II), 856 F.2d 1425 (9th Cir. 1988).

“"No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in Dalia v. United States, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in Dalia, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property. . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. See United States v. New York Telephone Co., 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . . Although the Freitas I court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in United States v. Villegas, 899 F.2d 1324 (1999). Although the Freitas I court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in Villegas. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the Freitas I court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” United States v. Pangburn, 983 F.2d 449, 453-55 (2d Cir. 1993).

127 In Simons, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
The Justice Department urged that the conflict be resolved with a uniform rule which permitted sneak and peek warrants under the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage.\textsuperscript{129}

The Act, in section 213, stops short of the Justice Department proposal. Characterized as a codification of the Second Circuit decision, 147 Cong.Rec. H7197 (daily ed. Oct. 23, 2001), the Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C. 3103a. Its sneak and peek authorization reaches all federal search and seizure warrants where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (\textit{e.g.}, risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (\textit{e.g.}, jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, \textit{i.e.}, in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation.\textsuperscript{130} The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

\textsuperscript{129} “The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities,” \textit{DoJ} at §353.

\textsuperscript{130} Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department's initial proposal, the Department's justification does not address the question.
constitutionally “reasonable,” that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

**Nationwide terrorism search warrants.** The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either “within or outside the district,” (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases. The provision may anticipate execution both in this country and overseas. The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage. Neither Rule 41 nor any other provision of federal

131 The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

132 The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

133 *United States v. Barona*, 56 F.3d 1087, 1092 (9th Cir. 1995)(“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994)(“if American law enforcement officials substantially participated in the search or if the

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” F.R.Crim.P. 41, *Advisory Committee Notes: 1990 Amendment*. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

**Terrorists’ DNA.** The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards *per se*.  

Existing federal law allowed the Attorney General to collect samples from foreign officials conducting the search were actually acting as agents for their American counterparts’); *United States v. Maturo*, 982 F.2d 57, 61 (2d Cir. 1992)(“where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials” or “where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials”); *United States v. Mitro*, 880 F.2d 1480, 1482 (1st Cir. 1989)(“where American agents participated in the foreign search or the foreign officers acted as agents for their American counterparts”); *United States v. Mount*, 757 F.2d 1315, 1318 (D.C. Cir. 1985)(“if American officials or officers participated in some significant way”); *United States v. Marzano*, 537 F.2d 257, 270 (7th Cir. 1976)(declining to adopt the “joint venture” standards, but finding level of American participation in the case before it insignificant); *United States v. Morrow*, 537 F.2d 120, 139 (5th Cir. 1976)(“if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts”); each of the decisions also suggests that evidence secured in a manner which shocked the conscience of the court would be excluded.

134 The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, see, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), reprinted, 78 Cong.Rec. 4982-983 (1934)(“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.) (conferring judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples form convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes,” DoJ at §353.

For a general discussion, see, Fischer, DNA Identification: Applications and Issues, CRS REP.NO. RL30717 (Jan. 12, 2001).

Access to Educational Records. Finally, the Act calls for an ex parte court order procedure under which senior Justice Department officials may seek authorization to collect educational records relevant to an investigation or prosecution of a crime of terrorism, section 507 (as an exception to the confidentiality requirements of the General Education Provisions Act, 20 U.S.C. 1232g), section 508 (as an exception to the confidentiality requirements of the National Education Statistics Act, 20 U.S.C. 9007).

Statute of Limitations. Prosecution for murder in violation of federal law may be initiated at any time, 18 U.S.C. 3281. A five year statute of limitations applied for most other federal crimes before passage of the Act, with a few exceptions. Among the relevant exceptions were an eight year statute of limitations for several terrorist offenses, 18 U.S.C. 3286, and a ten year statute of limitations for a few arson and explosives offenses, 18 U.S.C. 3295. The Justice Department recommended the elimination of a statute of limitations in terrorism cases.

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For a general discussion, see, Fischer, DNA Identification: Applications and Issues, CRS REP.NO. RL30717 (Jan. 12, 2001).

137 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

138 “This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

“This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in
The Act takes less dramatic action in section 809. It eliminates the statute of limitations for any crime of terrorism\textsuperscript{139} that risks or results in a death or serious bodily injury, 18 U.S.C. 3286. In the absence of such a risk or result, all other terrorism offenses become subject to the eight year statute of limitations unless already covered by the ten year statute for explosives and arson offenses, 18 U.S.C. 3286.

Application of the statute of limitations rarely provokes a constitutional inquiry. Nevertheless, due process precludes prosecution when it can be shown that pre-indictment delay “caused substantial prejudice to [a defendant’s] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.”\textsuperscript{140} Moreover, a judicial difference of opinion has appeared in those cases

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\textsuperscript{139} As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 (sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period. Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (Grimes, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (Frazer, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

Extraterritoriality. Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States or elsewhere. . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnapping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.

\[141\] United States v. De La Matta, 266 F.3d 1275, 1286 (11th Cir. 2001); United States v. Grimes, 142 F.3d 1342, 1351 (11th Cir. 1998); United States v. Morrow, 177 F.3d 272, 294 (5th Cir. 1999); Falter v. United States, 23 F.2d 420, 425-26 (2d Cir. 1928).

\[142\] People v. Frazer, 24 Cal.4th 737, 759, 982 P.2d 180, 1294, 88 Cal.Rptr.2d 312, 327 (1999).

\[143\] United States v. Layton, 855 F.2d 1388 (9th Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); United States v. Benitez, 741 F.2d 1312 (11th Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.\textsuperscript{144}

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

**Victims.** Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11\textsuperscript{th} Victim Compensation Fund legislation before it passed the Act. Consequently, the Act's victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 \textit{et seq.}, and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 \textit{et seq.}

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer's death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:

• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year)(42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d)(5)), section 621(d)

• waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

• eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
• makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

• prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

• allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

• reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

• makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

• allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

• establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

**Increasing Institutional Capacity.** A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

- $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)

- necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)

- $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)

- $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816

- $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701

- $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)

- $5 million for DEA police training in South and Central Asia, section 1007.

**Miscellaneous.** Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might to used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act, or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b), 807.\(^\text{146}\)

\(^{145}\) *i.e.*, Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).

\(^{146}\) For a general discussion of trade sanctions legislation, see, Jurenas, *Exempting Food and Agriculture Products from U.S. Economic Sanctions: Status and Implementation*, CRS ISSUE BRIEF IB100061.
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The USA PATRIOT Act: A Legal Analysis

Introduction

Congress passed the USA PATRIOT Act (the Act) in response to the terrorists’ attacks of September 11, 2001. The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to further close our borders to foreign terrorists and to detain and remove those within our borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it is not without safeguards, critics contend some of its provisions go too far. Although it grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough.


1 P.L. 107-56, 115 Stat. 272 (2001); its full title is the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT).”

2 H.R. 2975 was introduced by Representative Sensenbrenner for himself and Representatives Conyers, Hyde, Coble, Goodlatte, Jenkins, Jackson-Lee, Cannon, Meehan, Graham, Bachus, Wexler, Hostettler, Keller, Issa, Hart, Flake, Schiff, Thomas, Goss, Rangel, Berman and Lofgren; S.1510 by Senator Daschle for himself and Senators Lott, Leahy, Hatch, Graham, Shelby and Sarbanes.

3 H.R. 3004 was introduced by Representative Oxley for himself and Representatives LaFalce, Leach, Maloney, Roukema, Bentsen, Hooley, Bereuter, Baker, Bachus, King, Kelly, Gillmore, Cantor, Riley, Latourette, Green (of Wisconsin), and Grucci; and reported out of the House Financial Services Committee with amendments on October 15, 2001, H.R.Rep.No. 107-250. H.R. 3004, as reported out, included Internet gambling amendments that were not included in H.R. 2975/H.R.3108.
ed. Oct. 24, 2001), and H.R. 3162 was sent to the President who signed it on October 26, 2001.

**Criminal Investigations: Tracking and Gathering Communications**

A portion of the Act addresses issues suggested originally in a Department of Justice proposal circulated in mid-September. The first of its suggestions called for amendments to federal surveillance laws, laws which govern the capture and tracking of suspected terrorists’ communications within the United States. Federal law features a three tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications.

The tiers reflected the Supreme Court’s interpretation of the Fourth Amendment’s ban on unreasonable searches and seizures. The Amendment protects private conversations, *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967). It does not cloak information, even highly personal information, for which there is no individual justifiable expectation of privacy, such as telephone company records of calls made to and from an individual’s home, *Smith v. Maryland*, 442 U.S. 735 (1979), or bank records of an individual’s financial dealings, *United States v. Miller*, 425 U.S. 435 (1976).

Congress responded to *Berger* and *Katz*, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications, 18 U.S.C. 2511. At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious

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6 “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,” *U.S. Const*. Amend. IV.

7 Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
criminal cases. When approved by senior Justice Department officials, law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.

8 "The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of” one or more predicate offense, 18 U.S.C. 2516.

9 The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement), 1751 (presidential and presidential staff assassination, kidnapping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnapping, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or naturalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations, 18 U.S.C. 2518. The court notifies the parties to any conversations seized under the order after the order expires, 18 U.S.C. 2518(8).

Below Title III, the next tier of privacy protection covers some of those matters which the Supreme Court has described as beyond the reach of the Fourth Amendment protection – telephone records, e-mail held in third party storage, and the like, 18 U.S.C. 2701-2709 (Chapter 121). Here, the law permits law enforcement access, ordinarily pursuant to a warrant or court order or under a subpoena in some cases, but in connection with any criminal investigation and without the extraordinary levels of approval or constraint that mark a Title III interception, 18 U.S.C. 2703.

Least demanding and perhaps least intrusive of all is the procedure that governs court orders approving the government’s use of trap and trace devices and pen registers, a kind of secret “caller id”, which identify the source and destination of calls made to and from a particular telephone, 18 U.S.C. 3121-3127 (Chapter 206). The orders are available based on the government’s certification, rather than a finding of the court, that the use of the device is likely to produce information relevant to the investigation of a crime, any crime, 18 U.S.C. 3123. The devices record no more than the identity of the participants in a telephone conversation, but neither the orders nor the results they produce need ever be revealed to the participants.

The Act modifies the procedures at each of the three levels. It:

10 Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
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- permits pen register and trap and trace orders for electronic communications (e.g., e-mail)
- authorizes nationwide execution of court orders for pen registers, trap and trace devices, and access to stored e-mail or communication records
- treats stored voice mail like stored e-mail (rather than like telephone conversations)
- permits authorities to intercept communications to and from a trespasser within a computer system (with the permission of the system’s owner)
- adds terrorist and computer crimes to Title III’s predicate offense list
- reenforces protection for those who help execute Title III, ch. 121, and ch. 206 orders
- encourages cooperation between law enforcement and foreign intelligence investigators
- establishes a claim against the U.S. for certain communications privacy violations by government personnel
- terminates the authority found in many of the these provisions and several of the foreign intelligence amendments with a sunset provision (Dec. 31, 2005).

**Pen Registers and Trap and Trace Devices.** In section 216, the Act allows court orders authorizing trap and trace devices and pen registers to be used to capture source and addressee information for computer conversations (e.g., e-mail) as well as telephone conversations, 18 U.S.C. 3121, 3123. In answer to objections that e-mail header information can be more revealing than a telephone number, it creates a detailed report to the court, 18 U.S.C. 3123(a)(3).\(^1\)

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\(^1\) “Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public the agency shall ensure that a record will be maintained which will identify – (i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of the such device.

“(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof),” section 216(b)(1).
The use of pen registers or trap and trace devices was limited at one time to the judicial district in which the order was issued, 18 U.S.C. 3123 (2000 ed.). Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States, 18 U.S.C. 3123(b)(1)(C), 3127(2).  

Communications Records and Stored E-Mail. With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber, 18 U.S.C. 2703(a),(b). A warrant will also suffice to seize records describing telephone and other communications transactions without customer notice, 18 U.S.C. 2703(c). In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation, officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records, 18 U.S.C. 2703(b),(c). They can obtain a limited amount of record information (subscribers’ names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena, 18 U.S.C. 2703(c)(1)(C). There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial, 18 U.S.C. 2705.

In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider’s customer records, 18 U.S.C. 2703(c)(1)(C).  

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.

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12 The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” DoJ at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

13 Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user’s true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” DoJ at §107.
Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

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15 See e.g., DoJ at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement’s access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

**Electronic Surveillance.** To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202. A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(i). Yet only the interloper's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.17

**Criminal Investigators' Access to Foreign Intelligence Information.** The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism.18 It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that “the purpose for the surveillance is to obtain foreign intelligence information,” 50 U.S.C. 1804(a)(7)(B)(2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps “the purpose” might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation

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16 18 U.S.C. 229 (chemical weapons), 2332a(terrorist acts of violence committed against Americans overseas), 2332a(use of weapons of mass destruction), 2332b(acts of terrorism transcending national boundaries), 2332d(financial transactions with countries which support terrorists), 2339A(providing material support to terrorists), and 2339B(providing material support to terrorist organizations).

17 “Because service providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves as permitted under current law, they often have no way to exercise their rights to protect themselves from unauthorized attackers. Moreover, such attackers can target critical infrastructures and engage in cyberterrorism,” DoJ at §106.

Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment's warrant clause. It is here that the “primary purpose” notion originated. In United States v. Truong Dinh Hung, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, “as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.”

Subsequent case law, however, is not as clear as it might be: see e.g., United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984) (“FISA permits federal officials to obtain orders authorizing electronic surveillance ‘for the purpose of obtaining foreign intelligence information.’ The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying officials’ belief that the information sought is the type of foreign intelligence information described”); United States v. Pelton, 835 F.2d 1067, 1075-76 (4th Cir. 1987) (“We also reject Pelton’s claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial”); United States v. Sarkissian, 841 F.2d 959, 907-8 (9th Cir. 1988) (“Defendants rely on the primary purpose test articulated in United States v. Truong Dinh Hung. . . . One other court has applied the primary purpose test. Another court has rejected it . . . distinguishing Truong. A third court has declined to decide the issue. We also decline to decide the issue”); United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1991) (“Appellants attack the government’s surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance”).

Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” DoJ at §153.
demanding standard than the “a purpose” threshold proposed by the Justice Department, but a clear departure from the original “the purpose” entry point. FISA once described a singular foreign intelligence focus prerequisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k), 1825(k). \(^{21}\)

**Protective Measures.** The Act reenforces two kinds of safeguards, one set designed to prevent abuse and the other to protect those who assist the government. The sunset clause is perhaps the best known of the Act’s safeguards. Under the direction of section 224, many of the law enforcement and foreign intelligence authorities granted by the Act expire as of December 31, 2005. \(^{22}\) The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter

\(^{21}\) “(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. (2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, infra, quoting, 50 U.S.C. 1801.

\(^{22}\) “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210[ subpoenas for communications provider customer records], 211[ access to cable company communication service records], 213[sneak and peek], 216[pen register and trap and trace device amendments], 221[trade sanctions], and 222[assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005. (b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers' communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices). Variants of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees, but could not recover against the United States. Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice's Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government's request until a court order authorizing access can be obtained. Another allows providers to disclose customer records to protect the provider's rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others. A third section,

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26 Prior law already granted service providers immunity for disclosure of customer records in compliance with a court access order, 18 U.S.C. 2703(f).
27 “Existing law contains no provision that allows providers of electronic communications service to disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies that threaten death or serious bodily injury. This section amends 18 U.S.C. §2702 to authorize such disclosures if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.
“Current law also contains an odd disconnect: a provider may disclose the contents of the customer's communications in order to protect its rights or property but the current statute does not expressly permit a provider to voluntarily disclose non-content records (such as a subscriber's login records). 18 U.S.C. 2702(b)(5). This problem substantially hinders the ability of providers to protect themselves from cyber-terrorists and criminals. Yet the right to disclose the contents of communications necessarily implies the less intrusive ability to disclose non-content records. In order to promote the protection of our nation's critical infrastructures, this section's amendments allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems,” DoJ at
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

**Foreign Intelligence Investigations**

Although both criminal investigations and foreign intelligence investigations are conducted in the United States, criminal investigations seek information about unlawful activity; foreign intelligence investigations seek information about other countries and their citizens. Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough.

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA), something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President’s authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, *United States v. United States District Court*, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage

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28 Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

29 Thus in the name of assisting in the execution of Title III, chapter 121, or chapter 206 order, the courts may not cite the Act as the basis for an order compelling a service provider to make system modifications or provide any other technical assistance not already required under 18 U.S.C. 2518(4), 2706, or 3124(c), see, H.R.Rep.No. 107-236, at 62-3 (2001) (emphasis added) (“This Act is not intended to affect obligations under Communications Assistance for Law Enforcement Act [which addresses law enforcement-beneficial system modifications and the compensation to be paid for the changes], nor does the act impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance”).

30 *E.g.*, As amended by section 902 of the Act, “foreign intelligence” means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or *international terrorist activities,* 50 U.S.C. 401a(2)(language added by the Act in italics).

31 50 U.S.C. 1801 *et seq.*
lockers, 50 U.S.C. 1861-1863 (2000 ed.). Intelligence authorities gained narrow passages through other privacy barriers as well.\(^\text{32}\)

In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs.\(^\text{33}\) There were and still are extra


\(^{33}\) "As used in this subchapter: (a) ‘Foreign power’ means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

‘(b) ‘Agent of a foreign power’ means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of a foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C).

‘(c) ‘International terrorism’ means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnapping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

‘(d) ‘Sabotage’ means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

‘(e) ‘Foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans (“United States persons,” i.e., citizens or permanent resident aliens). The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

• permits “roving” surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)

• increases the number of judges on the FISA court from 7 to 11

• allows application for a FISA surveillance or search order when gathering foreign intelligence is a significant reason for the application rather than the reason

• authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations

• sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses

• carries a sunset provision

• establishes a claim against the U.S. for certain communications privacy violations by government personnel

• expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to – (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States,” 50 U.S.C. 1801.

34 Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
**FISA.** FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases.\(^\text{35}\) It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

**Search and Surveillance for Intelligence Purposes.** Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d) (2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, Draft at §151.\(^\text{36}\)

Section 901 of the Act address a concern raised during the 106th Congress relating to the availability of the FISA orders and the effective use of information gleaned from the execution of a FISA order.\(^\text{37}\) It vests the Director of Central

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\(^{36}\) *See also, DoJ at §151,* “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order’s minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed (50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

\(^{37}\) *See e.g., S.Rep.No. 106-352, at 3, 6, 7 (2000)* (“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application*
process, as interpreted by the OIPR is administratively burdensome and, at times, extremely slow. Many applications undergo months of scrutiny before submission to the court because the OIPR prescribes standards and restrictions not imposed by the statute. . . . In particular, the OIPR has been criticized for an overly restrictive interpretation of the FISA ‘currency’ requirement. This is the issue of how recent a subject’s activities must be to support a finding of probable cause that the subject is engaged in clandestine intelligence gathering activities. . . .While existing law does not specifically address “past activities,” it does not preclude, and legislative history supports, the conclusion that past activities may be part of the totality of circumstances considered by the FISC in making a probable cause determination. . . . By definition, information collected pursuant to a court order issued under the Foreign Intelligence Surveillance Act is foreign intelligence not law enforcement information. Accordingly, the Committee wants to clarify that the FISA ‘take’ can and must be shared by the Federal Bureau of Investigation with appropriate intelligence agencies. For the intelligence mission of the United States to be successful, there must be a cooperative and concerted effort among intelligence agencies. Any information collected by one agency under foreign intelligence authorities that could assist another agency in executing its lawful mission should be shared fully and promptly. Only then can the United States Government pursue aggressively important national security targets including, for example, counterterrorist and counternarcotics targets”;

Pen Registers and Trap and Trace Devices for Intelligence Gathering. Section 214 grants the request of the Department of Justice by dropping requirements which limited FISA pen register and trap and trace device orders to facilities used by foreign agents or those engaged in international terrorist or clandestine intelligence activities, 50 U.S.C. 1842(c)(3)(2000 ed.). It is enough that the order is sought as part of an investigation to protect against international terrorism or clandestine intelligence activities and is not motivated solely by an American’s exercise of his or her First Amendment rights. Elsewhere (section 505), the Act drops a similar limitation for intelligence officials’ access to telephone records, 18 U.S.C.

38 “When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevance, an additional factual showing that the communications device has been used to contact an ‘agent of a foreign power’ engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the ‘agent of a foreign power’ prong from the predication, and thus makes the FISA authority more closely track the criminal authority,” DoJ at §155.
Section 214 adjusts the language of the FISA pen register-trap and trace authority to permit its use to capture source and destination information relating to electronic communications (e.g., e-mail) as well as telephone communications, 50 U.S.C. 1842(d). The section makes it clear that requests for a FISA pen register-trap and trace order, like requests for other FISA orders, directed against Americans (U.S. persons) may not be based solely on activities protected by the First Amendment, 50 U.S.C. 1842, 1843.

Third Party Cooperation and Tangible Evidence. As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target's activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.  

Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise to be entitled to confidentiality. Section 505, in response to the Justice Department's suggestion, allows FBI field offices to make the requests, see DoJ at §157 (“At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports”).

When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court's order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.’ This would enhance the FBI's ability to monitor international terrorists and intelligence officers who are
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian. The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities, in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B));
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a);
- the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a);
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v;

41 “The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigative contexts. The time and difficulty involved in getting such pleadings before the Court usually outweighs the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” DoJ at §156.

42 Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.\(^{43}\)

**Access to Law Enforcement Information.** Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community's access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, *Draft* at §103.\(^{44}\)

\(^{43}\) H.R.Rep.No. 107-205, at 60-1 (2001)(“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

“The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

“Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual's credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding--without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information’’).

\(^{44}\) See also, *DoJ* at §103, “This section facilities the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, Draft at §354.⁴⁵

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, Draft at §154.⁴⁶

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion.⁴⁷ It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions."

⁴⁵ See also, DoJ at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.” Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officers.

⁴⁶ See also, DoJ at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”

⁴⁷ Blair v. United States, 250 U.S. 273, 281 (1919)(the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

The Act, in section 203(a), allows disclosure of matters occurring before the grand jury to “any federal law enforcement, intelligence, protective, immigration, national defense, or national security” officer to assist in the performance of his official duties, F.R.Crim.P. 6(e)(3)(C)(i)(V). Critics may protest that the change could lead to the use of the grand jury for intelligence gathering purposes, or less euphemistically, to spy on Americans. The proposal was never among those scheduled to sunset, but earlier versions of the section followed the path used for most other disclosures of grand jury material: prior affairs are conducted in private and outside the presence of the court. Only the attorney for the government, witnesses under examination, and a court reporter may attend its proceedings, F.R.Crim.P. 6(d). Matters occurring before the grand jury are secret and may be disclosed by the attending attorney for the government and those assisting the grand jury only in the performance of their duties; in presentation to a successor grand jury; or under court order for judicial proceedings, for inquiry into misconduct before the grand jury, or for state criminal proceedings, F.R.Crim.P. 6(e).

48 These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

49 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25 HARVARD JOURNAL OF LAW & PUBLIC POLICY 699, 719-20 (2002) (“There is a significant danger that the rule permitting disclosure will be treated as the de facto authorization of an expansion of the grand jury’s investigative role to encompass seeking material relevant only to matters of national security, national defense, immigration, and so forth. The grand jury’s awesome powers should not be unwittingly extended to a much wider range of issues. . . Since the grand jury operates in secret, there are no public checks on the scope of its investigations, and witnesses are not permitted to challenge its jurisdiction. Only the supervising court is in a position to keep the grand jury’s investigation within proper bounds. Requiring judicial approval of foreign intelligence and counterintelligence information disclosures would provide a natural check against the temptation to manipulate the grand jury to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6 (Nov. 2001) (“The grand jury secrecy rule is a rule of policy which has always had exceptions, and it has been frequently modified. The secrecy rule has no credible claim to constitutional stature”).
Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

"Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification.\textsuperscript{52} By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.\textsuperscript{53}

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

**Increasing Institutional Capacity.** As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a

\textsuperscript{52} \textit{Duncan v. Walker}, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted) (“It is our duty to give effect, if possible, to every clause and word of a statute. \textit{United States v. Menasche}, 348 U.S. 528, 538-539 (1955) (quoting \textit{Montclair v. Ramsdell}, 107 U.S. 147, 152 (1883)); see also \textit{Williams v. Taylor}, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); \textit{Market Co. v. Hoffman}, 101 U.S. 112, 115 (1879)(As early as in Bacon's Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage.\textit{Babbitt v. Sweet Home Chapter, Communities for Great Ore.}, 515 U.S. 687, 698 (1995); see also \textit{Ratzlaf v. United States}, 510 U.S. 135, 140 (1994)").

It is not possible to conclude that Congress intended the universal subsection (d) to apply until sunset and the grand jury and Title III subsections (a), (b), and (c) to operate thereafter, because the Title III subsection expires at the same time as the universal subsection.

\textsuperscript{53} \textit{Draft} at §154, “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”
The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

“The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so,” S.Rep.No. 107-63, at 11 (2001).

Money Laundering

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture. The Act bolsters federal efforts in each area.

Regulation. Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.


See e.g., 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
**Records and Reports.** For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler’s checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to files SARs as well,57 reflecting Congress’ view that the information provided the IRS may be valuable for other law enforcement purposes.58 This concern is likewise...

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58 H.R.Rep.No. 107-250, at 38-9 (2001) (“Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

“Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a ‘Safeguard Procedures Report’ which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

“While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement...
The differential access to the two kinds of reports is made anomalous by the fact that Form 8300 elicits much the same information that is required to be disclosed by the Bank Secrecy Act. For example, just as Form 8300 seeks the name, address, and social security number of a customer who engages in a cash transaction exceeding $10,000 with a trade or business, Currency Transaction Reports (CTRs) mandated by the Bank Secrecy Act require the same information to be reported on a cash transaction exceeding $10,000 between a financial institution and its customer.

59 “Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

“First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor from civil liability applies in arbitration, as well as judicial, proceedings. Second, it amends section 5318(g)(3) to clarify the safe harbor’s coverage of voluntary disclosures (that is, those not covered by the SAR regulatory reporting requirement). The language in section 5318(g)(3)(A) providing that ‘any financial institution that *** makes a disclosure pursuant to *** any other authority *** shall not be liable to any person’ is not intended to avoid the application of the reporting and disclosure provisions of the Federal securities laws to any person, or to insulate any issuers from private rights of actions for disclosures made under the Federal securities laws.

“Subsection [351](b) amends section 5318(g)(2) of title 31—which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed—to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee's official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
employment references to other insured depository financial institutions provided disclosure is not done with malicious intent.\textsuperscript{60}

The Financial Crimes Enforcement Network (FinCEN), a component within the Treasury Department long responsible for these anti-money laundering reporting and record-keeping requirements, 31 C.F.R. pt. 103, was administratively created in 1990 to provide other government agencies with an “intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes,” 55 Fed.Reg. 18433 (May 2, 1990).

The Act, in section 361, makes FinCEN a creature of statute, a bureau within the Treasury Department, 31 U.S.C. 310. Section 362 charges it with the responsibility of establishing a highly secure network to allow financial institutions to file required reports electronically and to permit FinCEN to provide those institutions with alerts and other information concerning money laundering protective measures, 31 U.S.C. 310 note.

\textbf{Special Measures.} In extraordinary circumstances involving international financial matters, the Act grants the Secretary of the Treasury, in consultation with other appropriate regulatory authorities, the power to issue regulations and orders involving additional required “special measures” and additional “due diligence” requirements to combat money laundering. The special measure authority, available under section 311, comes to life with the determination that particular institutions, jurisdictions, types of accounts, or types of transactions pose a primary money laundering problem.

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\textsuperscript{60} 31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 67 (2001).
These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

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61 31 U.S.C. 5318A. The circumstances considered in the case of a suspect jurisdiction are: evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction’s banking regulation; the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

62 The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’ including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

“Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate
business transactions.

“Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

“Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

“The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

“The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

“The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

“The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information that it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

“The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

“The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed
**Due Diligence.** Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.63

63 See generally, H.R.Rep.No. 107-250, at 71-2 (“Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

“The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

“The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

“For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
detect and report transactions that may involve the proceeds of foreign corruption. A private bank account is defined as an account (or any combination of accounts) that requires a minimum aggregate deposit of funds or other assets of not less than $1 million; is established on behalf of one or more individuals who have a direct or beneficial ownership in the account; and is assigned to, or administered or managed by, an officer, employee or agent of a financial institution acting as a liaison between the institution and the direct or beneficial owner of the account.

"This section directs the Secretary of the Treasury, within 6 months of enactment of this bill and in consultation with appropriate Federal functional regulators, to further define and clarify, by regulation, the requirements imposed by this section").

64 Or more exactly, a bank which has no physical presence in any country; a “physical presence” for a foreign bank is defined as “a place of business that – (i) is maintained by a foreign bank; (ii) is located at a fixed address (other than solely an electronic address) in a country in which the foreign bank is authorized to conduct banking activities, at which location the foreign bank – (I) employs 1 or more individuals on a full-time basis; and (II) maintains operating records relating to its banking activities; and (iii) is subject to inspection by the banking authority which licensed the foreign bank to conduct banking activities,” 31 U.S.C. 5318(j)(4).


66 The Act does not define “concentration accounts,” although the House Financial Services Committee report provides some incite into the section’s intent, H.R.Rep.No. 107-250, at 72-3 (2001)(“This section gives the Secretary of the Treasury discretionary authority to prescribe regulations governing the maintenance of concentration accounts by financial institutions, to ensure that these accounts are not used to prevent association of the identity of an individual customer with the movement of funds of which the customer is the direct or beneficial owner. If promulgated, the regulations are required to prohibit financial institutions from allowing clients to direct transactions into, out of, or through the concentration accounts of the institution; prohibit financial institutions and their employees from informing customers of the existence of, or means of identifying, the concentration accounts of the institution; and to establish written procedures governing the documentation of all transactions involving a concentration account.

General Regulatory Matters. The Act establishes several other regulatory mechanisms directed at the activities involving U.S. financial institutions and foreign individuals or institutions. Section 313, for instance, in another restriction on correspondent accounts for foreign financial institutions, prohibits U.S. financial institutions from maintaining correspondent accounts either directly or indirectly for foreign shell banks (banks with no physical place of business which have no affiliation with any financial institution through which their banking activities are subject to regulatory supervision.

The Act, in section 325, empowers the Secretary of the Treasury to promulgate regulations to prevent financial institutions from allowing their customers to conceal their financial activities by taking advantage of the institutions’ concentration account practices.

The Secretary of the Treasury is instructed in section 326 to issue regulations for financial institutions’ minimum new customer identification standards and record-
keeping and to recommend a means to effectively verify the identification of foreign customers.\textsuperscript{67}

\textsuperscript{67} 31 U.S.C. 5318(l); H.R.Rep.No. 107-250, at 62-3 (2001)(“Section [326](a) amends 31 U.S.C. 5318 by adding a new subsection governing the identification of account holders. Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a ‘street name’ or omnibus account in the broker-dealer's name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to ‘look through’ the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund's customers. Thus, the fund would not be required to ‘look through’ the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature.68

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

**Reports to Congress.** Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

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exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.69

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

International Cooperation. Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.70

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (i.e., the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.


70 H.R.Rep.No. 107-250, at 67 (2001)(“This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury's progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

“The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime”).
Crimes. Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, smuggling, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
Section 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution’. For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

The definition of ‘financial institution’ in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of ‘commercial bank’ or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad--say to a Mexican bank--and launders them through a series of financial transactions, the government conceivably could not rely on the definition of a ‘financial institution’ in 1956(c)(6) to establish that the transaction was a ‘financial transaction’ within the meaning of 1956(c)(4)(B) (defining a ‘financial transaction’ as a transaction involving the use of a ‘financial institution’), or that it was a ‘monetary transaction’ within the meaning of 1957(f) (defining ‘monetary transaction’ as, inter alia, a transaction that would be a ‘financial transaction’ under 1956(c)(4)(B)).

Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launders the proceeds of one of the crimes set forth on a list of ‘specified unlawful activities.’ 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),” H.R.Rep.No. 107-250, at 38 (2000).

71 “[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.73

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents.74 They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

73 “The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business.

“Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.

“Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive,” H.R.Rep.No. 107-250, at 54 (2001).

74 “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
• 18 U.S.C. 476 (taking impressions of tools used for obligations and securities) from 10 to 25 years;
• 18 U.S.C. 477 (possessing or selling impressions of tools used for obligations or securities) from 10 to 25 years;
• 18 U.S.C. 484 (connecting parts of different notes) from 5 to 10 years;
• 18 U.S.C. 493 (bonds and obligations of certain lending agencies) from 5 to 10 years;
• 18 U.S.C. 478 (foreign obligations or securities) from 5 to 20 years;
• 18 U.S.C. 479 (uttering counterfeit foreign obligations or securities) from 3 to 20 years;
• 18 U.S.C. 480 (possessing counterfeit foreign obligations or securities) from 1 to 20 years;
• 18 U.S.C. 481 (plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities) from 5 to 25 years;
• 18 U.S.C. 482 (foreign bank notes) from 2 to 20 years; and
• 18 U.S.C. 483 (uttering counterfeit foreign bank notes) from 1 to 20 years.

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

**Bulk Cash.** Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act’s bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting.

The section appears to be the product of reactions to the Supreme Court’s decision in *United States v. Bajakian*, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court’s

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75 “For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).
As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency – representing the proceeds of drug trafficking and other criminal offenses – is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad.

Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United States without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute,” H.R.Rep.No. 107-250 at 36-7 (2001).
under either circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.77

**Venue.** Section 1004 relies on dicta in *United States v. Cabrales*, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering,78 in the state and district in which the monetary transaction takes place. The Supreme Court in *Cabrales* held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in dicta, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.79

**Forfeiture.** Forfeiture is the government confiscation of property as a consequence of crime.80 The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 et seq. (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

**Constitutional Considerations.** The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 et seq., which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the

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78 “The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed,” *U.S.Const.* Art.III, §2, cl.3.

“[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,” *U.S.Const.* Amend. VI.

79 See also, *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnaping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.

80 For general background information, see, Doyle, *Crime and Forfeiture*, CRS REP.NO. 97-139A (Oct. 11, 2000).
jurisdiction of the United States, belonging to any foreign individual, foreign entity, or foreign country whom they determine to have planned, authorized, aided or engaged in an attack on the United States by a foreign country or foreign nationals. The section also permits the government to present secretly (ex parte and in camera) any classified information upon which the forfeiture was based should the decision be subject to judicial review. The Justice Department requested the section as a revival of the President's powers in times of unconventional wars. By virtue of section 316, property owners may initiate a challenge to a confiscation by filing a claim under the rules applicable in maritime confiscations. The section permits two defenses to forfeiture – that the property is not subject to confiscation under section 106 or that the claimant is entitled to the innocent owner defense of 18 U.S.C. 983(d). The characterization of the defenses as “affirmative defense” indicates that the claimant bears the burden of proof. The innocent owner defenses of 18 U.S.C. 983(d) are probably not available in cases under section 106, since that section is explicitly

81 “This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App. U.S.C. §5(b).

“This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress's war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

“The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2),” DoJ at §159.

82 “An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
excepted from the coverage of 18 U.S.C. 983.\textsuperscript{83} The challenge proceedings permit the court to admit evidence, such as hearsay evidence, that would not otherwise be admissible under the Federal Rules of Evidence if the evidence is reliable and if national security might be imperiled should dictates of the Federal Rules be followed, §316(b). The section recognizes the rights of claimants to proceed alternatively under the Constitution or the Administrative Procedure Act.\textsuperscript{84}

The Justice Department also recommended enactment of an overlapping provision which ultimately passed as section 806 of the Act without any real discussion of the relationship of the two sections.\textsuperscript{85} Section 806 authorizes confiscation of all property, regardless of where it is found, of any individual, entity, or organization engaged in domestic or international terrorism (as defined in 18 U.S.C. 2331),\textsuperscript{86} against the United States, Americans or their property, 18 U.S.C.

\textsuperscript{83} 18 U.S.C. 983(i)(2)(D).

\textsuperscript{84} “The exclusion of certain provisions of Federal law from the definition of the term ‘civil forfeiture statute’ in section 983(i) of title 18, United States Code, shall not be construed to deny an owner of property the right to contest the confiscation of assets of suspected international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C) subchapter II of chapter 5 of title 5, United States Code (commonly known as the ‘Administrative Procedure Act’).” Sec. 316(c)(1).

\textsuperscript{85} “Current law does not contain any authority tailored specifically to the confiscation of terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available current forfeiture laws require detailed tracing that is quite difficult for accounts coming through the banks of countries used by many terrorists.

“This section increases the government’s ability to strike at terrorist organizations’ economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001,” DoJ, at §403. The House Report on H.R. 2975 which contained versions of both sections is no more explicit on the relation of the two sections.

\textsuperscript{86} “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
Section 806 as discussed below also calls for the more common confiscation of property derived from and or facilitating acts of domestic or international terrorism against the United States or its citizens. Confiscations under 806 may be challenged under the procedures of 18 U.S.C. 983, since they are not exempted there. To the extent that forfeiture under section 806 is based on international rather than domestic terrorism, claimants may also use the procedures of section 316.

Confiscation based solely on the fact that the property is owned by a criminal offender, rather than that it is derived from or facilitates some crime is fairly uncommon. It is the mark of common law forfeiture of estate. At common law, a felon forfeited all of his property. Most contemporary forfeiture statutes employ statutory forfeiture, a more familiar presence in American law, which consists of the confiscation of things whose possession is criminal, of the fruits of crime, and of the means of crime – untaxed whiskey, the drug dealer’s profits, and the rum runner’s ship.

Three characteristics set forfeiture of estate apart. The property is lost solely by reason of its ownership by a felon. All of a felon’s property is confiscated, not merely that which is related to the crime for which he is convicted. Finally, it occasions attainder which negates the felon’s right to hold property or for title to property to pass through him to his heirs. It was with this in mind, that the Framers declared that “no attainder of treason shall work corruption of blood or forfeiture exception during the life of the person attainted.” And for this reason, President Lincoln insisted that the confiscated real estate of Confederate supporters should revert their heirs at death.

of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5)(as amended by section 802 of the Act).

Austin v. United States, 509 U.S. 602, 611-12 (1993)(“Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture . . . . Of England’s three kinds of forfeiture, only the third took hold in the United States”).


12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal in personam proceedings following criminal conviction as a means of accomplishing confiscation.
Neither section 106 nor 806 require conviction of the terrorist property owner. Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers. The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners. Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them. The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate

90 Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c) (“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act”).

91 Silesian American Corp. V. Clark, 332 U.S. 469 (1947); cf., Societe Internationale v. Rogers, 357 U.S. 197, 211 (1958) (“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).

92 Zittman v. McGrath, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’”).

any presumption of remedial purposes.\textsuperscript{94} The same has been said of the applicability of the ex post facto clause.\textsuperscript{95}

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO.\textsuperscript{96} If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

Other Forfeiture Amendments. In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.\textsuperscript{97}

\textsuperscript{94} United States v. Ursery, 518 U.S. 267, 278 (1996).

\textsuperscript{95} See e.g., United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.), 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994).

\textsuperscript{96} DoJ, at §403.

\textsuperscript{97} 18 U.S.C. 1956(b). Cf., H.R.Rep.No. 107-250, at 54-5 (2001) (‘‘The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas.\footnote{18 U.S.C. 953.} Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted American Bank, 191 F.3d 30 (1st Cir. 1999).

“The second provision, modeled on 18 U.S.C. 1345(b), gives the district court the power to restrain property, issue seizure warrants, or take other action necessary to ensure that a defendant in an action covered by the statute does not dissipate the assets that would be needed to satisfy a judgment.

“This section also authorizes a court, on the motion of the Government or a State or Federal regulator, to appoint a receiver to gather and protect assets needed to satisfy a judgment under sections 1956 and 957, and the forfeiture provisions in sections 981 and 982. This authority is intended to apply in three circumstances: (1) when there is a judgment in a criminal case, including an order of restitution, following a conviction for a violation of section 1956 or 1957; (2) when there is a judgment in a civil case under section 1956(b) assessing a penalty for a violation of either section 1956 or 1957; and (3) when there is a civil forfeiture judgment under section 981 or a criminal forfeiture judgment, including a personal money judgment, under section 982.

“The amendment also makes section 1956(b) applicable to violations of section 1957. It applies to conduct occurring before the effective date of the Act”).

\footnote{18 U.S.C. 981(k). H.R.Rep.No. 107-250, at 57-8 (2001) (“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank's customers. Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank's correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it. The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”).}
Cf. H.R.Rep.No. 107-250, at 58-9 (2001) ("Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of "substitute assets" when the defendant has placed the property otherwise subject to forfeiture "beyond the jurisdiction of the court." Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

"This section amends 21 U.S.C. 853 to make clear that a court in a criminal case may issue a repatriation order--either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. 853(e) to restrain property--so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both").


101 H.R.Rep.No. 107-250, at 56 (2001)("This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act").

102 H.R.Rep.No. 107-250, at 59-60 (2001)("Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country.

"Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
A fugitive may not challenge a federal forfeiture.\textsuperscript{103} Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in “order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.”

to contest the restraining order could do so on the ground that 28 U.S.C. 2467 was not properly applied to the particular case, but could not oppose the restraining order on any ground that could also be raised in the proceedings pending in a foreign court. This provision prevents a litigant from taking ‘two bites at the apple’ by raising objections to the basis for the forfeiture in the Federal court that he also raised, or is entitled to raise, in the foreign court where the forfeiture action is pending. It complements the existing provision in section 2467(e) providing that the Federal court is bound by the findings of fact of the foreign court, and may not look behind such findings in determining whether to enter an order enforcing a foreign forfeiture judgment.

“This section also amends 28 U.S.C. 2467 to make clear that it is not necessary to prove that the person asserting an interest in the property received actual notice of the forfeiture proceedings. As is the case with respect to forfeitures under U.S. law, it is sufficient if the foreign nation takes steps to provide notice, in accordance with the principles of due process. See Gonzalez v. United States, 1997 WL 278123 (S.D.N.Y. 1997) (‘the [G]overnment is not required to ensure actual receipt of notice that is properly mailed’); Albajon v. Gugliotta, 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant's identifications, and mailed after claimant released from jail, is sufficient to satisfy due process, even if claimant never received notice); United States v. Schiavo, 897 F. Supp. 644, 648 49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; due process satisfied even if he did not receive the notice).

“Finally, 28 U.S.C. 2467 is amended to authorize the enforcement of a forfeiture judgment based on any foreign offense that would constitute an offense giving rise to a civil or criminal forfeiture of the same property if the offense had been committed in the United States. This is one of two safeguards that the statute contains against the enforcement of judgments that the United States does not consider appropriate for enforcement: if the judgment is based on an act that would not constitute a crime in the United States, such as removing assets from the reach of a repressive regime, it could not be enforced. In addition, section 2467 already provides that a foreign judgment may only be enforced by a Federal court at the request of the United States, and only after the Attorney General has certified that the judgment was obtained in accordance with the principles of due process. Thus, neither a foreign Government nor a foreign private party could enforce a foreign judgment on its own under this provision.”). Note that the safeguard to which the report refers is the range of foreign offenses that will support an enforceable confiscation order, \textit{i.e.}, drug offenses and crimes on the money laundering predicate offense list, and that the amendment narrows that safeguard by adding additional foreign offenses, \textit{i.e.}, any foreign equivalent of a federal crime which would support a confiscation order.

\textsuperscript{103} 28 U.S.C. 2466.
Alien Terrorists and Victims

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

Border Protection. The border protection provisions:

- authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401
- authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402
- remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404
- authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405
- authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.
- instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007
- direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418
- express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414
- add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415
- call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416
- limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).

Detention and Removal. Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity, 8 U.S.C. 1227 (a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(iv). Aliens may be inadmissible for any number of terrorism-related reasons, 8 U.S.C. 1182(a)(3)(B). Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported.


Section 411 defines “terrorist organization” to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the Federal Register as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C.
Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).


An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in “premeditated, politically motivated violence perpetrated against noncombatant targets,” or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security or endanger some individual or the general public. The Attorney General's determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
The USA PATRIOT Act: A Legal Analysis

April 15, 2002

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Summary

The USA PATRIOT Act passed in the wake of the September 11 terrorist attacks. It flows from a consultation draft circulated by the Department of Justice, to which Congress made substantial modifications and additions. The stated purpose of the Act is to enable law enforcement officials to track down and punish those responsible for the attacks and to protect against any similar attacks.

The Act grants federal officials greater powers to trace and intercept terrorists’ communications both for law enforcement and foreign intelligence purposes. It reenforces federal anti-money laundering laws and regulations in an effort to deny terrorists the resources necessary for future attacks. It tightens our immigration laws to close our borders to foreign terrorists and to expel those among us. Finally, it creates a few new federal crimes, such as the one outlawing terrorists’ attacks on mass transit; increases the penalties for many others; and institutes several procedural changes, such as a longer statute of limitations for crimes of terrorism.

Critics have suggested that it may go too far. The authority to monitor e-mail traffic, to share grand jury information with intelligence and immigration officers, to confiscate property, and to impose new book-keeping requirements on financial institutions, are among the features troubling to some.

The Act itself responds to some of these reservations. Many of the wiretapping and foreign intelligence amendments sunset on December 31, 2005. The Act creates judicial safeguards for e-mail monitoring and grand jury disclosures; recognizes innocent owner defenses to forfeiture; and entrusts enhanced anti-money laundering powers to those regulatory authorities whose concerns include the well being of our financial institutions.

This report, stripped of its citations and footnotes, is available in an abbreviated form as The USA PATRIOT Act: A Sketch, CRS Rep.No. RS21203. In addition, much of the information contained here may also be found under a different arrangement in a report entitled, Terrorism: Section by Section Analysis of the USA PATRIOT Act, CRS Rep.No. RL31200 (Dec. 10, 2001). A wider array of terrorism-related analysis appears on the CRS terrorism electronic briefing book page.
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The USA PATRIOT Act: A Legal Analysis

Introduction

Congress passed the USA PATRIOT Act (the Act) in response to the terrorists’ attacks of September 11, 2001. The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to further close our borders to foreign terrorists and to detain and remove those within our borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it is not without safeguards, critics contend some of its provisions go too far. Although it grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough.


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1 P.L. 107-56, 115 Stat. 272 (2001); its full title is the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT).”

2 H.R. 2975 was introduced by Representative Sensenbrenner for himself and Representatives Conyers, Hyde, Coble, Goodlatte, Jenkins, Jackson-Lee, Cannon, Meehan, Graham, Bachus, Wexler, Hostettler, Keller, Issa, Hart, Flake, Schiff, Thomas, Goss, Rangel, Berman and Lofgren; S.1510 by Senator Daschle for himself and Senators Lott, Leahy, Hatch, Graham, Shelby and Sarbanes.

3 H.R. 3004 was introduced by Representative Oxley for himself and Representatives LaFalce, Leach, Maloney, Roukema, Bentsen, Hooley, Bereuter, Baker, Bachus, King, Kelly, Gillmore, Cantor, Riley, Latourette, Green (of Wisconsin), and Grucci; and reported out of the House Financial Services Committee with amendments on October 15, 2001, H.R.Rep.No. 107-250. H.R. 3004, as reported out, included Internet gambling amendments that were not included in H.R. 2975/H.R.3108.
ed. Oct. 24, 2001), and H.R. 3162 was sent to the President who signed it on October 26, 2001.

**Criminal Investigations: Tracking and Gathering Communications**

A portion of the Act addresses issues suggested originally in a Department of Justice proposal circulated in mid-September. The first of its suggestions called for amendments to federal surveillance laws, laws which govern the capture and tracking of suspected terrorists’ communications within the United States. Federal law features a three-tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications.

The tiers reflected the Supreme Court’s interpretation of the Fourth Amendment’s ban on unreasonable searches and seizures. The Amendment protects private conversations, *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967). It does not cloak information, even highly personal information, for which there is no individual justifiable expectation of privacy, such as telephone company records of calls made to and from an individual's home, *Smith v. Maryland*, 442 U.S. 735 (1979), or bank records of an individual's financial dealings, *United States v. Miller*, 425 U.S. 435 (1976).

Congress responded to *Berger* and *Katz*, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications, 18 U.S.C. 2511. At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious

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4 The Department’s proposal, dated September 20, 2001, came with a brief section by section analysis. Both the proposal (Draft) and analysis (DoJ) were printed as an appendix in *Administration's Draft Anti-Terrorism Act of 2001, Hearing Before the House Comm. on the Judiciary*, 107th Cong., 1st Sess. S. 54 (2001).


6 “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,” *U.S. Const. Amend. IV*.

7 Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
criminal cases. When approved by senior Justice Department officials, law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.

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8 “The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of” one or more predicate offense, 18 U.S.C. 2516.

9 The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement), 1751 (presidential and presidential staff assassination, kidnapping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnapping, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or naturalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations, 18 U.S.C. 2518. The court notifies the parties to any conversations seized under the order after the order expires, 18 U.S.C. 2518(8).

Below Title III, the next tier of privacy protection covers some of those matters which the Supreme Court has described as beyond the reach of the Fourth Amendment protection – telephone records, e-mail held in third party storage, and the like, 18 U.S.C. 2701-2709 (Chapter 121). Here, the law permits law enforcement access, ordinarily pursuant to a warrant or court order or under a subpoena in some cases, but in connection with any criminal investigation and without the extraordinary levels of approval or constraint that mark a Title III interception, 18 U.S.C. 2703.

Least demanding and perhaps least intrusive of all is the procedure that governs court orders approving the government’s use of trap and trace devices and pen registers, a kind of secret “caller id”, which identify the source and destination of calls made to and from a particular telephone, 18 U.S.C. 3121-3127 (Chapter 206). The orders are available based on the government’s certification, rather than a finding of the court, that the use of the device is likely to produce information relevant to the investigation of a crime, any crime, 18 U.S.C. 3123. The devices record no more than the identity of the participants in a telephone conversation, but neither the orders nor the results they produce need ever be revealed to the participants.

The Act modifies the procedures at each of the three levels. It:

offense involving counterfeiting punishable under 18 U.S.C. 471, 472, or 473; (e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States; (f) any offense including extortionate credit transactions under 18 U.S.C. 892, 893, or 894; (g) a violation of 31 U.S.C. 5322 (dealing with the reporting of currency transactions); (h) any felony violation of 18 U.S.C. 2511 and 2512 (interception and disclosure of certain communications and to certain intercepting devices); (i) any felony violation of 18 U.S.C. ch. 71 (obscenity); (j) 49 U.S.C. 60123(b) (destruction of a natural gas pipeline), 46502 (aircraft piracy); (k) 22 U.S.C. 2778 (Arms Export Control Act); (l) the location of any fugitive from justice from an offense described in this section; (m) a violation of 8 U.S.C. 1324, 1327, or 1328; (n) any felony violation of 18 U.S.C. 922, 924 (firearms); (o) any violation of 26 U.S.C. 5861 (firearms); (p) a felony violation of 18 U.S.C. 1028 (production of false identification documents), 1542 (false statements in passport applications), 1546 (fraud and misuse of visas, permits, and other documents) or a violation of 8 U.S.C. 1324, 1327, or 1328 (smuggling of aliens); (p) 229 (chemical weapons), 2332 (terrorist violence against Americans overseas), 2332a (weapons of mass destruction), 2332b (multinational terrorism), 2332d (financial transactions with countries supporting terrorism), 2339A (support of terrorist), 2332B (support of terrorist organizations); (r) any conspiracy to commit any of these, 18 U.S.C. 2516(1)(crimes added by the Act in italics). Other than telephone face to face conversations (i.e., electronic communications), the approval of senior Justice Department officials is not required and an order may be sought in any felony investigation, 18 U.S.C. 2516(3).

10 Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public the agency shall ensure that a record will be maintained which will identify—(i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of the such device.

(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof), section 216(b)(1).

Pen Registers and Trap and Trace Devices. In section 216, the Act allows court orders authorizing trap and trace devices and pen registers to be used to capture source and addressee information for computer conversations (e.g., e-mail) as well as telephone conversations, 18 U.S.C. 3121, 3123. In answer to objections that e-mail header information can be more revealing than a telephone number, it creates a detailed report to the court, 18 U.S.C. 3123(a)(3).

• permits pen register and trap and trace orders for electronic communications (e.g., e-mail)
• authorizes nationwide execution of court orders for pen registers, trap and trace devices, and access to stored e-mail or communication records
• treats stored voice mail like stored e-mail (rather than like telephone conversations)
• permits authorities to intercept communications to and from a trespasser within a computer system (with the permission of the system’s owner)
• adds terrorist and computer crimes to Title III’s predicate offense list
• reenforces protection for those who help execute Title III, ch. 121, and ch. 206 orders
• encourages cooperation between law enforcement and foreign intelligence investigators
• establishes a claim against the U.S. for certain communications privacy violations by government personnel
• terminates the authority found in many of the these provisions and several of the foreign intelligence amendments with a sunset provision (Dec. 31, 2005).

11 "Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public the agency shall ensure that a record will be maintained which will identify—(i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of the such device.

"(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof),” section 216(b)(1).
The use of pen registers or trap and trace devices was limited at one time to the judicial district in which the order was issued, 18 U.S.C. 3123 (2000 ed.). Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States, 18 U.S.C. 3123(b)(1)(C), 3127(2).

Communications Records and Stored E-Mail. With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber, 18 U.S.C. 2703(a),(b). A warrant will also suffice to seize records describing telephone and other communications transactions without customer notice, 18 U.S.C. 2703(c). In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation, officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records, 18 U.S.C. 2703(b),(c). They can obtain a limited amount of record information (subscribers' names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena, 18 U.S.C. 2703(c)(1)(C). There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial, 18 U.S.C. 2705.

In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider’s customer records, 18 U.S.C. 2703(c)(1)(C).13

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.

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12 The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” DoJ at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

13 Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user's true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” DoJ at §107.
Previously, only a federal court in the district in which the e-mail was stored could issue the order. Under section 220, federal courts in the district where an offense under investigation occurred may issue orders applicable “without geographic limitation,” 18 U.S.C. 2703.14

The Act, in section 209, treats voice mail like e-mail, that is, subject to the warrant or court order procedure, rather than to the more demanding coverage of Title III once required, United States v. Smith, 155 F.3d 1050, 1055-56 (9th Cir. 1998).

Finally, the Act resolves a conflict between chapter 121 and the federal law governing cable companies. Government entities may have access to cable company customer records only under a court order following an adversary hearing if they can show that the records will evidence that the customer is or has engaged in criminal activity, 47 U.S.C. 511(h). When cable companies began offering telephone and other communications services the question arose whether the more demanding cable rules applied or whether law enforcement agencies were entitled to ex parte court orders under the no-notice procedures applicable to communications providers.15 The Act makes it clear that the cable rules apply when cable television viewing services are

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14 Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

15 See e.g., DoJ at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement’s access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

**Electronic Surveillance.** To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202. A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(i). Yet only the interloper's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.

**Criminal Investigators' Access to Foreign Intelligence Information.** The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism. It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that “the purpose for the surveillance is to obtain foreign intelligence information,” 50 U.S.C. 1804(a)(7)(B)(2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps “the purpose” might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation.

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16 18 U.S.C. 229 (chemical weapons), 2332 (terrorist acts of violence committed against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2332d (financial transactions with countries which support terrorists), 2339A (providing material support to terrorists), and 2339B (providing material support to terrorist organizations).

17 “Because service providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves as permitted under current law, they often have no way to exercise their rights to protect themselves from unauthorized attackers. Moreover, such attackers can target critical infrastructures and engage in cyberterrorism,” DoJ at §106. Elsewhere the Act defines “electronic surveillance” for purposes of the Foreign Intelligence Surveillance Act (FISA) to emphasize that the law enforcement authority for this intruder surveillance does not confer similar authority for purposes of foreign intelligence gathering, section 1003 (50 U.S.C. 1801(f)(2)).

Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment's warrant clause. It is here that the “primary purpose” notion originated. In United States v. Truong Dinh Hung, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, “as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.” Subsequent case law, however, is not as clear as it might be: see e.g., United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984) (“FISA permits federal officials to obtain orders authorizing electronic surveillance ‘for the purpose of obtaining foreign intelligence information.’ The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying officials’ belief that the information sought is the type of foreign intelligence information described”); United States v. Pelton, 835 F.2d 1067, 1075-76 (4th Cir. 1987) (“We also reject Pelton’s claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial”); United States v. Sarkissian, 841 F.2d 959, 907-8 (9th Cir. 1988) (“Defendants rely on the primary purpose test articulated in United States v. Truong Dinh Hung. . . . One other court has applied the primary purpose test. Another court has rejected it . . . distinguishing Truong. A third court has declined to decide the issue. We also decline to decide the issue”); United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1991) (“Appellants attack the government's surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance”).

The Justice Department sought FISA surveillance and physical search authority on the basis of “a” foreign intelligence purpose. Section 218 of the Act insists that foreign intelligence gathering be a “significant purpose” for the request for the FISA surveillance or physical search order, 50 U.S.C. 1804(a)(7)(B), 1823(a)(7)(B), a more

19 Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment's warrant clause. It is here that the “primary purpose” notion originated. In United States v. Truong Dinh Hung, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, “as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.” Subsequent case law, however, is not as clear as it might be: see e.g., United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984) (“FISA permits federal officials to obtain orders authorizing electronic surveillance ‘for the purpose of obtaining foreign intelligence information.’ The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying officials’ belief that the information sought is the type of foreign intelligence information described”); United States v. Pelton, 835 F.2d 1067, 1075-76 (4th Cir. 1987) (“We also reject Pelton’s claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial”); United States v. Sarkissian, 841 F.2d 959, 907-8 (9th Cir. 1988) (“Defendants rely on the primary purpose test articulated in United States v. Truong Dinh Hung. . . . One other court has applied the primary purpose test. Another court has rejected it . . . distinguishing Truong. A third court has declined to decide the issue. We also decline to decide the issue”); United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1991) (“Appellants attack the government's surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance”).

20 “Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” DoJ at §153.
demanding standard than the “a purpose” threshold proposed by the Justice Department, but a clear departure from the original “the purpose” entry point. FISA once described a singular foreign intelligence focus prerequisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k), 1825(k).21

**Protective Measures.** The Act reinforces two kinds of safeguards, one set designed to prevent abuse and the other to protect those who assist the government. The sunset clause is perhaps the best known of the Act’s safeguards. Under the direction of section 224, many of the law enforcement and foreign intelligence authorities granted by the Act expire as of December 31, 2005.22 The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter

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21 “(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. (2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, infra, quoting, 50 U.S.C. 1801.

22 “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210[subpoenas for communications provider customer records], 211[access to cable company communication service records], 213[sneak and peek], 216[pen register and trap and trace device amendments], 221[trade sanctions], and 222[assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005. (b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers' communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices). 23 Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees, 24 but could not recover against the United States. 25 Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice's Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government's request until a court order authorizing access can be obtained. 26 Another allows providers to disclose customer records to protect the provider's rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others. 27 A third section,

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26 Prior law already granted service providers immunity for disclosure of customer records in compliance with a court access order, 18 U.S.C. 2703(f).
27 “Existing law contains no provision that allows providers of electronic communications service to disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies that threaten death or serious bodily injury. This section amends 18 U.S.C. §2702 to authorize such disclosures if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.

“Current law also contains an odd disconnect: a provider may disclose the contents of the customer's communications in order to protect its rights or property but the current statute does not expressly permit a provider to voluntarily disclose non-content records (such as a subscriber's login records). 18 U.S.C. 2702(b)(5). This problem substantially hinders the ability of providers to protect themselves from cyber-terrorists and criminals. Yet the right to disclose the contents of communications necessarily implies the less intrusive ability to disclose non-content records. In order to promote the protection of our nation's critical infrastructures, this section's amendments allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems,” DoJ at
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

Foreign Intelligence Investigations

Although both criminal investigations and foreign intelligence investigations are conducted in the United States, criminal investigations seek information about unlawful activity; foreign intelligence investigations seek information about other countries and their citizens. Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough.

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA), something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President's authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, United States v. United States District Court, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage

§110.

28 Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

29 Thus in the name of assisting in the execution of Title III, chapter 121, or chapter 206 order, the courts may not cite the Act as the basis for an order compelling a service provider to make system modifications or provide any other technical assistance not already required under 18 U.S.C. 2518(4), 2706, or 3124(c), see, H.R.Rep.No. 107-236, at 62-3 (2001) (emphasis added) (“This Act is not intended to affect obligations under Communications Assistance for Law Enforcement Act [which addresses law enforcement-beneficial system modifications and the compensation to be paid for the changes], nor does the act impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance”).

30 E.g., As amended by section 902 of the Act, “‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2)(language added by the Act in italics).

31 50 U.S.C. 1801 et seq.
In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs. There were and still are extra lockers, 50 U.S.C. 1861-1863 (2000 ed.). Intelligence authorities gained narrow passages through other privacy barriers as well.\(^3\)


“As used in this subchapter: (a) ‘Foreign power’ means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

“(b) ‘Agent of a foreign power’ means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C).

“(c) ‘International terrorism’ means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnaping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

“(d) ‘Sabotage’ means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

“(e) ‘Foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an...
safeguards if it appears that an intelligence investigation may generate information about Americans ("United States persons," i.e., citizens or permanent resident aliens).\textsuperscript{34} The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

- permits “roving” surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)
- increases the number of judges on the FISA court from 7 to 11
- allows application for a FISA surveillance or search order when gathering foreign intelligence is \textit{a significant} reason for the application rather than \textit{the} reason
- authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations
- sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses
- carries a sunset provision
- establishes a claim against the U.S. for certain communications privacy violations by government personnel
- expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to – (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States,” 50 U.S.C. 1801.

\textsuperscript{34} Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
**FISA.** FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases.\(^{35}\) It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

**Search and Surveillance for Intelligence Purposes.** Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, Draft at §151.\(^{36}\)

Section 901 of the Act address a concern raised during the 106th Congress relating to the availability of the FISA orders and the effective use of information gleaned from the execution of a FISA order.\(^{37}\) It vests the Director of Central

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\(^{36}\) See also, DoJ at §151, “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order’s minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed (50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

\(^{37}\) See e.g., S.Rep.No. 106-352, at 3, 6, 7 (2000)(“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application
Intelligence with the responsibility to formulate requirements and priorities for the use of FISA to collect foreign intelligence information. He is also charged with the responsibility of assisting the Attorney General in the efficient and effective dissemination of FISA generated information (50 U.S.C. 403-3(c)).

Pen Registers and Trap and Trace Devices for Intelligence Gathering. Section 214 grants the request of the Department of Justice by dropping requirements which limited FISA pen register and trap and trace device orders to facilities used by foreign agents or those engaged in international terrorist or clandestine intelligence activities, 50 U.S.C. 1842(c)(3)(2000 ed.). It is enough that the order is sought as part of an investigation to protect against international terrorism or clandestine intelligence activities and is not motivated solely by an American’s exercise of his or her First Amendment rights. Elsewhere (section 505), the Act drops a similar limitation for intelligence officials’ access to telephone records, 18 U.S.C.

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38 “When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevance, an additional factual showing that the communications device has been used to contact an ‘agent of a foreign power’ engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the ‘agent of a foreign power’ prong from the predication, and thus makes the FISA authority more closely track the criminal authority,” DoJ at §155.
Section 214 adjusts the language of the FISA pen register-trap and trace authority to permit its use to capture source and destination information relating to electronic communications (e.g., e-mail) as well as telephone communications, 50 U.S.C. 1842(d). The section makes it clear that requests for a FISA pen register-trap and trace order, like requests for other FISA orders, directed against Americans (U.S. persons) may not be based solely on activities protected by the First Amendment, 50 U.S.C. 1842, 1843.

**Third Party Cooperation and Tangible Evidence.** As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target's activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.40

39 Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise to be entitled to confidentiality. Section 505, in response to the Justice Department's suggestion, allows FBI field offices to make the requests, see DoJ at §157 (“At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports”).

40 When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court's order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.’ This would enhance the FBI's ability to monitor international terrorists and intelligence officers who are
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian. The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities, in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B);
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a);
- the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a);
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v;

trained to thwart surveillance by rapidly changing hotel accommodations, cell phones, Internet accounts, etc., just prior to important meetings or communications. Under the current law, the government would have to return to the FISA Court for an order that named the new carrier, landlord, etc., before effecting surveillance. Under the proposed amendment, the FBI could simply present the newly discovered carrier, landlord, custodian or other person with a generic order issued by the Court and could then effect FISA coverage as soon as technically feasible,” DoJ at 152.


41 “The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigatory contexts. The time and difficulty involved in getting such pleadings before the Court usually outweighs the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” DoJ at §156.

42 Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.\(^{43}\)

**Access to Law Enforcement Information.** Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community’s access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, Draft at §103.\(^{44}\)

\(^{43}\) H.R.Rep.No. 107-205, at 60-1 (2001)(“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

“The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

“Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual’s credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding--without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information”).

\(^{44}\) See also, DoJ at §103, “This section facilities the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, Draft at §354.45

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, Draft at §154.46

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion.47 It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions.”

45 See also, DoJ at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.” Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officials

46 See also, DoJ at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”

47 Blair v. United States, 250 U.S. 273, 281 (1919) (the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

The Act, in section 203(a), allows disclosure of matters occurring before the grand jury to “any federal law enforcement, intelligence, protective, immigration, national defense, or national security” officer to assist in the performance of his official duties, F.R.Crim.P. 6(e)(3)(C)(i)(V).

Critics may protest that the change could lead to the use of the grand jury for intelligence gathering purposes, or less euphemistically, to spy on Americans. The proposal was never among those scheduled to sunset, but earlier versions of the section followed the path used for most other disclosures of grand jury material: prior

48 These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

49 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25 HARVARD JOURNAL OF LAW & PUBLIC POLICY 699, 719-20 (2002)(“There is a significant danger that the rule permitting disclosure will be treated as the de facto authorization of an expansion of the grand jury’s investigative role to encompass seeking material relevant only to matters of national security, national defense, immigration, and so forth. The grand jury’s awesome powers should not be unwittingly extended to a much wider range of issues. . . Since the grand jury operates in secret, there are no public checks on the scope of its investigations, and witnesses are not permitted to challenge its jurisdiction. Only the supervising court is in a position to keep the grand jury’s investigation within proper bounds. Requiring judicial approval of foreign intelligence and counterintelligence information disclosures would provide a natural check against the temptation to manipulate the grand jury to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6 (Nov. 2001)(“The grand jury secrecy rule is a rule of policy which has always had exceptions, and it has been frequently modified. The secrecy rule has no credible claim to constitutional stature”).
court approval, H.R.Rep.No. 107-236, at 73 (2001). The Act, in section 203(a), instead calls for confidential notification of the court that a disclosure has occurred and the entity to whom it was made, F.R.Crim.P. 6(e)(3)(C)(iii). It also insists that the Attorney General establish implementing procedures for instances when the disclosure “identifies” Americans (U.S. persons), section 203(c).

Law enforcement officials may share Title III information with the intelligence community under the same conditions, section 203(b), although the grand jury and Title III sharing provisions differ in at least three important respects. The court need not be notified of Title III disclosures. On the other hand, the authority for sharing Title III information expires on December 31, 2005, section 224, and agencies and their personnel guilty of intentional improper disclosures may be subject to a claim for damages and disciplinary action, 18 U.S.C. 2520.

The third subsection of section 203 remains something of an enigma. It speaks in much the same language as its counterparts. It allows law enforcement officials to share information with the intelligence community, “notwithstanding any other provisions of law,” section 203(d). It either swallows the other subsections, or supplements them. Several factors argue for its classification as a supplement. Congress is unlikely to have crafted subsections (a), (b) and (c) only to completely

50 Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

51 “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person’s official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification. By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

**Increasing Institutional Capacity.** As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a

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52 Duncan v. Walker, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted) (“It is our duty to give effect, if possible, to every clause and word of a statute. United States v. Menasche, 348 U.S. 528, 538-539 (1955) (quoting Montclair v. Ramsdell, 107 U.S. 147, 152 (1883)); see also Williams v. Taylor, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); Market Co. v. Hoffman, 101 U.S. 112, 115 (1879)(As early as in Bacon's Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage. By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

53 Draft at §154, “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”
computerized translation capability to be used in foreign intelligence gathering. Section 907 instructs the Director of the Central Intelligence, in consultation with the Director of the FBI, to report on the creation of a National Virtual Translation Center. The report is to include information concerning staffing, allocation of resources, compatibility with comparable systems to be used for law enforcement purposes, and features which permit its efficient and secure use by all of the intelligence agencies.

Money Laundering

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture. The Act bolsters federal efforts in each area.

Regulation. Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.

54 “The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

55 For a brief overview, see, Murphy, Money Laundering: Current Law and Proposals, CRS REP.NO. RS21032 (DEC. 21, 2001).

56 See e.g., 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
Records and Reports. For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler’s checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to file SARs as well,57 reflecting Congress’ view that the information provided the IRS may be valuable for other law enforcement purposes.58 This concern is likewise


58 H.R.Rep.No. 107-250, at 38-9 (2001)(“Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

“Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a ‘Safeguard Procedures Report’ which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

“While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement...
reflected in section 357 which asks the Secretary of the Treasury to report on the Internal Revenue Service’s role in the administration of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311 et seq.), and what transfers of authority, if any, are appropriate.

Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action.59 Section 355 expands the immunity to cover disclosures in authorities as the various reports mandated by the Bank Secrecy Act, which can typically be retrieved electronically from a database maintained by the Treasury Department. The differential access to the two kinds of reports is made anomalous by the fact that Form 8300 elicits much the same information that is required to be disclosed by the Bank Secrecy Act. For example, just as Form 8300 seeks the name, address, and social security number of a customer who engages in a cash transaction exceeding $10,000 with a trade or business, Currency Transaction Reports (CTRs) mandated by the Bank Secrecy Act require the same information to be reported on a cash transaction exceeding $10,000 between a financial institution and its customer”.

59 “Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

“First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor from civil liability applies in arbitration, as well as judicial, proceedings. Second, it amends section 5318(g)(3) to clarify the safe harbor’s coverage of voluntary disclosures (that is, those not covered by the SAR regulatory reporting requirement). The language in section 5318(g)(3)(A) providing that ‘any financial institution that *** makes a disclosure pursuant to *** any other authority *** shall not be liable to any person’ is not intended to avoid the application of the reporting and disclosure provisions of the Federal securities laws to any person, or to insulate any issuers from private rights of actions for disclosures made under the Federal securities laws.

“Subsection [351](b) amends section 5318(g)(2) of title 31—which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed—to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee’s official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
The Financial Crimes Enforcement Network (FinCEN), a component within the Treasury Department long responsible for these anti-money laundering reporting and record-keeping requirements, 31 C.F.R. pt. 103, was administratively created in 1990 to provide other government agencies with an “intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes,” 55 Fed.Reg. 18433 (May 2, 1990).

The Act, in section 361, makes FinCEN a creature of statute, a bureau within the Treasury Department, 31 U.S.C. 310. Section 362 charges it with the responsibility of establishing a highly secure network to allow financial institutions to file required reports electronically and to permit FinCEN to provide those institutions with alerts and other information concerning money laundering protective measures, 31 U.S.C. 310 note.

**Special Measures.** In extraordinary circumstances involving international financial matters, the Act grants the Secretary of the Treasury, in consultation with other appropriate regulatory authorities, the power to issue regulations and orders involving additional required “special measures” and additional “due diligence” requirements to combat money laundering. The special measure authority, available under section 311, comes to life with the determination that particular institutions, jurisdictions, types of accounts, or types of transactions pose a primary money

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60 31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 66 (2001).
These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

61 U.S.C. 5318A. The circumstances considered in the case of a suspect jurisdiction are: evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction’s banking regulation; the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

62 The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’ including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

“Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate
business transactions.

"Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

"Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

"The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

"The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

"The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

"The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent’ account for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

"The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

"The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed
**Due Diligence.** Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watchdog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.63

63 See generally, H.R.Rep. No. 107-250, at 71-2 ("Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

"The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

"The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

"For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
General Regulatory Matters. The Act establishes several other regulatory mechanisms directed at the activities involving U.S. financial institutions and foreign individuals or institutions. Section 313, for instance, in another restriction on correspondent accounts for foreign financial institutions, prohibits U.S. financial institutions from maintaining correspondent accounts either directly or indirectly for foreign shell banks (banks with no physical place of business\(^{64}\)) which have no affiliation with any financial institution through which their banking activities are subject to regulatory supervision.\(^{65}\)

The Act, in section 325, empowers the Secretary of the Treasury to promulgate regulations to prevent financial institutions from allowing their customers to conceal their financial activities by taking advantage of the institutions’ concentration account practices.\(^{66}\)

The Secretary of the Treasury is instructed in section 326 to issue regulations for financial institutions’ minimum new customer identification standards and record-
Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a ‘street name’ or omnibus account in the broker-dealer's name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to ‘look through’ the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund's customers. Thus, the fund would not be required to ‘look through’ the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature.\(^\text{68}\)

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

**Reports to Congress.** Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

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exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.\(^{69}\)

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

**International Cooperation.** Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.\(^{70}\)

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (i.e., the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.

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\(^{70}\) H.R.Rep.No. 107-250, at 67 (2001) ("This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury's progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

"The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime").
**Crimes.** Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, smuggling, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
Section 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

“The definition of ‘financial institution’ in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of ‘commercial bank’ or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad—for example to a Mexican bank—and launderers them through a series of financial transactions, the government conceivably could not rely on the definition of a ‘financial institution’ in 1956(c)(6) to establish that the transaction was a ‘financial transaction’ within the meaning of 1956(c)(4)(B) (defining a ‘financial transaction’ as a transaction involving the use of a ‘financial institution’), or that it was a ‘monetary transaction’ within the meaning of 1957(f) (defining ‘monetary transaction’ as, inter alia, a transaction that would be a ‘financial transaction’ under 1956(c)(4)(B)).

Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launderers the proceeds of one of the crimes set forth on a list of ‘specified unlawful activities.’ 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),” H.R.Rep.No. 107-250, at 38 (2000).

71 “[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached "knowingly" and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.\(^73\)

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents.\(^74\) They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

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\(^{73}\) "The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business. Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another. Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive," H.R.Rep.No. 107-250, at 54 (2001).

\(^{74}\) "This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses," H.R.Rep.No. 107-250, at 75-6 (2001).
• 18 U.S.C. 476 (taking impressions of tools used for obligations and securities) from 10 to 25 years;  
• 18 U.S.C. 477 (possessing or selling impressions of tools used for obligations or securities) from 10 to 25 years;  
• 18 U.S.C. 484 (connecting parts of different notes) from 5 to 10 years;  
• 18 U.S.C. 493 (bonds and obligations of certain lending agencies) from 5 to 10 years;  
• 18 U.S.C. 478 (foreign obligations or securities) from 5 to 20 years;  
• 18 U.S.C. 479 (uttering counterfeit foreign obligations or securities) from 3 to 20 years;  
• 18 U.S.C. 480 (possessing counterfeit foreign obligations or securities) from 1 to 20 years;  
• 18 U.S.C. 481 (plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities) from 5 to 25 years;  
• 18 U.S.C. 482 (foreign bank notes) from 2 to 20 years; and  
• 18 U.S.C. 483 (uttering counterfeit foreign bank notes) from 1 to 20 years.

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

**Bulk Cash.** Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act’s bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting.  

The section appears to be the product of reactions to the Supreme Court’s decision in *United States v. Bajakian*, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court’s

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75 “For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).
As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency — representing the proceeds of drug trafficking and other criminal offenses — is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad.

Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United States without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute,” H.R.Rep.No. 107-250 at 36-7 (2001).
under *either* circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.  

**Venue.** Section 1004 relies on *dicta* in *United States v. Cabrales*, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering, in the state and district in which the monetary transaction takes place. The Supreme Court in *Cabrales* held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in *dicta*, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.

**Forfeiture.** Forfeiture is the government confiscation of property as a consequence of crime. The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 *et seq.* (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

**Constitutional Considerations.** The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 *et seq.*, which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the

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78 “The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed,” *U.S.Const.* Art.III, §2, cl.3.

79 “[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,” *U.S.Const.* Amend. VI.

80 *See also, United States v. Rodriguez-Moreno*, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnaping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.

81 For general background information, see, Doyle, *Crime and Forfeiture*, CRS REP.NO. 97-139A (Oct. 11, 2000).
This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App.U.S.C. §5(b).

This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress's war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2),” DoJ at §159.

An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
excepted from the coverage of 18 U.S.C. 983. The challenge proceedings permit the court to admit evidence, such as hearsay evidence, that would not otherwise be admissible under the Federal Rules of Evidence if the evidence is reliable and if national security might be imperiled should dictates of the Federal Rules be followed, §316(b). The section recognizes the rights of claimants to proceed alternatively under the Constitution or the Administrative Procedure Act.

The Justice Department also recommended enactment of an overlapping provision which ultimately passed as section 806 of the Act without any real discussion of the relationship of the two sections. Section 806 authorizes confiscation of all property, regardless of where it is found, of any individual, entity, or organization engaged in domestic or international terrorism (as defined in 18 U.S.C. 2331), against the United States, Americans or their property, 18 U.S.C.

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83 18 U.S.C. 983(i)(2)(D).

84 “The exclusion of certain provisions of Federal law from the definition of the term ‘civil forfeiture statute’ in section 983(i) of title 18, United States Code, shall not be construed to deny an owner of property the right to contest the confiscation of assets of suspected international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C) subchapter II of chapter 5 of title 5, United States Code (commonly known as the ‘Administrative Procedure Act’).” Sec. 316(c)(1).

85 “Current law does not contain any authority tailored specifically to the confiscation of terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available current forfeiture laws require detailed tracing that is quite difficult for accounts coming through the banks of countries used by many terrorists.

‘This section increases the government's ability to strike at terrorist organizations’ economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001,” DoJ, at §403. The House Report on H.R. 2975 which contained versions of both sections is no more explicit on the relation of the two sections.

86 “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
of a government by mass destruction, assassination or kidnapping; and (C) occur primarily
within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5)(as amended by
section 802 of the Act).

87 Austin v. United States, 509 U.S. 602, 611-12 (1993)(“Three kinds of forfeiture were
established in England at the time the Eighth Amendment was ratified in the United States:
deodand, forfeiture, and statutory forfeiture . . . . Of England’s three kinds of forfeiture, only
the third took hold in the United States”).


89 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony
conviction. This is hardly a distinction, since over time legislation creating statutory
forfeitures has employed criminal in personam proceedings following criminal conviction as
a means of accomplishing confiscation.
Neither section 106 nor 806 require conviction of the terrorist property owner. While both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers. The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners. Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them. The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate

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90 Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c) (“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act”).

91 Silesian American Corp. V. Clark, 332 U.S. 469 (1947); cf., Societe Internationale v. Rogers, 357 U.S. 197, 211 (1958) (“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).

92 Zittman v. McGrath, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’”).

any presumption of remedial purposes. The same has been said of the applicability of the ex post facto clause.

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO. If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

**Other Forfeiture Amendments.** In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.

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95 See e.g., United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.), 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994).

96 *DoJ*, at §403.

97 18 U.S.C. 1956(b). *Cf.*, H.R.Rep.No. 107-250, at 54-5 (2001) (“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas.\(^98\) Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted

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American Bank, 191 F.3d 30 (1st Cir. 1999).

“The second provision, modeled on 18 U.S.C. 1345(b), gives the district court the power to restrain property, issue seizure warrants, or take other action necessary to ensure that a defendant in an action covered by the statute does not dissipate the assets that would be needed to satisfy a judgment.

“This section also authorizes a court, on the motion of the Government or a State or Federal regulator, to appoint a receiver to gather and protect assets needed to satisfy a judgment under sections 1956 and 957, and the forfeiture provisions in sections 981 and 982. This authority is intended to apply in three circumstances: (1) when there is a judgment in a criminal case, including an order of restitution, following a conviction for a violation of section 1956 or 1957; (2) when there is a judgment in a civil case under section 1956(b) assessing a penalty for a violation of either section 1956 or 1957; and (3) when there is a civil forfeiture judgment under section 981 or a criminal forfeiture judgment, including a personal money judgment, under section 982.

“The amendment also makes section 1956(b) applicable to violations of section 1957. It applies to conduct occurring before the effective date of the Act”.

\(^98\) 18 U.S.C. 981(k). H.R.Rep.No. 107-250, at 57-8 (2001)(“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank's customers.

“Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank's correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

“The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”.

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defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation.\textsuperscript{99}

Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here.\textsuperscript{100} Section 320 enlarges this provisions to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements.\textsuperscript{101} This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.\textsuperscript{102}

\textsuperscript{99} Cf., H.R.Rep.No. 107-250, at 58-9 (2001) ("Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of 'substitute assets' when the defendant has placed the property otherwise subject to forfeiture 'beyond the jurisdiction of the court.' Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction."

"This section amends 21 U.S.C. 853 to make clear that a court in a criminal case may issue a repatriation order--either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. 853(e) to restrain property--so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both").

\textsuperscript{100} 18 U.S.C. 981(a)(1)(B).

\textsuperscript{101} H.R.Rep. No. 107-250, at 56 (2001)("This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act").

\textsuperscript{102} H.R.Rep. No. 107-250, at 59-60 (2001)("Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country.

"Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
A fugitive may not challenge a federal forfeiture.\textsuperscript{103} Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in “order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.”

to contest the restraining order could do so on the ground that 28 U.S.C. 2467 was not properly applied to the particular case, but could not oppose the restraining order on any ground that could also be raised in the proceedings pending in a foreign court. This provision prevents a litigant from taking ‘two bites at the apple’ by raising objections to the basis for the forfeiture in the Federal court that he also raised, or is entitled to raise, in the foreign court where the forfeiture action is pending. It complements the existing provision in section 2467(e) providing that the Federal court is bound by the findings of fact of the foreign court, and may not look behind such findings in determining whether to enter an order enforcing a foreign forfeiture judgment.

“This section also amends 28 U.S.C. 2467 to make clear that it is not necessary to prove that the person asserting an interest in the property received actual notice of the forfeiture proceedings. As is the case with respect to forfeitures under U.S. law, it is sufficient if the foreign nation takes steps to provide notice, in accordance with the principles of due process. See Gonzalez v. United States, 1997 WL 278123 (S.D.N.Y. 1997) (‘the [G]overnment is not required to ensure actual receipt of notice that is properly mailed’); Albajon v. Gugliotta , 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant’s identifications, and mailed after claimant released from jail, is sufficient to satisfy due process, even if claimant never received notice); United States v. Schiavo , 897 F. Supp. 644, 648 49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; due process satisfied even if he did not receive the notice).

“Finally, 28 U.S.C. 2467 is amended to authorize the enforcement of a forfeiture judgment based on any foreign offense that would constitute an offense giving rise to a civil or criminal forfeiture of the same property if the offense had been committed in the United States. This is one of two safeguards that the statute contains against the enforcement of judgments that the United States does not consider appropriate for enforcement: if the judgment is based on an act that would not constitute a crime in the United States, such as removing assets from the reach of a repressive regime, it could not be enforced. In addition, section 2467 already provides that a foreign judgment may only be enforced by a Federal court at the request of the United States, and only after the Attorney General has certified that the judgment was obtained in accordance with the principles of due process. Thus, neither a foreign Government nor a foreign private party could enforce a foreign judgment on its own under this provision.”). Note that the safeguard to which the report refers is the range of foreign offenses that will support an enforceable confiscation order, \textit{i.e.}, drug offenses and crimes on the money laundering predicate offense list, and that the amendment narrows that safeguard by adding additional foreign offenses, \textit{i.e.}, any foreign equivalent of a federal crime which would support a confiscation order.

\textsuperscript{103} 28 U.S.C. 2466.
Alien Terrorists and Victims

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

Border Protection. The border protection provisions:

• authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401

• authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402

• remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404

• authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405

• authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.

• instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007

• direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418

• express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414

• add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415

• call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416

• limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).

Detention and Removal. Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity, 8 U.S.C. 1227 (a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(iv). Aliens may be inadmissible for any number of terrorism-related reasons, 8 U.S.C. 1182 (a)(3)(B). Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported.


Section 411 defines “terrorist organization” to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the Federal Register as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C.

• instruct the Attorney General to report on the feasibility of using biometric scanners to help prevent terrorists and other foreign criminals from entering the country, section 1008

• authorize appropriations of $250,000 for the FBI to determine the feasibility of providing airlines with computer access to the names of suspected terrorists, section 1009

• authorize reciprocal sharing of the State Department’s visa lookout data and related information with other nations in order to prevent terrorism, drug trafficking, slave marketing, and gun running, section 413
Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).


An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in “premeditated, politically motivated violence perpetrated against noncombatant targets,” or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security or endanger some individual or the general public. The Attorney General's determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed. Reg. 57833, 57834 (Nov. 16, 2001).

Victims. The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

• permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421; 105
• extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422 106

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105 “The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

106 “The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks.

“The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application.

“Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

“Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 31.

“Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.


107 “Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

“The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

“The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death),” H.R.Rep.No. 107-236, at 68 (2001).

108 “Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien's 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien's 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
• a denial of benefits of the Act to terrorists and their families, section 427

• authority for the Attorney General to establish evidentiary standards to implement the alien victim provisions of the Act, section 426.

Other Crimes, Penalties, & Procedures

New Crimes. The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department, the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offenses for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents, 18 U.S.C. 175b. Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.

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109 “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government's ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . . .” DoJ at §305.

110 The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

111 “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2) (“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.\textsuperscript{112}

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D). The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

\textsuperscript{112} \textit{U.S. Const.} Art.III, §2, cl.3 (“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . . .”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . .”); \textit{United States v. Cabrales.} 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from \textit{Cabrales} when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnaping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, \textit{United States v. Rodriguez-Moreno}, 526 U.S. 725, 280-81 n.4 (1999)(“By way of comparison, last Term in \textit{Cabrales} we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).
The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of ‘material support or resources’ is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’),” DoJ, at §304.

And it adds expert advice or assistance to the types of assistance that may not be provided under section 2339A. This last addition may encounter the same First Amendment vagueness problems some courts have found in assistance which takes the form of “training” and “personnel,” Humanitarian Law Project v. Reno, 205 F.3d 1130, 1137-136 (9th Cir. 2000).113 Finally, the section announces that a prosecution for violation of section 2339A (support of terrorists) may be brought where the support is provided or where the predicate act of terrorism occurs. There may be some question whether the Constitution permits prosecution where the predicate act occurs.114

Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.115


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115 “The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill (‘Federal terrorism offenses’) is used in identifying the relevant crimes,” DoJ, at §304.

New Penalties. The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. 3571(b),(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense.117

The proposal, however, failed to identify the critical elements that would trigger the alternative.118 Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

• for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

• for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

117 “Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersede lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,”DoJ, at §302.

118 “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense,” Draft at §302.
• for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;

• for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;

• for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;

• for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and

• for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism.119 Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:

• arson committed within a federal enclave, 18 U.S.C. 81;
• killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);
• destruction of communications facilities, 18 U.S.C. 1362;
• destruction of property within a federal enclave, 18 U.S.C. 1363;
• causing a train wreck, 18 U.S.C. 1922;
• providing material support to a terrorist, 18 U.S.C. 2339A;
• torture committed overseas under color of law, 18 U.S.C. 2340A;
• sabotage of a nuclear facility, 42 U.S.C. 2284;

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119 “The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §§846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

“This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.
• interfering with a flight crew within U.S. special aircraft jurisdiction, 49 U.S.C. 46504;
• carrying a weapon or explosive abroad an aircraft within U.S. special aircraft jurisdiction, 49 U.S.C. 46505; and
• sabotage of interstate gas pipeline facilities, 49 U.S.C. 60123.

When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years). The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission), a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

120 Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

121 “Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.

“This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” \( (i.e., \text{those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce}) \), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders).\(^{122}\)

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

**Other Procedural Adjustments.** In other procedural adjustments designed to facilitate criminal investigations, the Act:

- increases the rewards for information in terrorism cases
- expands the Posse Comitatus Act exceptions
- authorizes “sneak and peek” search warrants
- permits nationwide and perhaps worldwide execution of warrants in terrorism cases
- eases government access to confidential information
- allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
- lengthens the statute of limitations applicable to crimes of terrorism
- clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
- adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B.\(^{123}\)

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\(^{122}\) It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, \( e.g., \) damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

\(^{123}\) When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001)(remarks of Rep. Sensenbrenner); for general background, see, Doyle, *McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys*, CRS REP.NO. RL30060 (Dec. 14, 2001).
Rewards. The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L.105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism. 124

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

Posse Comitatus. The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104. 125

Delayed notification of a search (sneak and peek). Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take

124 The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct threat assessments for federal agencies, and to reimburse federal agencies for the costs of detaining terrorist suspects overseas.

125 For a general discussion of the Posse Comitatus Act, see, Doyle, The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law, CRS REP.NO. 95-964 (June 1, 2000).
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, *Richards v. Wisconsin*, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, *Wilson v. Arkansas*, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, *Dalia v. United States*, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, *cf.*, *United States v. Miller*, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, *United States v. Freitas*, 800 F.2d 1451, 1453 (9th Cir. 1986).126

126 “The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in *United States v. New York Telephone Co.*, 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth
The Second Circuit was less convinced and preferred to hold sneak and peek searches to the demands of Rule 41, *United States v. Pangburn*, 983 F.2d 449 (2d Cir. 1993).\(^{127}\) The Fourth Circuit was, if anything, less convinced. Moreover, the facts in the case demonstrate the potential impact of the issue on computer privacy, *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000).\(^{128}\)

Amendment, demands that surreptitious entries be closely circumscribed,” *United States v. Freitas (Freitas I)*, 800 F.2d 1451, 1455-456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, *United States v. Freitas (Freitas II)*, 856 F.2d 1425 (9th Cir. 1988).

\(^{127}\) “No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in *Dalia v. United States*, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in *Dalia*, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property. . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. *See United States v. New York Telephone Co.*, 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . . Although the *Freitas I* court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in *United States v. Villegas*, 899 F.2d 1324 (1999). Although the *Freitas I* court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in *Villegas*. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the *Freitas I* court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” *United States v. Pangburn*, 983 F.2d 449, 453-55 (2d Cir. 1993).

\(^{128}\) In *Simons*, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
Fourth Amendment does not mention notice, and the Supreme Court has stated that the constitution does not categorically proscribe covert entries, which necessarily involve a delay in notice. And insofar as the August search satisfied the requirements of the Fourth Amendment, i.e., it was conducted pursuant to a warrant based on probable cause issued by a neutral and detached magistrate, we perceive no basis for concluding that the 45-day delay in notice rendered the search unconstitutional. Having concluded that the Rule 41(d) violation at issue here did not infringe on Simons’ constitutional rights, we must now evaluate his argument that the violation was deliberate. . . . The district court did not address the intent issue when it ruled on Simons’ motion to suppress. . . . We therefore remand for the district court to consider whether the Government intentionally and deliberately disregarded the notice provision of Rule 41(d) when it carried out the August 6, 1998 search,” 206 F.3d at 403.

The justice department urged that the conflict be resolved with a uniform rule which permitted sneak and peek warrants under the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage.129

The Act, in section 213, stops short of the Justice Department proposal. Characterized as a codification of the Second Circuit decision, 147 Cong.Rec. H7197 (daily ed. Oct. 23, 2001), the Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C. 3103a. Its sneak and peek authorization reaches all federal search and seizure warrants where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (e.g., risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (e.g., jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, i.e., in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation.130 The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

129 “The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities,” DoJ at §353.

130 Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department’s initial proposal, the Department’s justification does not address the question.
constitutionally “reasonable,” that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

**Nationwide terrorism search warrants.** The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either “within or outside the district,” (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases.\(^{131}\) The provision may anticipate execution both in this country and overseas.\(^{132}\) The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage.\(^{133}\) Neither Rule 41 nor any other provision of federal

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\(^{131}\) The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

\(^{132}\) The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

\(^{133}\) *United States v. Barona*, 56 F.3d 1087, 1092 (9th Cir. 1995)(“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994)(“if American law enforcement officials substantially participated in the search or if the

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” F.R.Crim.P. 41, *Advisory Committee Notes: 1990 Amendment*. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

**Terrorists’ DNA.** The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards *per se*. Existing federal law allowed the Attorney General to collect samples from

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134 The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, see, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), reprinted, 78 Cong.Rec. 4982-983 (1934)(“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.) (conferring judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

federal prisoners convicted of a variety of violent crimes, 42 U.S.C. 14135a. The Act enlarges the predicate offense list to include any crime of violence or any terrorism offense, section 503.136

**Access to Educational Records.** Finally, the Act calls for an ex parte court order procedure under which senior Justice Department officials may seek authorization to collect educational records relevant to an investigation or prosecution of a crime of terrorism, section 507 (as an exception to the confidentiality requirements of the General Education Provisions Act, 20 U.S.C. 1232g), section 508 (as an exception to the confidentiality requirements of the National Education Statistics Act, 20 U.S.C. 9007).

**Statute of Limitations.** Prosecution for murder in violation of federal law may be initiated at any time, 18 U.S.C. 3281. A five year statute of limitations applied for most other federal crimes before passage of the Act, with a few exceptions. Among the relevant exceptions were an eight year statute of limitations for several terrorist offenses, 18 U.S.C. 3286,137 and a ten year statute of limitations for a few arson and explosives offenses, 18 U.S.C. 3295. The Justice Department recommended the elimination of a statute of limitations in terrorism cases.138

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136 Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples form convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes,” DoJ at §353.


137 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

138 “This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

“This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in
The Act takes less dramatic action in section 809. It eliminates the statute of limitations for any crime of terrorism that risks or results in a death or serious bodily injury, 18 U.S.C. 3286. In the absence of such a risk or result, all other terrorism offenses become subject to the eight year statute of limitations unless already covered by the ten year statute for explosives and arson offenses, 18 U.S.C. 3286.

Application of the statute of limitations rarely provokes a constitutional inquiry. Nevertheless, due process precludes prosecution when it can be shown that pre-indictment delay “caused substantial prejudice to [a defendant’s] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.” Moreover, a judicial difference of opinion has appeared in those cases.

139 As defined by 18 U.S.C. 2332(b)(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 (sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period. Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (Grimes, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (Frazer, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

**Extraterritoriality.** Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States or elsewhere . . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnapping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.

141 United States v. De La Matta, 266 F.3d 1275, 1286 (11th Cir. 2001); United States v. Grimes, 142 F.3d 1342, 1351 (11th Cir. 1998); United States v. Morrow, 177 F.3d 272, 294 (5th Cir. 1999); Falter v. United States, 23 F.2d 420, 425-26 (2d Cir. 1928).


143 United States v. Layton, 855 F.2d 1388 (9th Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); United States v. Benitez, 741 F.2d 1312 (11th Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.\(^\text{144}\)

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

**Victims.** Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11\(^\text{th}\) Victim Compensation Fund legislation before it passed the Act. Consequently, the Act’s victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 *et seq.*, and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 *et seq*.

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:

• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year)(42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d) (5)), section 621(d)

• waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

• eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
• makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

• prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

• allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

• reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

• makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

• allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

• establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

**Increasing Institutional Capacity.** A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

- $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)

- necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)

- $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)

- $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816

- $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701

- $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)

- $5 million for DEA police training in South and Central Asia, section 1007.

Miscellaneous. Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might to used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act, or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b), 807.146

145 I.e., Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).

146 For a general discussion of trade sanctions legislation, see, Jurenas, Exempting Food and Agriculture Products from U.S. Economic Sanctions: Status and Implementation, CRS ISSUE BRIEF IB100061.
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

Victims. The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

- permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421

- extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422

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105 “The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

106 “The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks.

“The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application.

“Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

“Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 31.

“Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.


“Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

“The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

“The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death),” H.R.Rep.No. 107-236, at 68 (2001).

“Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien’s 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien’s 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
• a denial of benefits of the Act to terrorists and their families, section 427

• authority for the Attorney General to establish evidentiary standards to implement the alien victim provisions of the Act, section 426.

Other Crimes, Penalties, & Procedures

New Crimes. The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department, the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offenses for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents, 18 U.S.C. 175b. Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.

109 “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . . .” DoJ at §305.

110 The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175(b)(2).

111 “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2)(“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.112

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D). The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

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112 U.S. Const. Art.III, §2, cl.3 (“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . . .”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . . .”); United States v. Cabrales, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the launde rings counts). The Court might be thought to have retreated somewhat from Cabrales when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnaping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999)(“By way of comparison, last Term in [Cabrales] we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).
The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of `material support or resources' is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’),” DoJ, at §304.

Finally, the section announces that a prosecution for violation of section 2339A (support of terrorists) may be brought where the support is provided or where the predicate act of terrorism occurs. There may be some question whether the Constitution permits prosecution where the predicate act occurs.  

Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.


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115 “The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill (‘Federal terrorism offenses’) is used in identifying the relevant crimes,” DoJ, at §304.

New Penalties. The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. 3571(b),(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense.117

The proposal, however, failed to identify the critical elements that would trigger the alternative.118 Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

• for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

• for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

117 “Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersede lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,” DoJ, at §302.

118 “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense,” Draft at §302.
for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;

for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;

for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;

for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and

for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism. Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:

- for arson committed within a federal enclave, 18 U.S.C. 81;
- for killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);
- for destruction of communications facilities, 18 U.S.C. 1362;
- for destruction of property within a federal enclave, 18 U.S.C. 1363;
- for causing a train wreck, 18 U.S.C. 1922;
- for providing material support to a terrorist, 18 U.S.C. 2339A;
- for torture committed overseas under color of law, 18 U.S.C. 2340A;
- for sabotage of a nuclear facility, 42 U.S.C. 2284;

119 “The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §§846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

“This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.
• interfering with a flight crew within U.S. special aircraft jurisdiction, 49 U.S.C. 46504;
• carrying a weapon or explosive abroad an aircraft within U.S. special aircraft jurisdiction, 49 U.S.C. 46505; and
• sabotage of interstate gas pipeline facilities, 49 U.S.C. 60123.

When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years).¹²⁰ The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission),¹²¹ a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

¹²⁰ Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

¹²¹ “Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.

“This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders).\(^\text{122}\)

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

**Other Procedural Adjustments.** In other procedural adjustments designed to facilitate criminal investigations, the Act:

- increases the rewards for information in terrorism cases
- expands the Posse Comitatus Act exceptions
- authorizes “sneak and peek” search warrants
- permits nationwide and perhaps worldwide execution of warrants in terrorism cases
- eases government access to confidential information
- allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
- lengthens the statute of limitations applicable to crimes of terrorism
- clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
- adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B.\(^\text{123}\)

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\(^{122}\) It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, e.g., damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

\(^{123}\) When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001)(remarks of Rep. Sensenbrenner); for general background, see, Doyle, *McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys*, CRS REP.NO. RL30060 (Dec. 14, 2001).
Rewards. The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L. 105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism.124

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

Posse Comitatus. The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.125

Delayed notification of a search (sneak and peek). Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take

124 The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct threat assessments for federal agencies, and to reimburse federal agencies for the costs of detaining terrorist suspects overseas.

125 For a general discussion of the Posse Comitatus Act, see, Doyle, The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law, CRS REP.NO. 95-964 (June 1, 2000).
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, Richards v. Wisconsin, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, Wilson v. Arkansas, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, Dalia v. United States, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, cf., United States v. Miller, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, United States v. Freitas, 800 F.2d 1451, 1453 (9th Cir. 1986).126

126 The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in United States v. New York Telephone Co., 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth
Amendment, demands that surreptitious entries be closely circumscribed,” United States v. Freitas (Freitas I), 800 F.2d 1451, 1455-456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, United States v. Freitas (Freitas II), 856 F.2d 1425 (9th Cir. 1988).

127 “No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in Dalia v. United States, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in Dalia, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property. . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. See United States v. New York Telephone Co., 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . . Although the Freitas I court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in United States v. Villegas, 899 F.2d 1324 (1999). Although the Freitas I court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in Villegas. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the Freitas I court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” United States v. Pangburn, 983 F.2d 449, 453-55 (2d Cir. 1993).

128 In Simons, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
The Justice Department urged that the conflict be resolved with a uniform rule which permitted sneak and peek warrants under the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage.129

The Act, in section 213, stops short of the Justice Department proposal. Characterized as a codification of the Second Circuit decision, 147 Cong.Rec. H7197 (daily ed. Oct. 23, 2001), the Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C. 3103a. Its sneak and peek authorization reaches all federal search and seizure warrants where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (e.g., risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (e.g., jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, i.e., in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation.130 The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

129 “The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities,” DoJ at §353.

130 Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department’s initial proposal, the Department’s justification does not address the question.
The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States.”

The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

Neither Rule 41 nor any other provision of federal

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**Nationwide terrorism search warrants.** The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either “within or outside the district,” (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases. The provision may anticipate execution both in this country and overseas. The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage. Neither Rule 41 nor any other provision of federal

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133 United States v. Barona, 56 F.3d 1087, 1092 (9th Cir. 1995)(“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); United States v. Behety, 32 F.3d 503, 510 (11th Cir. 1994)(“if American law enforcement officials substantially participated in the search or if the
If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” F.R.Crim.P. 41, Advisory Committee Notes: 1990 Amendment. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

**Terrorists' DNA.** The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards *per se.* Existing federal law allowed the Attorney General to collect samples from foreign officials conducting the search were actually acting as agents for their American counterparts); *United States v. Maturo,* 982 F.2d 57, 61 (2d Cir. 1992)(“where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials” or “where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials”); *United States v. Mitro,* 880 F.2d 1480, 1482 (1st Cir. 1989)(“where American agents participated in the foreign search or the foreign officers acted as agents for their American counterparts”); *United States v. Mount,* 757 F.2d 1315, 1318 (D.C.Cir. 1985)(“if American officials or officers participated in some significant way”); *United States v. Marzano,* 537 F.2d 120, 139 (5th Cir. 1976)(“if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts”); each of the decisions also suggests that evidence secured in a manner which shocked the conscience of the court would be excluded.

134 The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, see, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), reprinted, 78 Cong.Rec. 4982-983 (1934)(“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.)(confering judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

135 *Roe v. Marcotte,* 193 F.3d 72 (2d Cir. 1999); *Shaffer v. Saffle,* 148 F.3d 1180 (10th Cir. 1998); *Rise v. Oregon,* 59 F.3d 1556 (9th Cir. 1995); *Jones v. Murray,* 962 F.2d 302 (4th Cir. 1992).
federal prisoners convicted of a variety of violent crimes, 42 U.S.C. 14135a. The Act enlarges the predicate offense list to include any crime of violence or any terrorism offense, section 503.  

Access to Educational Records. Finally, the Act calls for an ex parte court order procedure under which senior Justice Department officials may seek authorization to collect educational records relevant to an investigation or prosecution of a crime of terrorism, section 507 (as an exception to the confidentiality requirements of the General Education Provisions Act, 20 U.S.C. 1232g), section 508 (as an exception to the confidentiality requirements of the National Education Statistics Act, 20 U.S.C. 9007).

Statute of Limitations. Prosecution for murder in violation of federal law may be initiated at any time, 18 U.S.C. 3281. A five year statute of limitations applied for most other federal crimes before passage of the Act, with a few exceptions. Among the relevant exceptions were an eight year statute of limitations for several terrorist offenses, 18 U.S.C. 3286, and a ten year statute of limitations for a few arson and explosives offenses, 18 U.S.C. 3295. The Justice Department recommended the elimination of a statute of limitations in terrorism cases.

136 Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples form convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes,” DoJ at §353.

For a general discussion, see, Fischer, DNA Identification: Applications and Issues, CRS REP.NO. RL30717 (Jan. 12, 2001).

137 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

138 “This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

“This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in
The Act takes less dramatic action in section 809. It eliminates the statute of limitations for any crime of terrorism that risks or results in a death or serious bodily injury, 18 U.S.C. 3286. In the absence of such a risk or result, all other terrorism offenses become subject to the eight year statute of limitations unless already covered by the ten year statute for explosives and arson offenses, 18 U.S.C. 3286.

Application of the statute of limitations rarely provokes a constitutional inquiry. Nevertheless, due process precludes prosecution when it can be shown that pre-indictment delay “caused substantial prejudice to [a defendant’s] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.”140 Moreover, a judicial difference of opinion has appeared in those cases

connection with the September 11, 2001 terrorist attacks. The constitutionality of such retroactive applications of changes in statutes of limitations is well-settled. See, e.g., United States v. Grimes, 142 F.3d 1342, 1350-51 (11th Cir. 1998); People v. Frazer, 982 P.2d 180 (Cal. 1999).

“Existing federal law (18 U.S.C. §3282) bars prosecuting most offenses after five years. 18 U.S.C. §3286, as currently formulated, extends the limitation period for prosecution for certain offenses that may be committed by terrorists – but only to eight years. While this is a limited improvement over the five-year limitation period for most federal offenses, it is patently inadequate in relation to the catastrophic human and social costs that frequently follow from such crimes as destruction of aircraft (18 U.S.C. §32), aircraft hijackings ([49] U.S.C. §§46502, 46504-06, attempted political assassinations (18 U.S.C. §§351, 1116, 1751), or hostage taking (18 U.S.C. §1203). These are not minor acts of misconduct which can properly be forgiven or forgotten merely because the perpetrator has avoided apprehension for some period of time. Anomalously, existing law provides longer limitation periods for such offenses as bank frauds and certain artwork thefts (18 U.S.C.§§3293-94) than it does for crimes characteristically committed by terrorists.

“In many American jurisdictions, the limitation periods for prosecution for serious offenses are more permissible than those found in federal law, including a number of states which have no limitation period for the prosecution of felonies generally. While this section does not go so far, it does eliminate the limitation period for prosecution of the major crimes that are most likely to be committed by terrorists (‘Federal terrorism offenses’), as specified in section 309 of this bill,” DoJ at 301.

139 As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 (sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

When an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses, the lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period. Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (Grimes, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (Frazer, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

**Extraterritoriality.** Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States or elsewhere. . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnapping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.

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141 United States v. De La Matta, 266 F.3d 1275, 1286 (11th Cir. 2001); United States v. Grimes, 142 F.3d 1342, 1351 (11th Cir. 1998); United States v. Morrow, 177 F.3d 272, 294 (5th Cir. 1999); Falter v. United States, 23 F.2d 420, 425-26 (2d Cir. 1928).


143 United States v. Layton, 855 F.2d 1388 (9th Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); United States v. Benítez, 741 F.2d 1312 (11th Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.  

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

Victims. Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11th Victim Compensation Fund legislation before it passed the Act. Consequently, the Act’s victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 et seq., and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 et seq.

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:

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• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year)(42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d)), section 621(d)

• waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

• eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
- makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

- prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

- allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

- reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

- makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

- allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

- establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

**Increasing Institutional Capacity.** A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

- $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)

- necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)

- $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)

- $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816

- $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701

- $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)

- $5 million for DEA police training in South and Central Asia, section 1007.

Miscellaneous. Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might to used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act, or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b), 807.146

145 I.e., Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).

146 For a general discussion of trade sanctions legislation, see, Jurenas, Exempting Food and Agriculture Products from U.S. Economic Sanctions: Status and Implementation, CRS ISSUE BRIEF IB100061.
This invention appertains to toys and more particularly to a wheeled figured toy.

One of the primary objects of my invention is to provide a novel wheeled toy figure simulating the appearance of an animal, such as a rabbit, provided with automatic means for depositing candy eggs on the ground during the pulling of the toy over a surface.

Another salient object of my invention is to provide a novel wheeled toy figure so constructed that the same will not only deposit eggs as the same is being drawn over the ground, but it will also have a jumping animated appearance.

A further important object of my invention is to provide a wheeled toy embodying pivotally connected front and rear sections with means operatively connecting said sections together to produce the animated jumping effect.

A still further object of my invention is the formation of a hopper in the rear section of the figure for receiving the candy eggs with a ground wheel supporting said rear section having a dispensing notch in its periphery for receiving and carrying one of the candy eggs at a time from the hopper for depositing such egg on the ground.

A still further important object of my invention is the provision of novel means for actuating the mechanism for giving the figure the jumping or jumping effect from said ground wheel.

A still further object of my invention is to provide a child’s toy of the above character, which will be durable and efficient in use, one that will be simple and easy to manufacture and one which can be placed upon the market at a reasonable cost.

With these and other objects in view, the invention consists in the novel construction, arrangement and formation of parts, as will be hereinafter more specifically described, claimed and illustrated in the accompanying drawing, in which drawing:

Figure 1 is a side elevational view of my novel wheeled toy, parts of the view being shown broken away to illustrate structural detail.

Figure 2 is a top plan view of my toy.

Figure 3 is an enlarged, transverse, sectional view through the toy taken on the line 3—3 of Figure 1 looking in the direction of the arrows.

Figure 4 is a view similar to Figure 1, but taken on a smaller scale and showing a different position of the toy.

Figure 5 is a view similar to Figure 4, but showing a different position of the figure and immediately after a candy egg has been deposited on the ground.

Referring to the drawing in detail, wherein similar reference characters designate corresponding parts throughout the several views, the letter “T” generally indicates my novel toy and the same includes a front main section 10 and a rear section 11. These sections 10 and 11 are pivotally connected together by a pivot pin 12, for a purpose which will later appear.

The toy is formed to simulate the appearance of a known object such as a hen or some animal. In the drawings, for the purpose of illustration, I have shown the toy constructed to simulate the appearance of a rabbit. Hence, the front section 10 includes a body portion 13, a head 14 and forwardly projected front legs 15. An axle 16 is carried by the front legs and front ground wheels 17 are mounted on the axle. This front section 10, with the exception of the axle 16 and wheels 17, is preferably cut from a single block of wood. The rear section 11 is shaped to simulate the hind quarters of the rabbit and hence, includes an upper main section 18 and depending rear legs 19.

In accordance with my invention, the rear section 11 includes side plates 20 secured to and held in spaced relation by a block 21. This block 21 is so formed as to provide, in conjunction with the side plates 20, a receptacle or hopper 22 for the reception of the candy eggs. The upper end of the hopper can be let partly open so as to permit the filling of the hopper with the eggs and, if desired, the opening can be closed by a suitable door. The lower end of the hopper is provided with an outlet opening 23 for the eggs.

The side plates 20 extend below the spacing block 21 and the side plates below the blocks rotatably support a rear axle 24. Keyed, or otherwise secured, to the rear axle is a rear ground wheel 25 and this wheel includes circular side wheel discs 26 and a central cylindrical body or spool 27. The spool or body 27 has formed in its periphery a dispensing notch 28. Normally the spool or body 27 closes the dispensing opening 23 of the hopper, but as the rear wheel 25 rotates and the dispensing notch 28 passes the hopper, a candy egg will drop into said notch and upon continued rotation of the wheel, and as the notch passes the ground, the egg will be deposited on the ground.

Also keyed, or otherwise secured, to the rear axle 24 is a crank 28 and the outer end of the crank has pivotally connected thereto a pulley or link 30. The forward end of this link is piv-
totally connected, as at 31, to the front section 10 of the figure forwardly of, and below, the pivot 11.

The toy is adapted to be pulled over the ground by a pull-cord and during the movement of the figure over the ground the wheel 25 will be rotated and each time the dispensing notch 28 passes the hopper an egg will be picked up from said hopper and deposited upon the ground. During the turning of the rear ground wheel the crank 29 will be turned which will actuate the link 30 causing the sections 10 and 11 of the figure to pivot one on the other which will give a jumping or running effect to the rabbit.

Thus it can be seen that I have provided a novel animated figure which will give a child a maximum amount of amusement and which will deposit eggs on the ground and thus create in the minds of children the laying of eggs by an Easter rabbit.

Attention is called to the fact that the side plates 20 of the rear section 11 project forwardly of the block 21 and that these side plates receive therebetween the rear section of the body portion 13 of the front part 10 of the figure.

Changes in details may be made without departing from the spirit or the scope of my invention, but what I claim as new is:

1. A wheeled toy comprising a front and a rear section pivotally connected together, front ground wheels carried by the front section and a main rear ground wheel carried by the rear section, means operatively connecting the rear ground wheel to the front section and swinging said sections on their pivot during the travel of the toy over the ground, a hopper formed in one of said sections for the reception of candy eggs and means operatively connecting a main rear ground wheel for depositing one candy egg at a time on the ground from said hopper.

2. A wheeled toy shaped to simulate the appearance of an animal, or the like, comprising a front and a rear section, means pivotally connecting said sections together, front ground wheels for supporting the front section, a main rear ground wheel supporting the rear section, a crank rotatable with the rear ground wheel, a link pivotally connected to the crank and to the front section, a hopper for the reception of candy eggs in said rear section and means controlled by said rear ground wheel for receiving one candy egg at a time from the hopper and for depositing the

same on the ground during the travel of the toy over the ground.

3. A wheeled toy constructed to simulate the appearance of an animal, or the like, comprising a front section, a rear section, means pivotally connecting such sections together, a front ground wheel supporting the front section, a main rear ground wheel assembly supporting the rear section, a hopper for the reception of candy eggs in said rear section having an outlet opening, a portion of said rear ground wheel assembly normally closing said opening and having a dispensing notch for movement past said opening during the rotation of said wheel assembly and receiving one candy egg at a time from the hopper and for depositing the same on the ground, a crank rotatable with the rear ground wheel assembly, and a link pivotally connecting the crank to the front section.

4. A wheeled toy constructed to simulate the appearance of an animal, or the like, comprising a body, front wheels supporting the front of the body, a rear ground wheel assembly supporting the rear of the body so that the toy can be pulled over the ground, a hopper in said body having a bottom outlet opening, said wheel assembly including a cylindrical portion normally closing said opening and having a dispensing slot moveable past the opening for receiving candy eggs therefrom.

5. A wheeled toy constructed to simulate the appearance of an animal, or the like, comprising a front section formed from a single piece of material, front wheels rotatably carried by said front section, a rear section including spaced plates and a spacing block between said plates for securing the same together, said spacing block and plates forming a hopper for the reception of candy eggs, said hopper having an outlet opening, said plates extending forwardly of, and below, the block, the forward ends of the plates receiving the front section, a pivot pin connecting the forward ends of said plates to the front section, a rear ground wheel assembly rotatably mounted between the lower ends of the side plates having a cylindrical portion normally closing the opening in the hopper and provided with a dispensing notch moveable past the opening for receiving candy eggs from the hopper, a crank rotatable with the rear ground wheel assembly, and a link pivotally connected to the crank and to said front section.

DANIEL E. GUMB.
FIG. 4a
The USA PATRIOT Act: A Legal Analysis

April 15, 2002

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The USA PATRIOT Act: A Legal Analysis

Summary

The USA PATRIOT Act passed in the wake of the September 11 terrorist attacks. It flows from a consultation draft circulated by the Department of Justice, to which Congress made substantial modifications and additions. The stated purpose of the Act is to enable law enforcement officials to track down and punish those responsible for the attacks and to protect against any similar attacks.

The Act grants federal officials greater powers to trace and intercept terrorists’ communications both for law enforcement and foreign intelligence purposes. It reinforces federal anti-money laundering laws and regulations in an effort to deny terrorists the resources necessary for future attacks. It tightens our immigration laws to close our borders to foreign terrorists and to expel those among us. Finally, it creates a few new federal crimes, such as the one outlawing terrorists’ attacks on mass transit; increases the penalties for many others; and institutes several procedural changes, such as a longer statute of limitations for crimes of terrorism.

Critics have suggested that it may go too far. The authority to monitor e-mail traffic, to share grand jury information with intelligence and immigration officers, to confiscate property, and to impose new book-keeping requirements on financial institutions, are among the features troubling to some.

The Act itself responds to some of these reservations. Many of the wiretapping and foreign intelligence amendments sunset on December 31, 2005. The Act creates judicial safeguards for e-mail monitoring and grand jury disclosures; recognizes innocent owner defenses to forfeiture; and entrusts enhanced anti-money laundering powers to those regulatory authorities whose concerns include the well being of our financial institutions.

This report, stripped of its citations and footnotes, is available in an abbreviated form as The USA PATRIOT Act: A Sketch, CRS Rep.No. RS21203. In addition, much of the information contained here may also be found under a different arrangement in a report entitled, Terrorism: Section by Section Analysis of the USA PATRIOT Act, CRS Rep.No. RL31200 (Dec. 10, 2001). A wider array of terrorism-related analysis appears on the CRS terrorism electronic briefing book page.
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The USA PATRIOT Act: A Legal Analysis

Introduction

Congress passed the USA PATRIOT Act (the Act) in response to the terrorists’ attacks of September 11, 2001. The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to further close our borders to foreign terrorists and to detain and remove those within our borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it is not without safeguards, critics contend some of its provisions go too far. Although it grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough.


P.L. 107-56, 115 Stat. 272 (2001); its full title is the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT).”

H.R. 2975 was introduced by Representative Sensenbrenner for himself and Representatives Conyers, Hyde, Coble, Goodlatte, Jenkins, Jackson-Lee, Cannon, Meehan, Graham, Bachus, Wexler, Hostettler, Keller, Issa, Hart, Flake, Schiff, Thomas, Goss, Rangel, Berman and Lofgren; S.1510 by Senator Daschle for himself and Senators Lott, Leahy, Hatch, Graham, Shelby and Sarbanes.

H.R. 3004 was introduced by Representative Oxley for himself and Representatives LaFalce, Leach, Maloney, Roukema, Bentsen, Hooley, Bereuter, Baker, Bachus, King, Kelly, Gillmore, Cantor, Riley, Latourette, Green (of Wisconsin), and Grucci; and reported out of the House Financial Services Committee with amendments on October 15, 2001, H.R.Rep.No. 107-250. H.R. 3004, as reported out, included Internet gambling amendments that were not included in H.R. 2975/H.R.3108.
The Department’s proposal, dated September 20, 2001, came with a brief section by section analysis. Both the proposal (Draft) and analysis (DoJ) were printed as an appendix in Administration's Draft Anti-Terrorism Act of 2001, Hearing Before the House Comm. on the Judiciary, 107th Cong., 1st Sess. 54 (2001).


“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,” U.S. Const. Amend. IV.

Congress responded to Berger and Katz, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications, 18 U.S.C. 2511. At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious criminal investigations: tracking and gathering communications

A portion of the Act addresses issues suggested originally in a Department of Justice proposal circulated in mid-September. The first of its suggestions called for amendments to federal surveillance laws, laws which govern the capture and tracking of suspected terrorists’ communications within the United States. Federal law features a three tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications.

The tiers reflected the Supreme Court’s interpretation of the Fourth Amendment’s ban on unreasonable searches and seizures. The Amendment protects private conversations, Berger v. New York, 388 U.S. 41 (1967); Katz v. United States, 389 U.S. 347 (1967). It does not cloak information, even highly personal information, for which there is no individual justifiable expectation of privacy, such as telephone company records of calls made to and from an individual's home, Smith v. Maryland, 442 U.S. 735 (1979), or bank records of an individual's financial dealings, United States v. Miller, 425 U.S. 435 (1976).
criminal cases. When approved by senior Justice Department officials, law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.9

8 “The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of” one or more predicate offense, 18 U.S.C. 2516.

9 The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests), 844(d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement), 1751 (presidential and presidential staff assassination, kidnapping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnapping, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or naturalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
offense involving counterfeiting punishable under 18 U.S.C. 471, 472, or 473; (e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States; (f) any offense including extortionate credit transactions under 18 U.S.C. 892, 893, or 894; (g) a violation of 31 U.S.C. 5322 (dealing with the reporting of currency transactions); (h) any felony violation of 18 U.S.C. 2511 and 2512 (interception and disclosure of certain communications and to certain intercepting devices); (i) any felony violation of 18 U.S.C. ch. 71 (obscenity); (j) 49 U.S.C. 60123(b) (destruction of a natural gas pipeline), 46502 (aircraft piracy); (k) 22 U.S.C. 2778 (Arms Export Control Act); (l) the location of any fugitive from justice from an offense described in this section; (m) a violation of 8 U.S.C. 1324, 1327, or 1328; (n) any felony violation of 18 U.S.C. 922, 924 (firearms); (o) any violation of 26 U.S.C. 5861 (firearms); (p) a felony violation of 18 U.S.C. 1028 (production of false identification documents), 1542 (false statements in passport applications), 1546 (fraud and misuse of visas, permits, and other documents) or a violation of 8 U.S.C. 1324, 1327, or 1328 (smuggling of aliens); (p) 229 (chemical weapons), 2332 (terrorist violence against Americans overseas), 2332a (weapons of mass destruction), 2332b (multinational terrorism), 2332d (financial transactions with countries supporting terrorism), 2339A (support of terrorist organization); (r) any conspiracy to commit any of these, 18 U.S.C. 2516(1)(crimes added by the Act in italics). Other than telephone face to face conversations (i.e., electronic communications), the approval of senior Justice Department officials is not required and an order may be sought in any felony investigation, 18 U.S.C. 2516(3).

10 Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
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• permits pen register and trap and trace orders for electronic communications (e.g., e-mail)

• authorizes nationwide execution of court orders for pen registers, trap and trace devices, and access to stored e-mail or communication records

• treats stored voice mail like stored e-mail (rather than like telephone conversations)

• permits authorities to intercept communications to and from a trespasser within a computer system (with the permission of the system’s owner)

• adds terrorist and computer crimes to Title III’s predicate offense list

• reenforces protection for those who help execute Title III, ch. 121, and ch. 206 orders

• encourages cooperation between law enforcement and foreign intelligence investigators

• establishes a claim against the U.S. for certain communications privacy violations by government personnel

• terminates the authority found in many of the these provisions and several of the foreign intelligence amendments with a sunset provision (Dec. 31, 2005).

Pen Registers and Trap and Trace Devices. In section 216, the Act allows court orders authorizing trap and trace devices and pen registers to be used to capture source and addressee information for computer conversations (e.g., e-mail) as well as telephone conversations, 18 U.S.C. 3121, 3123. In answer to objections that e-mail header information can be more revealing than a telephone number, it creates a detailed report to the court, 18 U.S.C. 3123(a)(3).11

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11 “Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public the agency shall ensure that a record will be maintained which will identify – (i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of the such device.

“(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof),” section 216(b)(1).
The use of pen registers or trap and trace devices was limited at one time to the judicial district in which the order was issued, 18 U.S.C. 3123 (2000 ed.). Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States, 18 U.S.C. 3123(b)(1)(C), 3127(2).\textsuperscript{12}

**Communications Records and Stored E-Mail.** With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber, 18 U.S.C. 2703(a),(b). A warrant will also suffice to seize records describing telephone and other communications transactions without customer notice, 18 U.S.C. 2703(c). In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation, officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records, 18 U.S.C. 2703(b),(c). They can obtain a limited amount of record information (subscribers’ names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena, 18 U.S.C. 2703(c)(1)(C). There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial, 18 U.S.C. 2705.

In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider’s customer records, 18 U.S.C. 2703(c)(1)(C).\textsuperscript{13}

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.

\textsuperscript{12} The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” DoJ at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

\textsuperscript{13} Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user’s true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” DoJ at §107.
Previously, only a federal court in the district in which the e-mail was stored could issue the order. Under section 220, federal courts in the district where an offense under investigation occurred may issue orders applicable “without geographic limitation,” 18 U.S.C. 2703.14

The Act, in section 209, treats voice mail like e-mail, that is, subject to the warrant or court order procedure, rather than to the more demanding coverage of Title III once required, United States v. Smith, 155 F.3d 1050, 1055-56 (9th Cir. 1998).

Finally, the Act resolves a conflict between chapter 121 and the federal law governing cable companies. Government entities may have access to cable company customer records only under a court order following an adversary hearing if they can show that the records will evidence that the customer is or has engaged in criminal activity, 47 U.S.C. 511(h). When cable companies began offering telephone and other communications services the question arose whether the more demanding cable rules applied or whether law enforcement agencies were entitled to ex parte court orders under the no-notice procedures applicable to communications providers.15 The Act makes it clear that the cable rules apply when cable television viewing services are

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14 Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

15 See e.g., DoJ at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement’s access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

**Electronic Surveillance.** To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202. A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(i). Yet only the interloper's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.

**Criminal Investigators' Access to Foreign Intelligence Information.** The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism. It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that “the purpose for the surveillance is to obtain foreign intelligence information,” 50 U.S.C. 1804(a)(7)(B)(2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps “the purpose” might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation

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16 18 U.S.C. 229 (chemical weapons), 2332(terrorist acts of violence committed against Americans overseas), 2332a(use of weapons of mass destruction), 2332b(acts of terrorism transcending national boundaries), 2332d(financial transactions with countries which support terrorists), 2339A(providing material support to terrorists), and 2339B(providing material support to terrorist organizations).

17 “Because service providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves as permitted under current law, they often have no way to exercise their rights to protect themselves from unauthorized attackers. Moreover, such attackers can target critical infrastructures and engage in cyberterrorism,” DoJ at §106. Elsewhere the Act defines “electronic surveillance” for purposes of the Foreign Intelligence Surveillance Act (FISA) to emphasize that the law enforcement authority for this intruder surveillance does not confer similar authority for purposes of foreign intelligence gathering, section 1003 (50 U.S.C. 1801(f)(2)).

18 For a general discussion of federal intelligence and law enforcement cooperation, see, Best, Intelligence and Law Enforcement: Countering Transnational Threats to the U.S., CRS REP.NO. RL30252 (Dec. 3, 2001).
The Justice Department sought FISA surveillance and physical search authority on the basis of “a” foreign intelligence purpose. Section 218 of the Act insists that foreign intelligence gathering be a “significant purpose” for the request for the FISA surveillance or physical search order, 50 U.S.C. 1804(a)(7)(B), 1823(a)(7)(B), a more

19 Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment's warrant clause. It is here that the “primary purpose” notion originated. In United States v. Truong Dinh Hung, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, “as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.” Subsequent case law, however, is not as clear as it might be: see e.g., United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984) (“FISA permits federal officials to obtain orders authorizing electronic surveillance ‘for the purpose of obtaining foreign intelligence information.’ The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying officials’ belief that the information sought is the type of foreign intelligence information described”); United States v. Pelton, 835 F.2d 1067, 1075-76 (4th Cir. 1987) (“We also reject Pelton’s claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial”); United States v. Sarkissian, 841 F.2d 959, 907-8 (9th Cir. 1988) (“Defendants rely on the primary purpose test articulated in United States v. Truong Dinh Hung. . . . One other court has applied the primary purpose test. Another court has rejected it . . . distinguishing Truong. A third court has declined to decide the issue. We also decline to decide the issue”); United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1991) (“Appellants attack the government’s surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance”).

20 “Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” DoJ at §153.
demanding standard than the “a purpose” threshold proposed by the Justice Department, but a clear departure from the original “the purpose” entry point. FISA once described a singular foreign intelligence focus prerequisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k), 1825(k).

**Protective Measures.** The Act reenforces two kinds of safeguards, one set designed to prevent abuse and the other to protect those who assist the government. The sunset clause is perhaps the best known of the Act’s safeguards. Under the direction of section 224, many of the law enforcement and foreign intelligence authorities granted by the Act expire as of December 31, 2005. The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter

\[\text{Footnotes:}\]

21 “(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. (2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, infra, quoting, 50 U.S.C. 1801.

22 “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information]. 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210[subpoenas for communications provider customer records], 211[access to cable company communication service records], 213[sneak and peek], 216[pen register and trap and trace device amendments], 221[trade sanctions], and 222[assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005. “(b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers' communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices). 23 Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees, 24 but could not recover against the United States. 25 Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice’s Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government’s request until a court order authorizing access can be obtained. 26 Another allows providers to disclose customer records to protect the provider’s rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others. 27 A third section,

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26 Prior law already granted service providers immunity for disclosure of customer records in compliance with a court access order, 18 U.S.C. 2703(f).
27 “Existing law contains no provision that allows providers of electronic communications service to disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies that threaten death or serious bodily injury. This section amends 18 U.S.C. §2702 to authorize such disclosures if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.

“Current law also contains an odd disconnect: a provider may disclose the contents of the customer’s communications in order to protect its rights or property but the current statute does not expressly permit a provider to voluntarily disclose non-content records (such as a subscriber’s login records). 18 U.S.C. 2702(b)(5). This problem substantially hinders the ability of providers to protect themselves from cyber-terrorists and criminals. Yet the right to disclose the contents of communications necessarily implies the less intrusive ability to disclose non-content records. In order to promote the protection of our nation’s critical infrastructures, this section’s amendments allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems,” DoJ at
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

Foreign Intelligence Investigations

Although both criminal investigations and foreign intelligence investigations are conducted in the United States, criminal investigations seek information about unlawful activity; foreign intelligence investigations seek information about other countries and their citizens. Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough.

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA), something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President's authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, United States v. United States District Court, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage

§110.

28 Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

29 Thus in the name of assisting in the execution of Title III, chapter 121, or chapter 206 order, the courts may not cite the Act as the basis for an order compelling a service provider to make system modifications or provide any other technical assistance not already required under 18 U.S.C. 2518(4), 2706, or 3124(c), see, H.R.Rep.No. 107-236, at 62-3 (2001) (emphasis added) (“This Act is not intended to affect obligations under Communications Assistance for Law Enforcement Act [which addresses law enforcement-beneficial system modifications and the compensation to be paid for the changes], nor does the act impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance”).

30 E.g., As amended by section 902 of the Act, “‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2)(language added by the Act in italics).

31 50 U.S.C. 1801 et seq.

In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs. There were and still are extra


\[33\] “As used in this subchapter: (a) ‘Foreign power’ means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

‘(b) ‘Agent of a foreign power’ means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C).

‘(c) ‘International terrorism’ means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnaping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

‘(d) ‘Sabotage’ means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

‘(e) ‘Foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans (“United States persons,” i.e., citizens or permanent resident aliens). The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

- permits “roving” surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)
- increases the number of judges on the FISA court from 7 to 11
- allows application for a FISA surveillance or search order when gathering foreign intelligence is a significant reason for the application rather than the reason
- authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations
- sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses
- carries a sunset provision
- establishes a claim against the U.S. for certain communications privacy violations by government personnel
- expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to – (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States,” 50 U.S.C. 1801.

34 Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
**FISA.** FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases.\(^{35}\) It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

**Search and Surveillance for Intelligence Purposes.** Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, Draft at §151.\(^{36}\)

Section 901 of the Act address a concern raised during the 106th Congress relating to the availability of the FISA orders and the effective use of information gleaned from the execution of a FISA order.\(^{37}\) It vests the Director of Central

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\(^{36}\) See also, DoJ at §151, “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order’s minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed (50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

\(^{37}\) See *e.g.*, S.Rep.No. 106-352, at 3, 6, 7 (2000)(“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application
process, as interpreted by the OIPR is administratively burdensome and, at times, extremely slow. Many applications undergo months of scrutiny before submission to the court because the OIPR prescribes standards and restrictions not imposed by the statute. . . . In particular, the OIPR has been criticized for an overly restrictive interpretation of the FISA ‘currency’ requirement. This is the issue of how recent a subject’s activities must be to support a finding of probable cause that the subject is engaged in clandestine intelligence gathering activities. . . . While existing law does not specifically address “past activities,” it does not preclude, and legislative history supports, the conclusion that past activities may be part of the totality of circumstances considered by the FISC in making a probable cause determination. . . . By definition, information collected pursuant to a court order issued under the Foreign Intelligence Surveillance Act is foreign intelligence not law enforcement information. Accordingly, the Committee wants to clarify that the FISA ‘take’ can and must be shared by the Federal Bureau of Investigation with appropriate intelligence agencies. For the intelligence mission of the United States to be successful, there must be a cooperative and concerted effort among intelligence agencies. Any information collected by one agency under foreign intelligence authorities that could assist another agency in executing its lawful mission should be shared fully and promptly. Only then can the United States Government pursue aggressively important national security targets including, for example, counterterrorist and counternarcotics targets”); see also, 147 Cong.Rec. S799-803 (daily ed. Feb. 24, 2000)(remarks of Sens. Specter, Torricelli and Biden).

Pen Registers and Trap and Trace Devices for Intelligence Gathering. Section 214 grants the request of the Department of Justice by dropping requirements which limited FISA pen register and trap and trace device orders to facilities used by foreign agents or those engaged in international terrorist or clandestine intelligence activities, 50 U.S.C. 1842(c)(3)(2000 ed.). It is enough that the order is sought as part of an investigation to protect against international terrorism or clandestine intelligence activities and is not motivated solely by an American’s exercise of his or her First Amendment rights. Elsewhere (section 505), the Act drops a similar limitation for intelligence officials’ access to telephone records, 18 U.S.C.

38 “When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevance, an additional factual showing that the communications device has been used to contact an ‘agent of a foreign power’ engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the ‘agent of a foreign power’ prong from the predication, and thus makes the FISA authority more closely track the criminal authority,” DoJ at §155.
Section 214 adjusts the language of the FISA pen register-trap and trace authority to permit its use to capture source and destination information relating to electronic communications (e.g., e-mail) as well as telephone communications, 50 U.S.C. 1842(d). The section makes it clear that requests for a FISA pen register-trap and trace order, like requests for other FISA orders, directed against Americans (U.S. persons) may not be based solely on activities protected by the First Amendment, 50 U.S.C. 1842, 1843.

**Third Party Cooperation and Tangible Evidence.** As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target's activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.40

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39 Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise to be entitled to confidentiality. Section 505, in response to the Justice Department's suggestion, allows FBI field offices to make the requests, see DoJ at §157 (“At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports”).

40 When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court's order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.’ This would enhance the FBI's ability to monitor international terrorists and intelligence officers who are...
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian.\footnote{41} The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities,\footnote{42} in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B));
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a);
- the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a);
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v;

\footnote{41} “The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigative contexts. The time and difficulty involved in getting such pleadings before the Court usually outweighs the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” \textit{DoJ} at §156.

\footnote{42} Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.43

**Access to Law Enforcement Information.** Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community's access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, *Draft* at §103.44

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43 H.R.Rep.No. 107-205, at 60-1 (2001)(“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

“The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

“Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual’s credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding—without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information”).

44 See also, *DoJ* at §103, “This section facilities the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, \textit{Draft} at §354.\footnote{See also, \textit{DoJ} at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.” Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officers.}

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, \textit{Draft} at §154.\footnote{See also, \textit{DoJ} at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”}

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion.\footnote{\textit{Blair v. United States}, 250 U.S. 273, 281 (1919)(the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).} It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its
affairs are conducted in private and outside the presence of the court. Only the
attorney for the government, witnesses under examination, and a court reporter may
attend its proceedings, F.R.Crim.P. 6(d). Matters occurring before the grand jury are
secret and may be disclosed by the attending attorney for the government and those
assisting the grand jury only in the performance of their duties; in presentation to a
successor grand jury; or under court order for judicial proceedings, for inquiry into
misconduct before the grand jury, or for state criminal proceedings, F.R.Crim.P. 6(e).

The Act, in section 203(a), allows disclosure of matters occurring before the
grand jury to “any federal law enforcement, intelligence, protective, immigration,
national defense, or national security” officer to assist in the performance of his

Critics may protest that the change could lead to the use of the grand jury for
intelligence gathering purposes, or less euphemistically, to spy on Americans. 49 The
proposal was never among those scheduled to sunset, but earlier versions of the
section followed the path used for most other disclosures of grand jury material: prior
to the grand jury’s awesome powers should not be unwittingly extended to a much wider range of issues. . .

These officers may receive: (1) “foreign intelligence information” that is, information
regardless whether it involves Americans or foreign nationals that “[a] relates to the ability
of the United States to protect against – (aa) actual or potential attack or other grave hostile
acts of a foreign power or an agent of a foreign power; (bb) sabotage or international
terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence
activities by an intelligence service or network of a foreign power;” or [b] “with respect to a
foreign power or foreign territory that relates to – (aa) the national defense or security of the
United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P.
6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that
is, [a] “information relating to the capabilities, intentions, or activities of foreign governments
or elements thereof, foreign organizations, or foreign persons, or international terrorist
activities” or [b] “information gathered and activities conducted, to protect against espionage,
other intelligence activities, sabotage, or assassinations conducted on behalf of foreign
governments or elements thereof, foreign organizations, or foreign persons, or international
terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in
italics).

48 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on
Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25
Harvard Journal of Law & Public Policy 699, 719-20 (2002)(“There is a significant
danger that the rule permitting disclosure will be treated as the de facto authorization of an
expansion of the grand jury’s investigative role to encompass seeking material relevant only
to matters of national security, national defense, immigration, and so forth. The grand jury’s
awesome powers should not be unwittingly extended to a much wider range of issues. . .
Since the grand jury operates in secret, there are no public checks on the scope of its
investigations, and witnesses are not permitted to challenge its jurisdiction. Only the
supervising court is in a position to keep the grand jury’s investigation within proper bounds.
Requiring judicial approval of foreign intelligence and counterintelligence information
disclosures would provide a natural check against the temptation to manipulate the grand jury
to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist
Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6
(Nov. 2001)(“The grand jury secrecy rule is a rule of policy which has always had exceptions,
and it has been frequently modified. The secrecy rule has no credible claim to constitutional
stature”).
information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e. “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

Law enforcement officials may share Title III information with the intelligence community under the same conditions, section 203(b), although the grand jury and Title III sharing provisions differ in at least three important respects. The court need not be notified of Title III disclosures. On the other hand, the authority for sharing Title III information expires on December 31, 2005, section 224, and agencies and their personnel guilty of intentional improper disclosures may be subject to a claim for damages and disciplinary action, 18 U.S.C. 2520.

The third subsection of section 203 remains something of an enigma. It speaks in much the same language as its counterparts. It allows law enforcement officials to share information with the intelligence community, “notwithstanding any other provisions of law,” section 203(d). It either swallows the other subsections, or supplements them. Several factors argue for its classification as a supplement. Congress is unlikely to have crafted subsections (a), (b) and (c) only to completely

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50 Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e. “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

51 “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification. By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

**Increasing Institutional Capacity.** As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a

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52 *Duncan v. Walker*, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted)(“It is our duty to give effect, if possible, to every clause and word of a statute. *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)); see also *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879)(As early as in Bacon's Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

53 *Draft* at §154, “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”
computerized translation capability to be used in foreign intelligence gathering.\textsuperscript{54} Section 907 instructs the Director of the Central Intelligence, in consultation with the Director of the FBI, to report on the creation of a National Virtual Translation Center. The report is to include information concerning staffing, allocation of resources, compatibility with comparable systems to be used for law enforcement purposes, and features which permit its efficient and secure use by all of the intelligence agencies.

**Money Laundering**

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture.\textsuperscript{55} The Act bolsters federal efforts in each area.

**Regulation.** Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.\textsuperscript{56}

\textsuperscript{54} “The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

“The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so,” S.Rep.No. 107-63, at 11 (2001).


\textsuperscript{56} See \textit{e.g.}, 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
Records and Reports. For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler’s checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to file SARs as well, reflecting Congress’ view that the information provided the IRS may be valuable for other law enforcement purposes. This concern is likewise

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58 H.R.Rep.No. 107-250, at 38-9 (2001) (“Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

“Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a ‘Safeguard Procedures Report’ which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

“While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement
Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action. 59 Section 355 expands the immunity to cover disclosures in

59 “Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

“First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor from civil liability applies in arbitration, as well as judicial, proceedings. Second, it amends section 5318(g)(3) to clarify the safe harbor’s coverage of voluntary disclosures (that is, those not covered by the SAR regulatory reporting requirement). The language in section 5318(g)(3)(A) providing that ‘any financial institution that *** makes a disclosure pursuant to *** any other authority *** shall not be liable to any person’ is not intended to avoid the application of the reporting and disclosure provisions of the Federal securities laws to any person, or to insulate any issuers from private rights of actions for disclosures made under the Federal securities laws.

“Subsection [351](b) amends section 5318(g)(2) of title 31—which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed—to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee’s official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
employment references to other insured depository financial institutions provided disclosure is not done with malicious intent.60

The Financial Crimes Enforcement Network (FinCEN), a component within the Treasury Department long responsible for these anti-money laundering reporting and record-keeping requirements, 31 C.F.R. pt. 103, was administratively created in 1990 to provide other government agencies with an “intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes,” 55 Fed.Reg. 18433 (May 2, 1990).

The Act, in section 361, makes FinCEN a creature of statute, a bureau within the Treasury Department, 31 U.S.C. 310. Section 362 charges it with the responsibility of establishing a highly secure network to allow financial institutions to file required reports electronically and to permit FinCEN to provide those institutions with alerts and other information concerning money laundering protective measures, 31 U.S.C. 310 note.

**Special Measures.** In extraordinary circumstances involving international financial matters, the Act grants the Secretary of the Treasury, in consultation with other appropriate regulatory authorities, the power to issue regulations and orders involving additional required “special measures” and additional “due diligence” requirements to combat money laundering. The special measure authority, available under section 311, comes to life with the determination that particular institutions, jurisdictions, types of accounts, or types of transactions pose a primary money

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60 31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 67 (2001).
laundering concern. These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

31 U.S.C. 5318A. The circumstances considered in the case of a suspect jurisdiction are: evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction’s banking regulation; the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’ including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

“Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate
business transactions.

“Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

“Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

“The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

“The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

“The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

“The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent’ account for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

“The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

“The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed
**Due Diligence.** Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.63

by regulation, order, or otherwise as permitted by law. However, if the Secretary proceeds by issuing an order, the order must be accompanied by a notice of proposed rulemaking relating to the imposition of the special measure, and may not remain in effect for more than 120 days, except pursuant to a regulation prescribed on or before the end of the 120-day period. The fifth special measure may be imposed only by regulation,” H.R.Rep.No. 107-250, at 68-9.

63 See generally, H.R.Rep.No. 107-250, at 71-2 (“Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

“The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

“The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

“For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
detect and report transactions that may involve the proceeds of foreign corruption. A private bank account is defined as an account (or any combination of accounts) that requires a minimum aggregate deposit of funds or other assets of not less than $1 million; is established on behalf of one or more individuals who have a direct or beneficial ownership in the account; and is assigned to, or administered or managed by, an officer, employee or agent of a financial institution acting as a liaison between the institution and the direct or beneficial owner of the account.

“This section directs the Secretary of the Treasury, within 6 months of enactment of this bill and in consultation with appropriate Federal functional regulators, to further define and clarify, by regulation, the requirements imposed by this section”).

Or more exactly, a bank which has no physical presence in any country; a “physical presence” for a foreign bank is defined as “a place of business that – (i) is maintained by a foreign bank; (ii) is located at a fixed address (other than solely an electronic address) in a country in which the foreign bank is authorized to conduct banking activities, at which location the foreign bank – (I) employs 1 or more individuals on a full-time basis; and (II) maintains operating records relating to its banking activities; and (iii) is subject to inspection by the banking authority which licensed the foreign bank to conduct banking activities,” 31 U.S.C. 5318(j)(4).

The Act, in section 325, empowers the Secretary of the Treasury to promulgate regulations to prevent financial institutions from allowing their customers to conceal their financial activities by taking advantage of the institutions’ concentration account practices.

The Secretary of the Treasury is instructed in section 326 to issue regulations for financial institutions’ minimum new customer identification standards and record-

General Regulatory Matters. The Act establishes several other regulatory mechanisms directed at the activities involving U.S. financial institutions and foreign individuals or institutions. Section 313, for instance, in another restriction on correspondent accounts for foreign financial institutions, prohibits U.S. financial institutions from maintaining correspondent accounts either directly or indirectly for foreign shell banks (banks with no physical place of business) which have no affiliation with any financial institution through which their banking activities are subject to regulatory supervision.

The Act, in section 325, empowers the Secretary of the Treasury to promulgate regulations to prevent financial institutions from allowing their customers to conceal their financial activities by taking advantage of the institutions’ concentration account practices.

The Secretary of the Treasury is instructed in section 326 to issue regulations for financial institutions’ minimum new customer identification standards and record-
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keeping and to recommend a means to effectively verify the identification of foreign customers.67

U.S.C. 5318 by adding a new subsection governing the identification of account holders. Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a ‘street name’ or omnibus account in the broker-dealer's name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to ‘look through’ the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund’s customers. Thus, the fund would not be required to ‘look through’ the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature. 68

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

**Reports to Congress.** Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

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exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.⁶⁹

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

International Cooperation. Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.⁷⁰

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (i.e., the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.


⁷⁰ H.R.Rep.No. 107-250, at 67 (2001)(“This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury's progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

“The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime”).
Crimes. Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

• involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
• are intended to promote any of the designated predicate offenses, or
• are intended to evade taxes, or
• are designed to conceal the proceeds generated by any of the predicate offenses, or
• are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

• 18 U.S.C. 541 (goods falsely classified)
• 18 U.S.C. 922(1) (unlawful importation of firearms)
• 18 U.S.C. 924(n) (firearms trafficking)
• 18 U.S.C. 1030 (computer fraud and abuse)
• felony violations of the Foreign Agents Registration Act, 22 U.S.C. 618.

As the report accompanying H.R. 3004 explains:

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, smuggling, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
expands 18 U.S.C. 1956 to cover financial transactions conducted in foreign financial institutions.\textsuperscript{71}

Section 329 makes it a federal crime to corruptly administer the money laundering regulatory scheme. Offenders are punishable by imprisonment for not more than 15 years and a fine of not more than three times the amount of the bribe.

Section 5326 of title 31 authorizes the Secretary of the Treasury to impose temporary, enhanced reporting requirements upon financial institutions in areas victimized by substantial money laundering activity (geographic targeting regulations and orders). Section 353 makes it clear that the civil sanctions, criminal penalties, and prohibitions on smurfing (structuring transactions to evade reporting requirements) apply to violations of the regulations and orders issued under 31 U.S.C. 5326.\textsuperscript{72} It also extends the permissible length of the temporary geographical orders from 60 to 180 days.

Violations of the special measures and special due diligence requirements of sections 311 and 312 are subject to both civil and criminal penalties by virtue of section 363's amendments to 31 U.S.C. 5321(a) and 5322. The amendments authorize civil penalties and criminal fines of twice the amount of the transaction but not more than $1 million. Criminal offenders would be subject to a fine in the same amount.

\textsuperscript{71} “[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

The definition of ‘financial institution’ in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of ‘commercial bank’ or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad--say to a Mexican bank--and launders them through a series of financial transactions, the government conceivably could not rely on the definition of a ‘financial institution’ in 1956(c)(6) to establish that the transaction was a ‘financial transaction’ within the meaning of 1956(c)(4)(B) (defining a ‘financial transaction’ as a transaction involving the use of a ‘financial institution’), or that it was a ‘monetary transaction’ within the meaning of 1957(f) (defining ‘monetary transaction’ as, inter alia, a transaction that would be a ‘financial transaction’ under 1956(c)(4)(B)).

Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launders the proceeds of one of the crimes set forth on a list of ‘specified unlawful activities.’ 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),” H.R.Rep.No. 107-250, at 38 (2000).

Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.  

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents. They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

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73 The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business.

“Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.

“Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive,” H.R.Rep.No. 107-250, at 54 (2001).

74 “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
• 18 U.S.C. 476 (taking impressions of tools used for obligations and securities) from 10 to 25 years;
• 18 U.S.C. 477 (possessing or selling impressions of tools used for obligations or securities) from 10 to 25 years;
• 18 U.S.C. 484 (connecting parts of different notes) from 5 to 10 years;
• 18 U.S.C. 493 (bonds and obligations of certain lending agencies) from 5 to 10 years;
• 18 U.S.C. 478 (foreign obligations or securities) from 5 to 20 years;
• 18 U.S.C. 479 (uttering counterfeit foreign obligations or securities) from 3 to 20 years;
• 18 U.S.C. 480 (possessing counterfeit foreign obligations or securities) from 1 to 20 years;
• 18 U.S.C. 481 (plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities) from 5 to 25 years;
• 18 U.S.C. 482 (foreign bank notes) from 2 to 20 years; and
• 18 U.S.C. 483 (uttering counterfeit foreign bank notes) from 1 to 20 years.

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

**Bulk Cash.** Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act’s bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting.\(^75\)

The section appears to be the product of reactions to the Supreme Court’s decision in *United States v. Bajakian*, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court’s

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\(^75\) “For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).
As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency – representing the proceeds of drug trafficking and other criminal offenses – is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad.

“Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United States without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

“Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute,” H.R.Rep.No. 107-250 at 36-7 (2001).

Extraterritorial Jurisdiction. The Act makes 18 U.S.C. 1029, the federal statute condemning various crimes involving credit cards, PIN numbers and other access devices, applicable overseas if the card or device is issued by or controlled by an American bank or other entity and some article is held in or transported to or through the United States during the course of the offense, section 377. The change was part of the original Justice Department proposals. Justice explained that, “[financial crime] admits of no border, utilizing the integrated global financial network for ill purposes. This provision would apply the financial crimes prohibitions to conduct committed abroad, so long as the tools or proceeds of the crimes pass through or are in the United States,” DoJ at §408. The section, however, appears to limit the otherwise applicable extraterritorial jurisdiction implicit in section 1029, since federal courts would likely recognize extraterritorial jurisdiction over a violation of

Section 5317 of title 31 once called for civil forfeiture of property traceable to a violation of 31 U.S.C. 5316 (reports on exporting or importing money instruments worth $10,000 or more). Section 372 of the Act recasts section 5317 to provide for civil and criminal forfeitures for violations of 31 U.S.C. 5316, of 31 U.S.C. 5313 (reports on domestic coins and currency transactions involving $10,000 or more) and of 31 U.S.C. 5324 (structuring transactions to evade reporting requirements (smurfing)).
under either circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.\footnote{77}

**Venue.** Section 1004 relies on dicta in United States v. Cabrales, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering,\footnote{78} in the state and district in which the monetary transaction takes place. The Supreme Court in Cabrales held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in dicta, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.\footnote{79}

**Forfeiture.** Forfeiture is the government confiscation of property as a consequence of crime.\footnote{80} The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 et seq. (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

**Constitutional Considerations.** The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 et seq., which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the


\footnote{78}{“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed,” U.S.Const. Art.III, §2, cl.3.}

\footnote{79}{“[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,” U.S.Const. Amend. VI.}

\footnote{80}{See also, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnaping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.}

\footnote{For general background information, see, Doyle, Crime and Forfeiture, CRS REP.NO. 97-139A (Oct. 11, 2000).}
jurisdiction of the United States, belonging to any foreign individual, foreign entity, or foreign country whom they determine to have planned, authorized, aided or engaged in an attack on the United States by a foreign country or foreign nationals. The section also permits the government to present secretly (ex parte and in camera) any classified information upon which the forfeiture was based should the decision be subject to judicial review. The Justice Department requested the section as a revival of the President's powers in times of unconventional wars. 81 By virtue of section 316, property owners may initiate a challenge to a confiscation by filing a claim under the rules applicable in maritime confiscations. The section permits two defenses to forfeiture – that the property is not subject to confiscation under section 106 or that the claimant is entitled to the innocent owner defense of 18 U.S.C. 983(d). 82 The characterization of the defenses as “affirmative defense” indicates that the claimant bears the burden of proof. The innocent owner defenses of 18 U.S.C. 983(d) are probably not available in cases under section 106, since that section is explicitly

81 “This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App.U.S.C. §5(b).

“This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress's war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

“The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2),” DoJ at §159.

82 “An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
excepted from the coverage of 18 U.S.C. 983. The challenge proceedings permit the court to admit evidence, such as hearsay evidence, that would not otherwise be admissible under the Federal Rules of Evidence if the evidence is reliable and if national security might be imperiled should dictates of the Federal Rules be followed, §316(b). The section recognizes the rights of claimants to proceed alternatively under the Constitution or the Administrative Procedure Act.

The Justice Department also recommended enactment of an overlapping provision which ultimately passed as section 806 of the Act without any real discussion of the relationship of the two sections. Section 806 authorizes confiscation of all property, regardless of where it is found, of any individual, entity, or organization engaged in domestic or international terrorism (as defined in 18 U.S.C. 2331), against the United States, Americans or their property, 18 U.S.C. 983(i)(2)(D).

“Current law does not contain any authority tailored specifically to the confiscation of terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available current forfeiture laws require detailed tracing that is quite difficult for accounts coming through the banks of countries used by many terrorists.

‘This section increases the government's ability to strike at terrorist organizations' economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001," DoJ, at §403. The House Report on H.R. 2975 which contained versions of both sections is no more explicit on the relation of the two sections.

“(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5) (as amended by section 802 of the Act).

87 Austin v. United States, 509 U.S. 602, 611-12 (1993) (“Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture . . . . Of England’s three kinds of forfeiture, only the third took hold in the United States”).


89 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal in personam proceedings following criminal conviction as a means of accomplishing confiscation.
Neither section 106 nor 806 require conviction of the terrorist property owner.\textsuperscript{90} Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers.\textsuperscript{91} The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners.\textsuperscript{92} Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them.\textsuperscript{93} The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate

\textsuperscript{90} Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c)(“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act”).

\textsuperscript{91} Silesian American Corp. V. Clark, 332 U.S. 469 (1947); cf., Societe Internationale v. Rogers, 357 U.S. 197, 211 (1958)(“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).

\textsuperscript{92} Zittman v. McGrath, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’”).

any presumption of remedial purposes. The same has been said of the applicability of the ex post facto clause.

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO. If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

**Other Forfeiture Amendments.** In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.

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95 See e.g., United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.), 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994).

96 DoJ, at §403.

97 18 U.S.C. 1956(b). Cf., H.R.Rep.No. 107-250, at 54-5 (2001)(“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas.\footnote{18 U.S.C. 981(k).  H.R.Rep.No. 107-250, at 57-8 (2001)(“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank's customers.

Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank's correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests").}

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted
defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation.\footnote{99}

Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here.\footnote{100} Section 320 enlarges this provision to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements.\footnote{101} This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.\footnote{102}

\footnote{99} Cf., H.R.Rep.No. 107-250, at 58-9 (2001) ("Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of 'substitute assets' when the defendant has placed the property otherwise subject to forfeiture 'beyond the jurisdiction of the court.' Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

"This section amends 21 U.S.C. 853 to make clear that a court in a criminal case may issue a repatriation order—either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. 853(e) to restrain property—so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both").

\footnote{100} 18 U.S.C. 981(a)(1)(B).

\footnote{101} H.R.Rep.No. 107-250, at 56 (2001)("This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act").

\footnote{102} H.R.Rep.No. 107-250, at 59-60 (2001)("Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country.

"Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
A fugitive may not challenge a federal forfeiture. Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in “order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.”
**Alien Terrorists and Victims**

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

**Border Protection.** The border protection provisions:

- authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401

- authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402

- remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404

- authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405

- authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.

- instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007

- direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418

- express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414

- add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415

- call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416

- limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
• instruct the Attorney General to report on the feasibility of using biometric scanners to help prevent terrorists and other foreign criminals from entering the country, section 1008

• authorize appropriations of $250,000 for the FBI to determine the feasibility of providing airlines with computer access to the names of suspected terrorists, section 1009

• authorize reciprocal sharing of the State Department’s visa lookout data and related information with other nations in order to prevent terrorism, drug trafficking, slave marketing, and gun running, section 413

Detention and Removal. Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity, 8 U.S.C. 1227 (a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(iv). Aliens may be inadmissible for any number of terrorism-related reasons, 8 U.S.C. 1182 (a)(3)(B). Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported.


Section 411 defines “terrorist organization” to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the Federal Register as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C.

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104 As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).
Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).


An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in “premeditated, politically motivated violence perpetrated against noncombatant targets,” or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security or endanger some individual or the general public. The Attorney General's determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

Victims. The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

- permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421\textsuperscript{105}
- extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422\textsuperscript{106}

\textsuperscript{105} “The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

\textsuperscript{106} “The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks.

“The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application.

“Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
• preservation of certain immigration benefits available to alien family members that would be otherwise lost as a consequence of the death of a victim of September 11, section 423

• limited easing of age restrictions on visas available to aliens under 21 years of age for those whose 21st birthday occurred immediately before or soon after September 11, section 424

• temporary administrative relief for alien family members of a victim of September 11 who are not otherwise entitled to relief under the Act, section 425

the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

“Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 31.

“Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.


107 “Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

“The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

“The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death),” H.R.Rep.No. 107-236, at 68 (2001).

108 “Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien’s 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien’s 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
• a denial of benefits of the Act to terrorists and their families, section 427

• authority for the Attorney General to establish evidentiary standards to implement the alien victim provisions of the Act, section 426.

Other Crimes, Penalties, & Procedures

New Crimes. The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department, the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offense for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents, 18 U.S.C. 175b. Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.

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109 “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g) . . . .” DoJ at §305.

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110 The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

110 The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

111 “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2)(“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).

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The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.112

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D). The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

112 U.S. Const. Art.III, §2, cl.3 (“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . . .”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . . .”); United States v. Cabrales, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from Cabrales when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnaping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999)(“By way of comparison, last Term in [Cabrales] we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).
The Justice Department sought the expansion along with the enlargement of the predicate offense list, "18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of 'material support or resources' is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill ('Federal terrorism offenses')."

Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.


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115 “The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill (‘Federal terrorism offenses’) is used in identifying the relevant crimes,” DoJ, at §304.

New Penalties. The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. §3571(b),(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense.117

The proposal, however, failed to identify the critical elements that would trigger the alternative.118 Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

- for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

- for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

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117 “Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersede lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,” DoJ, at §302.

118 “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense,” Draft at §302.
• for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;

• for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;

• for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;

• for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and

• for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism. Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:

• arson committed within a federal enclave, 18 U.S.C. 81;
• killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);
• destruction of communications facilities, 18 U.S.C. 1362;
• destruction of property within a federal enclave, 18 U.S.C. 1363;
• causing a train wreck, 18 U.S.C. 1922;
• providing material support to a terrorist, 18 U.S.C. 2339A;
• torture committed overseas under color of law, 18 U.S.C. 2340A;
• sabotage of a nuclear facility, 42 U.S.C. 2284;

119 “The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §§846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

“This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.
• interfering with a flight crew within U.S. special aircraft jurisdiction, 49 U.S.C. 46504;
• carrying a weapon or explosive abroad an aircraft within U.S. special aircraft jurisdiction, 49 U.S.C. 46505; and
• sabotage of interstate gas pipeline facilities, 49 U.S.C. 60123.

When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years). The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission), a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

120 Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Mesheick, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

121 “Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.

“This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders).\(^\text{122}\)

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

**Other Procedural Adjustments.** In other procedural adjustments designed to facilitate criminal investigations, the Act:

- increases the rewards for information in terrorism cases
- expands the Posse Comitatus Act exceptions
- authorizes “sneak and peek” search warrants
- permits nationwide and perhaps worldwide execution of warrants in terrorism cases
- eases government access to confidential information
- allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
- lengthens the statute of limitations applicable to crimes of terrorism
- clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
- adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B.\(^\text{123}\)

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\(^{122}\) It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, e.g., damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

\(^{123}\) When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001)(remarks of Rep. Sensenbrenner); for general background, see, Doyle, *McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys*, CRS REP.NO. RL30060 (Dec. 14, 2001).
Rewards. The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L. 105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism.\textsuperscript{124}

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

Posse Comitatus. The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.\textsuperscript{125}

Delayed notification of a search (sneak and peek). Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take

\textsuperscript{124} The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct threat assessments for federal agencies, and to reimburse federal agencies for the costs of detaining terrorist suspects overseas.

\textsuperscript{125} For a general discussion of the Posse Comitatus Act, see, Doyle, \textit{The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law}, CRS Rep.No. 95-964 (June 1, 2000).
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, Richards v. Wisconsin, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, Wilson v. Arkansas, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, Dalia v. United States, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, cf., United States v. Miller, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, United States v. Freitas, 800 F.2d 1451, 1453 (9th Cir. 1986).

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126 The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in United States v. New York Telephone Co., 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth
Amendment, demands that surreptitious entries be closely circumscribed,” United States v. Freitas (Freitas I), 800 F.2d 1451, 1455-456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, United States v. Freitas (Freitas II), 856 F.2d 1425 (9th Cir. 1988).

“No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in Dalia v. United States, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in Dalia, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property. . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. See United States v. New York Telephone Co., 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . . Although the Freitas I court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in United States v. Villegas, 899 F.2d 1324 (1999). Although the Freitas I court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in Villegas. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the Freitas I court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” United States v. Pangburn, 983 F.2d 449, 453-55 (2d Cir. 1993).

In Simons, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
The Justice Department urged that the conflict be resolved with a uniform rule which permitted sneak and peek warrants under the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage.\textsuperscript{129}

The Act, in section 213, stops short of the Justice Department proposal. Characterized as a codification of the Second Circuit decision, 147 Cong.Rec. H7197 (daily ed. Oct. 23, 2001), the Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C. 3103a. Its sneak and peek authorization reaches all federal search and seizure warrants where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (\textit{e.g.}, risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (\textit{e.g.}, jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, \textit{i.e.}, in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation.\textsuperscript{130} The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

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\textsuperscript{129} The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities,” \textit{DoJ} at §353.

\textsuperscript{130} Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department’s initial proposal, the Department’s justification does not address the question.
constitutionally “reasonable,” that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

**Nationwide terrorism search warrants.** The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either “within or outside the district,” (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases. The provision may anticipate execution both in this country and overseas. The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage. Neither Rule 41 nor any other provision of federal

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131 The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum; . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

132 The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

133 *United States v. Barona*, 56 F.3d 1087, 1092 (9th Cir. 1995)(“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994)(“if American law enforcement officials substantially participated in the search or if the
law apparently contemplated extraterritorial execution, cf., F.R.Crim.P.41, *Advisory Committee Notes: 1990 Amendment* (discussing a proposal for extraterritorial execution that the Supreme Court rejected). 134

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” F.R.Crim.P. 41, *Advisory Committee Notes: 1990 Amendment*. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

**Terrorists’ DNA.** The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards *per se*. 135 Existing federal law allowed the Attorney General to collect samples from foreign officials conducting the search were actually acting as agents for their American counterparts’); *United States v. Maturo*, 982 F.2d 57, 61 (2d Cir. 1992) (“where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials” or “where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials”); *United States v. Mitro*, 880 F.2d 1480, 1482 (1st Cir. 1989) (“where American agents participated in the foreign search or the foreign officers acted as agents for their American counterparts”); *United States v. Mount*, 757 F.2d 1315, 1318 (D.C.Cir. 1985) (“if American officials or officers participated in some significant way”); *United States v. Marzano*, 537 F.2d 257, 270 (7th Cir. 1976) (declining to adopt the “joint venture” standards, but finding level of American participation in the case before it insignificant); *United States v. Morrow*, 537 F.2d 120, 139 (5th Cir. 1976) (“if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts”); each of the decisions also suggests that evidence secured in a manner which shocked the conscience of the court would be excluded.

134 The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, see, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), reprinted, 78 Cong.Rec. 4982-983 (1934)(“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.)(conferring judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

The USA PATRIOT Act: A Legal Analysis

April 15, 2002

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The USA PATRIOT Act: A Legal Analysis

Summary

The USA PATRIOT Act passed in the wake of the September 11 terrorist attacks. It flows from a consultation draft circulated by the Department of Justice, to which Congress made substantial modifications and additions. The stated purpose of the Act is to enable law enforcement officials to track down and punish those responsible for the attacks and to protect against any similar attacks.

The Act grants federal officials greater powers to trace and intercept terrorists’ communications both for law enforcement and foreign intelligence purposes. It reinforces federal anti-money laundering laws and regulations in an effort to deny terrorists the resources necessary for future attacks. It tightens our immigration laws to close our borders to foreign terrorists and to expel those among us. Finally, it creates a few new federal crimes, such as the one outlawing terrorists’ attacks on mass transit; increases the penalties for many others; and institutes several procedural changes, such as a longer statute of limitations for crimes of terrorism.

Critics have suggested that it may go too far. The authority to monitor e-mail traffic, to share grand jury information with intelligence and immigration officers, to confiscate property, and to impose new book-keeping requirements on financial institutions, are among the features troubling to some.

The Act itself responds to some of these reservations. Many of the wiretapping and foreign intelligence amendments sunset on December 31, 2005. The Act creates judicial safeguards for e-mail monitoring and grand jury disclosures; recognizes innocent owner defenses to forfeiture; and entrusts enhanced anti-money laundering powers to those regulatory authorities whose concerns include the well being of our financial institutions.

This report, stripped of its citations and footnotes, is available in an abbreviated form as The USA PATRIOT Act: A Sketch, CRS Rep. No. RS21203. In addition, much of the information contained here may also be found under a different arrangement in a report entitled, Terrorism: Section by Section Analysis of the USA PATRIOT Act, CRS Rep. No. RL31200 (Dec. 10, 2001). A wider array of terrorism-related analysis appears on the CRS terrorism electronic briefing book page.
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The USA PATRIOT Act: A Legal Analysis

Introduction

Congress passed the USA PATRIOT Act (the Act) in response to the terrorists’ attacks of September 11, 2001. The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to further close our borders to foreign terrorists and to detain and remove those within our borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it is not without safeguards, critics contend some of its provisions go too far. Although it grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough.


1 P.L. 107-56, 115 Stat. 272 (2001); its full title is the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT).”

2 H.R. 2975 was introduced by Representative Sensenbrenner for himself and Representatives Conyers, Hyde, Coble, Goodlatte, Jenkins, Jackson-Lee, Cannon, Meehan, Graham, Bachus, Wexler, Hostettler, Keller, Issa, Hart, Flake, Schiff, Thomas, Goss, Rangel, Berman and Lofgren; S.1510 by Senator Daschle for himself and Senators Lott, Leahy, Hatch, Graham, Shelby and Sarbanes.

3 H.R. 3004 was introduced by Representative Oxley for himself and Representatives LaFalce, Leach, Maloney, Roukema, Bentsen, Hooley, Bereuter, Baker, Bachus, King, Kelly, Gillmore, Cantor, Riley, Latourette, Green (of Wisconsin), and Grucci; and reported out of the House Financial Services Committee with amendments on October 15, 2001, H.R.Rep.No. 107-250. H.R. 3004, as reported out, included Internet gambling amendments that were not included in H.R. 2975/H.R.3108.
ed. Oct. 24, 2001), and H.R. 3162 was sent to the President who signed it on October 26, 2001.

**Criminal Investigations: Tracking and Gathering Communications**

A portion of the Act addresses issues suggested originally in a Department of Justice proposal circulated in mid-September. The first of its suggestions called for amendments to federal surveillance laws, laws which govern the capture and tracking of suspected terrorists’ communications within the United States. Federal law features a three tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications.

The tiers reflected the Supreme Court’s interpretation of the Fourth Amendment’s ban on unreasonable searches and seizures. The Amendment protects private conversations, *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967). It does not cloak information, even highly personal information, for which there is no individual justifiable expectation of privacy, such as telephone company records of calls made to and from an individual’s home, *Smith v. Maryland*, 442 U.S. 735 (1979), or bank records of an individual’s financial dealings, *United States v. Miller*, 425 U.S. 435 (1976).

Congress responded to *Berger* and *Katz*, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications, 18 U.S.C. 2511. At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious

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4 The Department’s proposal, dated September 20, 2001, came with a brief section by section analysis. Both the proposal (Draft) and analysis (DoJ) were printed as an appendix in *Administration's Draft Anti-Terrorism Act of 2001, Hearing Before the House Comm. on the Judiciary*, 107th Cong., 1st Sess. 54 (2001).


6 “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,” *U.S. Const. Amend. IV*.

7 Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
criminal cases. When approved by senior Justice Department officials, law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.

8 “The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of” one or more predicate offense, 18 U.S.C. 2516.

9 The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement), 1751 (presidential and presidential staff assassination, kidnapping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnapping, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or naturalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations, 18 U.S.C. 2518. The court notifies the parties to any conversations seized under the order after the order expires, 18 U.S.C. 2518(8).

Below Title III, the next tier of privacy protection covers some of those matters which the Supreme Court has described as beyond the reach of the Fourth Amendment protection – telephone records, e-mail held in third party storage, and the like, 18 U.S.C. 2701-2709 (Chapter 121). Here, the law permits law enforcement access, ordinarily pursuant to a warrant or court order or under a subpoena in some cases, but in connection with any criminal investigation and without the extraordinary levels of approval or constraint that mark a Title III interception, 18 U.S.C. 2703.

Least demanding and perhaps least intrusive of all is the procedure that governs court orders approving the government’s use of trap and trace devices and pen registers, a kind of secret “caller id”, which identify the source and destination of calls made to and from a particular telephone, 18 U.S.C. 3121-3127 (Chapter 206). The orders are available based on the government's certification, rather than a finding of the court, that the use of the device is likely to produce information relevant to the investigation of a crime, any crime, 18 U.S.C. 3123. The devices record no more than the identity of the participants in a telephone conversation, but neither the orders nor the results they produce need ever be revealed to the participants.

The Act modifies the procedures at each of the three levels. It:

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offense involving counterfeiting punishable under 18 U.S.C. 471, 472, or 473; (e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States; (f) any offense including extortionate credit transactions under 18 U.S.C. 892, 893, or 894; (g) a violation of 31 U.S.C. 5322 (dealing with the reporting of currency transactions); (h) any felony violation of 18 U.S.C. 2511 and 2512 (interception and disclosure of certain communications and to certain intercepting devices); (i) any felony violation of 18 U.S.C. ch. 71 (obscenity); (j) 49 U.S.C. 60123(b) (destruction of a natural gas pipeline), 46502 (aircraft piracy); (k) 22 U.S.C. 2778 (Arms Export Control Act); (l) the location of any fugitive from justice from an offense described in this section; (m) a violation of 8 U.S.C. 1324, 1327, or 1328; (n) any felony violation of 18 U.S.C. 922, 924 (firearms); (o) any violation of 26 U.S.C. 5861 (firearms); (p) a felony violation of 18 U.S.C. 1028 (production of false identification documents), 1542 (false statements in passport applications), 1546 (fraud and misuse of visas, permits, and other documents) or a violation of 8 U.S.C. 1324, 1327, or 1328 (smuggling of aliens); (p) 229 (chemical weapons), 2332 (terrorist violence against Americans overseas), 2332a (weapons of mass destruction), 2332b (multinational terrorism), 2332d (financial transactions with countries supporting terrorism), 2339A (support of terrorist), 2332B (support of terrorist organizations); (r) any conspiracy to commit any of these, 18 U.S.C. 2516(1)(crimes added by the Act in italics). Other than telephone face to face conversations (i.e., electronic communications), the approval of senior Justice Department officials is not required and an order may be sought in any felony investigation, 18 U.S.C. 2516(3).

10 Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
permits pen register and trap and trace orders for electronic communications
(e.g., e-mail)

authorizes nationwide execution of court orders for pen registers, trap and
trace devices, and access to stored e-mail or communication records

treats stored voice mail like stored e-mail (rather than like telephone
conversations)

permits authorities to intercept communications to and from a trespasser within
a computer system (with the permission of the system’s owner)

adds terrorist and computer crimes to Title III’s predicate offense list

reenforces protection for those who help execute Title III, ch. 121, and ch. 206
orders

encourages cooperation between law enforcement and foreign intelligence
investigators

establishes a claim against the U.S. for certain communications privacy
violations by government personnel

terminates the authority found in many of the these provisions and several of
the foreign intelligence amendments with a sunset provision (Dec. 31, 2005).

Pen Registers and Trap and Trace Devices. In section 216, the Act
allows court orders authorizing trap and trace devices and pen registers to be used
for capture source and addressee information for computer conversations (e.g.,
e-mail) as well as telephone conversations, 18 U.S.C. 3121, 3123. In answer to
objections that e-mail header information can be more revealing than a telephone
telephone number, it creates a detailed report to the court, 18 U.S.C. 3123(a)(3).

Where the law enforcement agency implementing an ex parte order under this subsection
seeks to do so by installing and using its own pen register or trap and trace device on a packet-
switched data network of a provider of electronic communication service to the public the
agency shall ensure that a record will be maintained which will identify – (i) any officer or
official who installed the device and any officer or officers who accessed the device to obtain
information from the network; (ii) the date and time the device was installed, the date and time
the device was uninstalled, and the date, time, and duration of each time the device is accessed
to obtain information; (iii) the configuration of the device at the time of its installation and any
subsequent modification thereof; and (iv) any information which has been collected by the
device. To the extent that the pen register or trap and trace device can be set automatically
to record this information electronically, the record shall be maintained electronically
throughout the installation and use of the such device.

(B) The record maintained under subparagraph (A) shall be provided ex parte and
under seal to the court which entered the ex parte order authorizing the installation and use
of the device within 30 days after termination of the order (including any extensions thereof),
section 216(b)(1).
The use of pen registers or trap and trace devices was limited at one time to the judicial district in which the order was issued, 18 U.S.C. 3123 (2000 ed.). Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States, 18 U.S.C. 3123(b)(1)(C), 3127(2).  

Communications Records and Stored E-Mail. With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber, 18 U.S.C. 2703(a),(b). A warrant will also suffice to seize records describing telephone and other communications transactions without customer notice, 18 U.S.C. 2703(c). In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation, officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records, 18 U.S.C. 2703(b),(c). They can obtain a limited amount of record information (subscribers' names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena, 18 U.S.C. 2703(c)(1)(C). There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial, 18 U.S.C. 2705.

In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider’s customer records, 18 U.S.C. 2703(c)(1)(C).  

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.

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12 The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” DoJ at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

13 Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user's true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” DoJ at §107.
Previously, only a federal court in the district in which the e-mail was stored could issue the order. Under section 220, federal courts in the district where an offense under investigation occurred may issue orders applicable “without geographic limitation,” 18 U.S.C. 2703.\(^\text{14}\)

The Act, in section 209, treats voice mail like e-mail, that is, subject to the warrant or court order procedure, rather than to the more demanding coverage of Title III once required, United States v. Smith, 155 F.3d 1050, 1055-56 (9th Cir. 1998).

Finally, the Act resolves a conflict between chapter 121 and the federal law governing cable companies. Government entities may have access to cable company customer records only under a court order following an adversary hearing if they can show that the records will evidence that the customer is or has engaged in criminal activity, 47 U.S.C. 511(h). When cable companies began offering telephone and other communications services the question arose whether the more demanding cable rules applied or whether law enforcement agencies were entitled to ex parte court orders under the no-notice procedures applicable to communications providers.\(^\text{15}\) The Act makes it clear that the cable rules apply when cable television viewing services are

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\(^\text{14}\) Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

\(^\text{15}\) See e.g., DoJ at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement’s access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

**Electronic Surveillance.** To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202. A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(i). Yet only the interloper's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.

**Criminal Investigators' Access to Foreign Intelligence Information.**
The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism. It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that "the purpose for the surveillance is to obtain foreign intelligence information," 50 U.S.C. 1804(a)(7)(B)(2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps "the purpose" might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation

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16 18 U.S.C. 229 (chemical weapons), 2332(terrorist acts of violence committed against Americans overseas), 2332a(use of weapons of mass destruction), 2332b(acts of terrorism transcending national boundaries), 2332d(financial transactions with countries which support terrorists), 2339A(providing material support to terrorists), and 2339B(providing material support to terrorist organizations).

17 “Because service providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves as permitted under current law, they often have no way to exercise their rights to protect themselves from unauthorized attackers. Moreover, such attackers can target critical infrastructures and engage in cyberterrorism,” DoJ at §106. Elsewhere the Act defines “electronic surveillance” for purposes of the Foreign Intelligence Surveillance Act (FISA) to emphasize that the law enforcement authority for this intruder surveillance does not confer similar authority for purposes of foreign intelligence gathering, section 1003 (50 U.S.C. 1801(f)(2)).

Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment's warrant clause. It is here that the “primary purpose” notion originated. In *United States v. Truong Dinh Hung*, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, “as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.”

Subsequent case law, however, is not as clear as it might be: *see e.g., United States v. Duggan*, 743 F.2d 59, 77 (2d Cir. 1984) (“FISA permits federal officials to obtain orders authorizing electronic surveillance ‘for the purpose of obtaining foreign intelligence information.’ The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying officials’ belief that the information sought is the type of foreign intelligence information described”); *United States v. Pelton*, 835 F.2d 1067, 1075-76 (4th Cir. 1987) (“We also reject Pelton's claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial”); *United States v. Sarkissian*, 841 F.2d 959, 907-8 (9th Cir. 1988) (“Defendants rely on the primary purpose test articulated in *United States v. Truong Dinh Hung* . . . . One other court has applied the primary purpose test. Another court has rejected it . . . distinguishing Truong. A third court has declined to decide the issue. We also decline to decide the issue”); *United States v. Johnson*, 952 F.2d 565, 572 (1st Cir. 1991) (“Appellants attack the government's surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance”).

"Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” DoJ at §153.
demanding standard than the “a purpose” threshold proposed by the Justice Department, but a clear departure from the original “the purpose” entry point. FISA once described a singular foreign intelligence focus prerequisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k), 1825(k).²¹

Protective Measures. The Act reenforces two kinds of safeguards, one set designed to prevent abuse and the other to protect those who assist the government. The sunset clause is perhaps the best known of the Act’s safeguards. Under the direction of section 224, many of the law enforcement and foreign intelligence authorities granted by the Act expire as of December 31, 2005.²² The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter

²¹ “(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. (2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, infra, quoting, 50 U.S.C. 1801.

²² “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210[subpoenas for communications provider customer records], 211[access to cable company communication service records], 213[sneak and peek], 216[pen register and trap and trace device amendments], 221[trade sanctions], and 222[assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005.

“(b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers' communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices).\(^{23}\) Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees,\(^ {24}\) but could not recover against the United States.\(^ {25}\) Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice's Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government's request until a court order authorizing access can be obtained.\(^ {26}\) Another allows providers to disclose customer records to protect the provider's rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others.\(^ {27}\) A third section,


\(^{24}\) 18 U.S.C. 2520 and 2707 (2000 ed.).


\(^{26}\) Prior law already granted service providers immunity for disclosure of customer records in compliance with a court access order, 18 U.S.C. 2703(f).

\(^{27}\) “Existing law contains no provision that allows providers of electronic communications service to disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies that threaten death or serious bodily injury. This section amends 18 U.S.C. §2702 to authorize such disclosures if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.

“Current law also contains an odd disconnect: a provider may disclose the contents of the customer's communications in order to protect its rights or property but the current statute does not expressly permit a provider to voluntarily disclose non-content records (such as a subscriber's login records). 18 U.S.C. 2702(b)(5). This problem substantially hinders the ability of providers to protect themselves from cyber-terrorists and criminals. Yet the right to disclose the contents of communications necessarily implies the less intrusive ability to disclose non-content records. In order to promote the protection of our nation's critical infrastructures, this section's amendments allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems,” DoJ at
Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

Thus in the name of assisting in the execution of Title III, chapter 121, or chapter 206 order, the courts may not cite the Act as the basis for an order compelling a service provider to make system modifications or provide any other technical assistance not already required under 18 U.S.C. 2518(4), 2706, or 3124(c), see, H.R.Rep.No. 107-236, at 62-3 (2001) (emphasis added) (“This Act is not intended to affect obligations under Communications Assistance for Law Enforcement Act [which addresses law enforcement-beneficial system modifications and the compensation to be paid for the changes], nor does the act impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance”).

Foreign Intelligence Investigations

Although both criminal investigations and foreign intelligence investigations are conducted in the United States, criminal investigations seek information about unlawful activity; foreign intelligence investigations seek information about other countries and their citizens. Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough.

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA), something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President's authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, United States v. United States District Court, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage

§110.

28 Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

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30 E.g., As amended by section 902 of the Act, “‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2)(language added by the Act in italics).

31 50 U.S.C. 1801 et seq.
In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs. There were and still are extra


33 “As used in this subchapter: (a) ‘Foreign power’ means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

(b) ‘Agent of a foreign power’ means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C).

(c) ‘International terrorism’ means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnapping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

(d) ‘Sabotage’ means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

(e) ‘Foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans (“United States persons,” i.e., citizens or permanent resident aliens). The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

- permits “roving” surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)
- increases the number of judges on the FISA court from 7 to 11
- allows application for a FISA surveillance or search order when gathering foreign intelligence is a significant reason for the application rather than the reason
- authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations
- sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses
- carries a sunset provision
- establishes a claim against the U.S. for certain communications privacy violations by government personnel
- expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to – (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States,” 50 U.S.C. 1801.

Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
FISA. FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases. It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

Search and Surveillance for Intelligence Purposes. Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, Draft at §151.36

Section 901 of the Act address a concern raised during the 106th Congress relating to the availability of the FISA orders and the effective use of information gleaned from the execution of a FISA order.37 It vests the Director of Central


36 See also, DoJ at §151, “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order’s minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed (50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

37 See e.g., S.Rep.No. 106-352, at 3, 6, 7 (2000)(“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application
Intelligence with the responsibility to formulate requirements and priorities for the use of FISA to collect foreign intelligence information. He is also charged with the responsibility of assisting the Attorney General in the efficient and effective dissemination of FISA generated information (50 U.S.C. 403-3(c)).

**Pen Registers and Trap and Trace Devices for Intelligence Gathering.** Section 214 grants the request of the Department of Justice by dropping requirements which limited FISA pen register and trap and trace device orders to facilities used by foreign agents or those engaged in international terrorist or clandestine intelligence activities, 50 U.S.C. 1842(c)(3)(2000 ed.). It is enough that the order is sought as part of an investigation to protect against international terrorism or clandestine intelligence activities and is not motivated solely by an American’s exercise of his or her First Amendment rights. Elsewhere (section 505), the Act drops a similar limitation for intelligence officials’ access to telephone records, 18 U.S.C.

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38 “When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevance, an additional factual showing that the communications device has been used to contact an ‘agent of a foreign power’ engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the ‘agent of a foreign power’ prong from the predication, and thus makes the FISA authority more closely track the criminal authority;” DoJ at §155.
Section 214 adjusts the language of the FISA pen register-trap and trace authority to permit its use to capture source and destination information relating to electronic communications (e.g., e-mail) as well as telephone communications, 50 U.S.C. 1842(d). The section makes it clear that requests for a FISA pen register-trap and trace order, like requests for other FISA orders, directed against Americans (U.S. persons) may not be based solely on activities protected by the First Amendment, 50 U.S.C. 1842, 1843.

**Third Party Cooperation and Tangible Evidence.** As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target's activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.40

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39 Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise to be entitled to confidentiality. Section 505, in response to the Justice Department's suggestion, allows FBI field offices to make the requests, see DoJ at §157 (“At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports”).

40 When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court’s order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.’ This would enhance the FBI’s ability to monitor international terrorists and intelligence officers who are
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian.\(^{41}\) The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities,\(^{42}\) in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B);
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a);
- the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a);
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v;

\(^{41}\) “The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigative contexts. The time and difficulty involved in getting such pleadings before the Court usually outweighs the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” DoJ at §156.

\(^{42}\) Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
Access to Law Enforcement Information. Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community’s access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, Draft at §103.44

43 H.R.Rep.No. 107-205, at 60-1 (2001)(“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

“The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

“Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual’s credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding--without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information”).

44 See also, DoJ at §103, “This section facilities the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, Draft at §354.  

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, Draft at §154.

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion. It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions.”

45 See also, DoJ at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.” Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officers.

46 See also, DoJ at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”

47 Blair v. United States, 250 U.S. 273, 281 (1919) (the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
affairs are conducted in private and outside the presence of the court. Only the
attorney for the government, witnesses under examination, and a court reporter may
attend its proceedings, F.R.Crim.P. 6(d). Matters occurring before the grand jury are
secret and may be disclosed by the attending attorney for the government and those
assisting the grand jury only in the performance of their duties; in presentation to a
successor grand jury; or under court order for judicial proceedings, for inquiry into
misconduct before the grand jury, or for state criminal proceedings, F.R.Crim.P. 6(e).

The Act, in section 203(a), allows disclosure of matters occurring before the
grand jury to “any federal law enforcement, intelligence, protective, immigration,
national defense, or national security” officer to assist in the performance of his

Critics may protest that the change could lead to the use of the grand jury for
intelligence gathering purposes, or less euphemistically, to spy on Americans.49 The
proposal was never among those scheduled to sunset, but earlier versions of the
section followed the path used for most other disclosures of grand jury material: prior

48 These officers may receive: (1) “foreign intelligence information” that is, information
regardless whether it involves Americans or foreign nationals that “[a] relates to the ability
of the United States to protect against – (aa) actual or potential attack or other grave hostile
acts of a foreign power or an agent of a foreign power; (bb) sabotage or international
terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence
activities by an intelligence service or network of a foreign power;” or [b] “with respect to a
foreign power or foreign territory that relates to – (aa) the national defense or security of the
United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P.
6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that
is, [a] “information relating to the capabilities, intentions, or activities of foreign governments
or elements thereof, foreign organizations, or foreign persons, or international terrorist
activities” or [b] “information gathered and activities conducted, to protect against espionage,
other intelligence activities, sabotage, or assassinations conducted on behalf of foreign
governments or elements thereof, foreign organizations, or foreign persons, or international
terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in
italics).

49 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on
Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25
HARVARD JOURNAL OF LAW & PUBLIC POLICY 699, 719-20 (2002)(“There is a significant
danger that the rule permitting disclosure will be treated as the de facto authorization of an
expansion of the grand jury’s investigative role to encompass seeking material relevant only
to matters of national security, national defense, immigration, and so forth. The grand jury’s
awesome powers should not be unwittingly extended to a much wider range of issues... Since
the grand jury operates in secret, there are no public checks on the scope of its
investigations, and witnesses are not permitted to challenge its jurisdiction. Only the
supervising court is in a position to keep the grand jury’s investigation within proper bounds.
Requiring judicial approval of foreign intelligence and counterintelligence information
disclosures would provide a natural check against the temptation to manipulate the grand jury
to develop information for unauthorized purposes’’); but see, Scheidegger et al., Federalist
Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6
(Nov. 2001)(“The grand jury secrecy rule is a rule of policy which has always had exceptions,
and it has been frequently modified. The secrecy rule has no credible claim to constitutional
stature’’).
Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

Law enforcement officials may share Title III information with the intelligence community under the same conditions, section 203(b), although the grand jury and Title III sharing provisions differ in at least three important respects. The court need not be notified of Title III disclosures. On the other hand, the authority for sharing Title III information expires on December 31, 2005, section 224, and agencies and their personnel guilty of intentional improper disclosures may be subject to a claim for damages and disciplinary action, 18 U.S.C. 2520.

The third subsection of section 203 remains something of an enigma. It speaks in much the same language as its counterparts. It allows law enforcement officials to share information with the intelligence community, “notwithstanding any other provisions of law,” section 203(d). It either swallows the other subsections, or supplements them. Several factors argue for its classification as a supplement. Congress is unlikely to have crafted subsections (a), (b) and (c) only to completely

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50 Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

51 “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification. By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

Increasing Institutional Capacity. As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a

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52 Duncan v. Walker, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted) (“It is our duty to give effect, if possible, to every clause and word of a statute. United States v. Menasche, 348 U.S. 528, 538-539 (1955) (quoting Montclair v. Ramsdell, 107 U.S. 147, 152 (1883)); see also Williams v. Taylor, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); Market Co. v. Hoffman, 101 U.S. 112, 115 (1879)(As early as in Bacon's Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage. By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

53 Draft at §154, “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”
computerized translation capability to be used in foreign intelligence gathering.\(^{54}\) Section 907 instructs the Director of the Central Intelligence, in consultation with the Director of the FBI, to report on the creation of a National Virtual Translation Center. The report is to include information concerning staffing, allocation of resources, compatibility with comparable systems to be used for law enforcement purposes, and features which permit its efficient and secure use by all of the intelligence agencies.

**Money Laundering**

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture.\(^{55}\) The Act bolsters federal efforts in each area.

**Regulation.** Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.\(^{56}\)

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\(^{54}\) “The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

“The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so,” S.Rep.No. 107-63, at 11 (2001).

\(^{55}\) For a brief overview, see, Murphy, Money Laundering: Current Law and Proposals, CRS Rep.NO. RS21032 (Dec. 21, 2001).

\(^{56}\) See e.g., 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
**Records and Reports.** For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department's Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler's checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to files SARs as well, reflecting Congress’ view that the information provided the IRS may be valuable for other law enforcement purposes. This concern is likewise

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58 H.R.Rep.No. 107-250, at 38-9 (2001)(“Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

“Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a ‘Safeguard Procedures Report’ which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

“While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement
reflected in section 357 which asks the Secretary of the Treasury to report on the Internal Revenue Service’s role in the administration of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311 et seq.), and what transfers of authority, if any, are appropriate.

Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action. 59 Section 355 expands the immunity to cover disclosures in

authorities as the various reports mandated by the Bank Secrecy Act, which can typically be retrieved electronically from a database maintained by the Treasury Department. The differential access to the two kinds of reports is made anomalous by the fact that Form 8300 elicits much the same information that is required to be disclosed by the Bank Secrecy Act.

For example, just as Form 8300 seeks the name, address, and social security number of a customer who engages in a cash transaction exceeding $10,000 with a trade or business, Currency Transaction Reports (CTRs) mandated by the Bank Secrecy Act require the same information to be reported on a cash transaction exceeding $10,000 between a financial institution and its customer”).

59 “Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

“First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor from civil liability applies in arbitration, as well as judicial, proceedings. Second, it amends section 5318(g)(3) to clarify the safe harbor’s coverage of voluntary disclosures (that is, those not covered by the SAR regulatory reporting requirement). The language in section 5318(g)(3)(A) providing that ‘any financial institution that *** makes a disclosure pursuant to *** any other authority *** shall not be liable to any person’ is not intended to avoid the application of the reporting and disclosure provisions of the Federal securities laws to any person, or to insulate any issuers from private rights of actions for disclosures made under the Federal securities laws.

“Subsection [351](b) amends section 5318(g)(2) of title 31--which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed--to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee's official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
employment references to other insured depository financial institutions provided disclosure is not done with malicious intent.\textsuperscript{60}

The Financial Crimes Enforcement Network (FinCEN), a component within the Treasury Department long responsible for these anti-money laundering reporting and record-keeping requirements, 31 C.F.R. pt. 103, was administratively created in 1990 to provide other government agencies with an “intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes,” 55 Fed.Reg. 18433 (May 2, 1990).

The Act, in section 361, makes FinCEN a creature of statute, a bureau within the Treasury Department, 31 U.S.C. 310. Section 362 charges it with the responsibility of establishing a highly secure network to allow financial institutions to file required reports electronically and to permit FinCEN to provide those institutions with alerts and other information concerning money laundering protective measures, 31 U.S.C. 310 note.

\textbf{Special Measures.} In extraordinary circumstances involving international financial matters, the Act grants the Secretary of the Treasury, in consultation with other appropriate regulatory authorities, the power to issue regulations and orders involving additional required “special measures” and additional “due diligence” requirements to combat money laundering. The special measure authority, available under section 311, comes to life with the determination that particular institutions, jurisdictions, types of accounts, or types of transactions pose a primary money

\textsuperscript{60} 31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 66 (2001).
laundering concern. These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

61 31 U.S.C. 5318A. The circumstances considered in the case of a suspect jurisdiction are: evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction’s banking regulation; the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

62 The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’ including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

“Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate
business transactions.

“Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

“Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

“The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

“The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

“The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

“The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent’ account for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information that it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

“The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

“The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed
**Due Diligence.** Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption. 63

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63 See generally, H.R.Rep. No. 107-250, at 71-2 (“Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

“The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

“The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

“For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
detect and report transactions that may involve the proceeds of foreign corruption. A private bank account is defined as an account (or any combination of accounts) that requires a minimum aggregate deposit of funds or other assets of not less than $1 million; is established on behalf of one or more individuals who have a direct or beneficial ownership in the account; and is assigned to, or administered or managed by, an officer, employee or agent of a financial institution acting as a liaison between the institution and the direct or beneficial owner of the account.

“This section directs the Secretary of the Treasury, within 6 months of enactment of this bill and in consultation with appropriate Federal functional regulators, to further define and clarify, by regulation, the requirements imposed by this section”.

64 Or more exactly, a bank which has no physical presence in any country; a “physical presence” for a foreign bank is defined as “a place of business that – (i) is maintained by a foreign bank; (ii) is located at a fixed address (other than solely an electronic address) in a country in which the foreign bank is authorized to conduct banking activities, at which location the foreign bank – (I) employs 1 or more individuals on a full-time basis; and (II) maintains operating records relating to its banking activities; and (iii) is subject to inspection by the banking authority which licensed the foreign bank to conduct banking activities,” 31 U.S.C. 5318(j)(4).


66 The Act does not define “concentration accounts,” although the House Financial Services Committee report provides some incite into the section’s intent, H.R.Rep.No. 107-250, at 72-3 (2001)(“This section gives the Secretary of the Treasury discretionary authority to prescribe regulations governing the maintenance of concentration accounts by financial institutions, to ensure that these accounts are not used to prevent association of the identity of an individual customer with the movement of funds of which the customer is the direct or beneficial owner. If promulgated, the regulations are required to prohibit financial institutions from allowing clients to direct transactions into, out of, or through the concentration accounts of the institution; prohibit financial institutions and their employees from informing customers of the existence of, or means of identifying, the concentration accounts of the institution; and to establish written procedures governing the documentation of all transactions involving a concentration account.”)
Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a ‘street name’ or omnibus account in the broker-dealer's name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to ‘look through’ the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund's customers. Thus, the fund would not be required to ‘look through’ the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature. 68

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

**Reports to Congress.** Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

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exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.\textsuperscript{69}

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

**International Cooperation.** Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.\textsuperscript{70}

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (\textit{i.e.}, the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.


\textsuperscript{70} H.R.Rep.No. 107-250, at 67 (2001)(“This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury's progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

“The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime”).
**Crimes.** Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, smuggling, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
expands 18 U.S.C. 1956 to cover financial transactions conducted in foreign financial institutions.  

Section 329 makes it a federal crime to corruptly administer the money laundering regulatory scheme. Offenders are punishable by imprisonment for not more than 15 years and a fine of not more than three times the amount of the bribe.

Section 5326 of title 31 authorizes the Secretary of the Treasury to impose temporary, enhanced reporting requirements upon financial institutions in areas victimized by substantial money laundering activity (geographic targeting regulations and orders). Section 353 makes it clear that the civil sanctions, criminal penalties, and prohibitions on smurfing (structuring transactions to evade reporting requirements) apply to violations of the regulations and orders issued under 31 U.S.C. 5326. It also extends the permissible length of the temporary geographical orders from 60 to 180 days.

Violations of the special measures and special due diligence requirements of sections 311 and 312 are subject to both civil and criminal penalties by virtue of section 363's amendments to 31 U.S.C. 5321(a) and 5322. The amendments authorize civil penalties and criminal fines of twice the amount of the transaction but not more than $1 million. Criminal offenders would be subject to a fine in the same amount.

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71 "[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

“The definition of ‘financial institution’ in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of ‘commercial bank’ or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad—say to a Mexican bank—and launderers them through a series of financial transactions, the government conceivably could not rely on the definition of a ‘financial institution’ in 1956(c)(6) to establish that the transaction was a ‘financial transaction’ within the meaning of 1956(c)(4)(B) (defining a ‘financial transaction’ as a transaction involving the use of a ‘financial institution’), or that it was a ‘monetary transaction’ within the meaning of 1957(f) (defining ‘monetary transaction’ as, inter alia, a transaction that would be a ‘financial transaction’ under 1956(c)(4)(B)).

“Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launders the proceeds of one of the crimes set forth on a list of ‘specified unlawful activities.’ 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),” H.R.Rep.No. 107-250, at 38 (2000).

Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.\(^{73}\)

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents.\(^{74}\) They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

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\(^{73}\) The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business.

“Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.

“Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive,” H.R.Rep.No. 107-250, at 54 (2001).

\(^{74}\) “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
• 18 U.S.C. 476 (taking impressions of tools used for obligations and securities) from 10 to 25 years;
• 18 U.S.C. 477 (possessing or selling impressions of tools used for obligations or securities) from 10 to 25 years;
• 18 U.S.C. 484 (connecting parts of different notes) from 5 to 10 years;
• 18 U.S.C. 493 (bonds and obligations of certain lending agencies) from 5 to 10 years;
• 18 U.S.C. 478 (foreign obligations or securities) from 5 to 20 years;
• 18 U.S.C. 479 (uttering counterfeit foreign obligations or securities) from 3 to 20 years;
• 18 U.S.C. 480 (possessing counterfeit foreign obligations or securities) from 1 to 20 years;
• 18 U.S.C. 481 (plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities) from 5 to 25 years;
• 18 U.S.C. 482 (foreign bank notes) from 2 to 20 years; and
• 18 U.S.C. 483 (uttering counterfeit foreign bank notes) from 1 to 20 years.

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

**Bulk Cash.** Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act’s bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting.⁷⁵

The section appears to be the product of reactions to the Supreme Court’s decision in *United States v. Bajakian*, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court’s

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⁷⁵ “For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).
As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency – representing the proceeds of drug trafficking and other criminal offenses – is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad. . . .

Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United States without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

“Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute,” H.R.Rep.No. 107-250 at 36-7 (2001).
under *either* circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.\(^77\)

**Venue.** Section 1004 relies on *dicta* in *United States v. Cabrales*, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering,\(^78\) in the state and district in which the monetary transaction takes place. The Supreme Court in *Cabrales* held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in *dicta*, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.\(^79\)

**Forfeiture.** Forfeiture is the government confiscation of property as a consequence of crime.\(^80\) The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 et seq. (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

**Constitutional Considerations.** The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 et seq., which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the

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\(^{78}\) “The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed,” *U.S.Const.* Art.III, §2, cl.3.

“[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,” *U.S.Const.* Amend. VI.

\(^{79}\) See also, *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnaping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.

\(^{80}\) For general background information, see, Doyle, *Crime and Forfeiture*, CRS REP.NO. 97-139A (Oct. 11, 2000).
This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App.U.S.C. §5(b).

This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress’s war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2),” DoJ at §159.

An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).

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81 This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App.U.S.C. §5(b).

This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress's war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2),” DoJ at §159.

82 An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
excepted from the coverage of 18 U.S.C. 983. The challenge proceedings permit the court to admit evidence, such as hearsay evidence, that would not otherwise be admissible under the Federal Rules of Evidence if the evidence is reliable and if national security might be imperiled should dictates of the Federal Rules be followed, §316(b). The section recognizes the rights of claimants to proceed alternatively under the Constitution or the Administrative Procedure Act.

The Justice Department also recommended enactment of an overlapping provision which ultimately passed as section 806 of the Act without any real discussion of the relationship of the two sections. Section 806 authorizes confiscation of all property, regardless of where it is found, of any individual, entity, or organization engaged in domestic or international terrorism (as defined in 18 U.S.C. 2331), against the United States, Americans or their property, 18 U.S.C.

83 18 U.S.C. 983(i)(2)(D).

84 “The exclusion of certain provisions of Federal law from the definition of the term ‘civil forfeiture statute’ in section 983(i) of title 18, United States Code, shall not be construed to deny an owner of property the right to contest the confiscation of assets of suspected international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C) subchapter II of chapter 5 of title 5, United States Code (commonly known as the ‘Administrative Procedure Act’).” Sec. 316(c)(1).

85 “Current law does not contain any authority tailored specifically to the confiscation of terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available current forfeiture laws require detailed tracing that is quite difficult for accounts coming through the banks of countries used by many terrorists.

‘This section increases the government’s ability to strike at terrorist organizations’ economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001,” DoJ, at §403. The House Report on H.R. 2975 which contained versions of both sections is no more explicit on the relation of the two sections.

86 “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
981(a)(1)(G). Section 806 as discussed below also calls for the more common confiscation of property derived from and or facilitating acts of domestic or international terrorism against the United States or its citizens. Confiscations under 806 may be challenged under the procedures of 18 U.S.C. 983, since they are not exempted there. To the extent that forfeiture under section 806 is based on international rather than domestic terrorism, claimants may also use the procedures of section 316.

Confiscation based solely on the fact that the property is owned by a criminal offender, rather than that it is derived from or facilitates some crime is fairly uncommon. It is the mark of common law forfeiture of estate. At common law, a felon forfeited all of his property. Most contemporary forfeiture statutes employ statutory forfeiture, a more familiar presence in American law, which consists of the confiscation of things whose possession is criminal, of the fruits of crime, and of the means of crime – untaxed whiskey, the drug dealer’s profits, and the rum runner’s ship.

Three characteristics set forfeiture of estate apart. The property is lost solely by reason of its ownership by a felon. All of a felon’s property is confiscated, not merely that which is related to the crime for which he is convicted. Finally, it occasions attainder which negates the felon’s right to hold property or for title to property to pass through him to his heirs. It was with this in mind, that the Framers declared that “no attainder of treason shall work corruption of blood or forfeiture exception during the life of the person attainted.” And for this reason, President Lincoln insisted that the confiscated real estate of Confederate supporters should revert their heirs at death.
Neither section 106 nor 806 require conviction of the terrorist property owner.\(^{90}\) Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers.\(^{91}\) The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners.\(^{92}\) Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them.\(^{93}\) The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate

\(^{90}\) Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c)(“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act”).

\(^{91}\) *Silesian American Corp. V. Clark*, 332 U.S. 469 (1947); cf., *Societe Internationale v. Rogers*, 357 U.S. 197, 211 (1958)(“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).

\(^{92}\) *Zittman v. McGrath*, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’”).

any presumption of remedial purposes. The same has been said of the applicability of the ex post facto clause.

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO. If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

Other Forfeiture Amendments. In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.

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95 See e.g., United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.), 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994).
96 DoJ, at §403.
97 18 U.S.C. 1956(b). Cf., H.R.Rep.No. 107-250, at 54-5 (2001)(“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas. Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted American Bank, 191 F.3d 30 (1st Cir. 1999).

“The second provision, modeled on 18 U.S.C. 1345(b), gives the district court the power to restrain property, issue seizure warrants, or take other action necessary to ensure that a defendant in an action covered by the statute does not dissipate the assets that would be needed to satisfy a judgment.

“This section also authorizes a court, on the motion of the Government or a State or Federal regulator, to appoint a receiver to gather and protect assets needed to satisfy a judgment under sections 1956 and 957, and the forfeiture provisions in sections 981 and 982. This authority is intended to apply in three circumstances: (1) when there is a judgment in a criminal case, including an order of restitution, following a conviction for a violation of section 1956 or 1957; (2) when there is a judgment in a civil case under section 1956(b) assessing a penalty for a violation of either section 1956 or 1957; and (3) when there is a civil forfeiture judgment under section 981 or a criminal forfeiture judgment, including a personal money judgment, under section 982.

“The amendment also makes section 1956(b) applicable to violations of section 1957. It applies to conduct occurring before the effective date of the Act.”).

18 U.S.C. 981(k). H.R.Rep. No. 107-250, at 57-8 (2001)(“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank's customers.

“Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank's correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

“The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”).
defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation.\textsuperscript{99}

Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here.\textsuperscript{100} Section 320 enlarges this provisions to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements.\textsuperscript{101} This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.\textsuperscript{102}

\textsuperscript{99} Cf., H.R.Rep.No. 107-250, at 58-9 (2001) ("Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of "substitute assets" when the defendant has placed the property otherwise subject to forfeiture "beyond the jurisdiction of the court." Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

"This section amends 21 U.S.C. 853 to make clear that a court in a criminal case may issue a repatriation order--either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. 853(e) to restrain property--so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both").

\textsuperscript{100} 18 U.S.C. 981(a)(1)(B).

\textsuperscript{101} H.R.Rep.No. 107-250, at 56 (2001)("This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act").

\textsuperscript{102} H.R.Rep.No. 107-250, at 59-60 (2001)("Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country.

"Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
to contest the restraining order could do so on the ground that 28 U.S.C. 2467 was not properly applied to the particular case, but could not oppose the restraining order on any ground that could also be raised in the proceedings pending in a foreign court. This provision prevents a litigant from taking ‘two bites at the apple’ by raising objections to the basis for the forfeiture in the Federal court that he also raised, or is entitled to raise, in the foreign court where the forfeiture action is pending. It complements the existing provision in section 2467(e) providing that the Federal court is bound by the findings of fact of the foreign court, and may not look behind such findings in determining whether to enter an order enforcing a foreign forfeiture judgment.

“This section also amends 28 U.S.C. 2467 to make clear that it is not necessary to prove that the person asserting an interest in the property received actual notice of the forfeiture proceedings. As is the case with respect to forfeitures under U.S. law, it is sufficient if the foreign nation takes steps to provide notice, in accordance with the principles of due process. See Gonzalez v. United States, 1997 WL 278123 (S.D.N.Y. 1997) (‘the [G]overnment is not required to ensure actual receipt of notice that is properly mailed’); Albajon v. Gugliotta, 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant’s identifications, and mailed after claimant released from jail, is sufficient to satisfy due process, even if claimant never received notice); United States v. Schiavo, 897 F. Supp. 644, 648 49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; due process satisfied even if he did not receive the notice).

“Finally, 28 U.S.C. 2467 is amended to authorize the enforcement of a forfeiture judgment based on any foreign offense that would constitute an offense giving rise to a civil or criminal forfeiture of the same property if the offense had been committed in the United States. This is one of two safeguards that the statute contains against the enforcement of judgments that the United States does not consider appropriate for enforcement: if the judgment is based on an act that would not constitute a crime in the United States, such as removing assets from the reach of a repressive regime, it could not be enforced. In addition, section 2467 already provides that a foreign judgment may only be enforced by a Federal court at the request of the United States, and only after the Attorney General has certified that the judgment was obtained in accordance with the principles of due process. Thus, neither a foreign Government nor a foreign private party could enforce a foreign judgment on its own under this provision.”). Note that the safeguard to which the report refers is the range of foreign offenses that will support an enforceable confiscation order, i.e., drug offenses and crimes on the money laundering predicate offense list, and that the amendment narrows that safeguard by adding additional foreign offenses, i.e., any foreign equivalent of a federal crime which would support a confiscation order.

Alien Terrorists and Victims

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

Border Protection. The border protection provisions:

• authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401

• authorize appropriations of an additional $50 million for both INS and the Customs Service to upgrade their border surveillance equipment, section 402

• remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404

• authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405

• authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.

• instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007

• direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418

• express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414

• add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415

• call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416

• limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
Instruct the Attorney General to report on the feasibility of using biometric scanners to help prevent terrorists and other foreign criminals from entering the country, section 1008.

Authorize appropriations of $250,000 for the FBI to determine the feasibility of providing airlines with computer access to the names of suspected terrorists, section 1009.

Authorize reciprocal sharing of the State Department’s visa lookout data and related information with other nations in order to prevent terrorism, drug trafficking, slave marketing, and gun running, section 413.

**Detention and Removal.** Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity, 8 U.S.C. 1227 (a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(iv). Aliens may be inadmissible for any number of terrorism-related reasons, 8 U.S.C. 1182 (a)(3)(B). Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported.


Section 411 defines “terrorist organization” to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the Federal Register as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C.

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104 As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).
Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).


An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in “premeditated, politically motivated violence perpetrated against noncombatant targets,” or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security or endanger some individual or the general public. The Attorney General's determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

**Victims.** The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

- permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421
- extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422

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105 "The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident," H.R.Rep.No. 107-236, at 66-7 (2001).

106 "The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks.

"The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application.

"Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

“Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 31.

“Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.


107 “Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigran t status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

“The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

“The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death),” H.R.Rep.No. 107-236, at 68 (2001).

108 “Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien’s 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien’s 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
a denial of benefits of the Act to terrorists and their families, section 427

authority for the Attorney General to establish evidentiary standards to implement the alien victim provisions of the Act, section 426.

Other Crimes, Penalties, & Procedures

New Crimes. The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department, the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offenses for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents, 18 U.S.C. 175b. Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.

109 “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section amends 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . . .” DoJ at §305.

110 The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

111 “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2)(“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.112

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D) The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

112 U.S. Const. Art.III, §2, cl.3 ("The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . ."); Amend. IV ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . ."); United States v. Cabrales, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from Cabrales when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnaping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999)("By way of comparison, last Term in Cabrales we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense").
chemical weapons offenses, 18 U.S.C. 229;
terrorist attacks on mass transportation, 18 U.S.C. 1993;
sabotage of a nuclear facility, 42 U.S.C. 2284; and
sabotage of interstate pipelines, 49 U.S.C. 60123(b).

And it adds expert advice or assistance to the types of assistance that may not be provided under section 2339A. This last addition may encounter the same First Amendment vagueness problems some courts have found in assistance which takes the form of “training” and “personnel.” Humanitarian Law Project v. Reno, 205 F.3d 1130, 1137-136 (9th Cir. 2000). Finally, the section announces that a prosecution for violation of section 2339A (support of terrorists) may be brought where the support is provided or where the predicate act of terrorism occurs. There may be some question whether the Constitution permits prosecution where the predicate act occurs.

Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.


113 The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of ‘material support or resources’ is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’),” DoJ at 306.


115 “The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill (‘Federal terrorism offenses’) is used in identifying the relevant crimes,” DoJ, at §304.

New Penalties. The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. 3571(b),(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense. 117

The proposal, however, failed to identify the critical elements that would trigger the alternative. 118 Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

- for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

- for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

117 “Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersedes lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,” DoJ, at §302.

118 “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense,” Draft at §302.
• for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;

• for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;

• for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;

• for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and

• for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism.119 Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:

• arson committed within a federal enclave, 18 U.S.C. 81;
• killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);
• destruction of communications facilities, 18 U.S.C. 1362;
• destruction of property within a federal enclave, 18 U.S.C. 1363;
• causing a train wreck, 18 U.S.C. 1922;
• providing material support to a terrorist, 18 U.S.C. 2339A;
• torture committed overseas under color of law, 18 U.S.C. 2340A;
• sabotage of a nuclear facility, 42 U.S.C. 2284;

119 “The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §§846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

“This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.
• interfering with a flight crew within U.S. special aircraft jurisdiction, 49 U.S.C. 46504;
• carrying a weapon or explosive abroad an aircraft within U.S. special aircraft jurisdiction, 49 U.S.C. 46505; and
• sabotage of interstate gas pipeline facilities, 49 U.S.C. 60123.

When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years). The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission), a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

120 Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

121 “Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.

“This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders).122

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

Other Procedural Adjustments. In other procedural adjustments designed to facilitate criminal investigations, the Act:

• increases the rewards for information in terrorism cases
• expands the Posse Comitatus Act exceptions
• authorizes “sneak and peek” search warrants
• permits nationwide and perhaps worldwide execution of warrants in terrorism cases
• eases government access to confidential information
• allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
• lengthens the statute of limitations applicable to crimes of terrorism
• clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
• adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B.123

122 It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, e.g., damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

123 When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001)(remarks of Rep. Sensenbrenner); for general background, see, Doyle, McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys, CRS REP.NO. RL30060 (Dec. 14, 2001).
Rewards. The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L.105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism.124

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

Posse Comitatus. The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.125

Delayed notification of a search (sneak and peek). Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take

124 The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct threat assessments for federal agencies, and to reimburse federal agencies for the costs of detaining terrorist suspects overseas.

125 For a general discussion of the Posse Comitatus Act, see, Doyle, The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law, CRS REP.NO. 95-964 (June 1, 2000).
The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in United States v. New York Telephone Co., 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth Amendment requirements.
Amendment, demands that surreptitious entries be closely circumscribed,” United States v. Freitas (Freitas I), 800 F.2d 1451, 1455-456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, United States v. Freitas (Freitas II), 856 F.2d 1425 (9th Cir. 1988).

“No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in Dalia v. United States, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in Dalia, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property. . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. See United States v. New York Telephone Co., 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . . Although the Freitas I court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in United States v. Villegas, 899 F.2d 1324 (1999). Although the Freitas I court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in Villegas. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the Freitas I court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” United States v. Pangburn, 983 F.2d 449, 453-55 (2d Cir. 1993).

In Simons, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
The Justice Department urged that the conflict be resolved with a uniform rule which permitted sneak and peek warrants under the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage.129

The Act, in section 213, stops short of the Justice Department proposal. Characterized as a codification of the Second Circuit decision, 147 Cong.Rec. H7197 (daily ed. Oct. 23, 2001), the Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C. 3103a. Its sneak and peek authorization reaches all federal search and seizure warrants where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (e.g., risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (e.g., jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, i.e., in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation.130 The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

129 “The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities,” DoJ at §353.

130 Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department’s initial proposal, the Department’s justification does not address the question.
constitutionally “reasonable,” that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

**Nationwide terrorism search warrants.** The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either “within or outside the district,” (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases. The provision may anticipate execution both in this country and overseas. The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage. Neither Rule 41 nor any other provision of federal

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131 The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

132 The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” *DoJ* at §351.

133 *United States v. Barona*, 56 F.3d 1087, 1092 (9th Cir. 1995)(“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994)(“if American law enforcement officials substantially participated in the search or if the

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” *F.R.Crim.P. 41, Advisory Committee Notes: 1990 Amendment.* There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

**Terrorists’ DNA.** The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards *per se.* 135 Existing federal law allowed the Attorney General to collect samples from foreign officials conducting the search were actually acting as agents for their American counterparts’); *United States v. Maturo,* 982 F.2d 57, 61 (2d Cir. 1992)(“where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials” or “where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials”); *United States v. Mitro,* 880 F.2d 1480, 1482 (1st Cir. 1989)(“where American agents participated in the foreign search or the foreign officers acted as agents for their American counterparts”); *United States v. Mount,* 757 F.2d 1315, 1318 (D.C.Cir. 1985)(“if American officials or officers participated in some significant way”); *United States v. Marzano,* 537 F.2d 120, 139 (5th Cir. 1976)(“if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts”); each of the decisions also suggests that evidence secured in a manner which shocked the conscience of the court would be excluded.

134 The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, see, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), reprinted, 78 Cong.Rec. 4982-983 (1934)(“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.)(confering judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

135 *Roe v. Marcotte,* 193 F.3d 72 (2d Cir. 1999); *Shaffer v. Saffle,* 148 F.3d 1180 (10th Cir. 1998); *Rise v. Oregon,* 59 F.3d 1556 (9th Cir. 1995); *Jones v. Murray,* 962 F.2d 302 (4th Cir. 1992).
Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples form convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes,” DoJ at §353.

For a general discussion, see, Fischer, DNA Identification: Applications and Issues, CRS REP.NO. RL30717 (Jan. 12, 2001).

Statute of Limitations. Prosecution for murder in violation of federal law may be initiated at any time, 18 U.S.C. 3281. A five year statute of limitations applied for most other federal crimes before passage of the Act, with a few exceptions. Among the relevant exceptions were an eight year statute of limitations for several terrorist offenses, 18 U.S.C. 3286, and a ten year statute of limitations for a few arson and explosives offenses, 18 U.S.C. 3295. The Justice Department recommended the elimination of a statute of limitations in terrorism cases.

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137 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

138 “This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

“This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in
The Act takes less dramatic action in section 809. It eliminates the statute of limitations for any crime of terrorism\(^\text{139}\) that risks or results in a death or serious bodily injury, 18 U.S.C. 3286. In the absence of such a risk or result, all other terrorism offenses become subject to the eight year statute of limitations unless already covered by the ten year statute for explosives and arson offenses, 18 U.S.C. 3286.

Application of the statute of limitations rarely provokes a constitutional inquiry. Nevertheless, due process precludes prosecution when it can be shown that pre-indictment delay “caused substantial prejudice to [a defendant’s] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.”\(^\text{140}\) Moreover, a judicial difference of opinion has appeared in those cases

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\(^{139}\) As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 (sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period.\textsuperscript{141} Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.\textsuperscript{142}

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (\textit{Grimes}, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (\textit{Frazer}, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

\textbf{Extraterritoriality.} Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States or elsewhere. . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.\textsuperscript{143}

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnapping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.

\textsuperscript{141} \textit{United States v. De La Matta}, 266 F.3d 1275, 1286 (11th Cir. 2001); \textit{United States v. Grimes}, 142 F.3d 1342, 1351 (11th Cir. 1998); \textit{United States v. Morrow}, 177 F.3d 272, 294 (5th Cir. 1999); \textit{Falter v. United States}, 23 F.2d 420, 425-26 (2d Cir. 1928).

\textsuperscript{142} \textit{People v. Frazer}, 24 Cal.4th 737, 759, 982 P.2d 180, 1294, 88 Cal.Rptr.2d 312, 327 (1999).

\textsuperscript{143} \textit{United States v. Layton}, 855 F.2d 1388 (9th Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); \textit{United States v. Benítez}, 741 F.2d 1312 (11th Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.  

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

Victims. Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11th Victim Compensation Fund legislation before it passed the Act. Consequently, the Act’s victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 et seq., and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 et seq.

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:

• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year)(42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d) (5)), section 621(d)

• waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

• eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
• makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

• prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

• allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

• reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

• makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

• allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

• establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

Increasing Institutional Capacity. A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for a wide range of anti-terrorism purposes including:

- $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)

- Necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)

- $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)

- $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816

- $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701

- $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)

- $5 million for DEA police training in South and Central Asia, section 1007.

**Miscellaneous.** Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might be used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act, or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b), 807.146

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145 *I.e.*, Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).

Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples from convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes,” DoJ at §353.


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137 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

138 “This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

“This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in
The Act takes less dramatic action in section 809. It eliminates the statute of limitations for any crime of terrorism\(^{139}\) that risks or results in a death or serious bodily injury, 18 U.S.C. 3286. In the absence of such a risk or result, all other terrorism offenses become subject to the eight year statute of limitations unless already covered by the ten year statute for explosives and arson offenses, 18 U.S.C. 3286.

Application of the statute of limitations rarely provokes a constitutional inquiry. Nevertheless, due process precludes prosecution when it can be shown that pre-indictment delay “caused substantial prejudice to [a defendant’s] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.”\(^{140}\) Moreover, a judicial difference of opinion has appeared in those cases connection with the September 11, 2001 terrorist attacks. The constitutionality of such retroactive applications of changes in statutes of limitations is well-settled, See, e.g., United States v. Grimes, 142 F.3d 1342, 1350-51 (11th Cir. 1998); People v. Frazer, 982 P.2d 180 (Cal. 1999).

“Existing federal law (18 U.S.C. §3282) bars prosecuting most offenses after five years. 18 U.S.C. §3286, as currently formulated, extends the limitation period for prosecution for certain offenses that may be committed by terrorists – but only to eight years. While this is a limited improvement over the five-year limitation period for most federal offenses, it is patently inadequate in relation to the catastrophic human and social costs that frequently follow from such crimes as destruction of aircraft (18 U.S.C. §32), aircraft hijackings ([49] U.S.C. §§46502, 46504-06, attempted political assassinations (18 U.S.C. §§351, 1116, 1751), or hostage taking (18 U.S.C. §1203). These are not minor acts of misconduct which can properly be forgiven or forgotten merely because the perpetrator has avoided apprehension for some period of time. Anomalously, existing law provides longer limitation periods for such offenses as bank frauds and certain artwork thefts (18 U.S.C.§§3293-94) than it does for crimes characteristically committed by terrorists.

“In many American jurisdictions, the limitation periods for prosecution for serious offenses are more permissible than those found in federal law, including a number of states which have no limitation period for the prosecution of felonies generally. While this section does not go so far, it does eliminate the limitation period for prosecution of the major crimes that are most likely to be committed by terrorists (‘Federal terrorism offenses’), as specified in section 309 of this bill,” DoJ at 301.

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\(^{139}\) As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1999 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 ( sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period.\(^{141}\) Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.\(^{142}\)

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (\textit{Grimes}, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (\textit{Frazer}, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

**Extraterritoriality.** Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States . . . within the United States or elsewhere. . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.\(^{143}\)

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnapping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.

\(^{141}\) \textit{United States v. De La Matta}, 266 F.3d 1275, 1286 (11th Cir. 2001); \textit{United States v. Grimes}, 142 F.3d 1342, 1351 (11th Cir. 1998); \textit{United States v. Morrow}, 177 F.3d 272, 294 (5th Cir. 1999); \textit{Falter v. United States}, 23 F.2d 420, 425-26 (2d Cir. 1928).


\(^{143}\) \textit{United States v. Layton}, 855 F.2d 1388 (9th Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); \textit{United States v. Benítez}, 741 F.2d 1312 (11th Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.\footnote{Compare, United States v. Gatlin, 216 F.3d 207 (2d Cir. 2000); United States v. Laden, 92 F.Supp.2d 189 (S.D.N.Y. 2000); with, United States v. Corey, 232 F.3d 1166 (9th Cir. 2000); United States v. Erdos, 474 F.2d 157 (4th Cir. 1973).}

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

Victims. Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11th Victim Compensation Fund legislation before it passed the Act. Consequently, the Act’s victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 \textit{et seq.}, and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 \textit{et seq.}

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:
• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year) (42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d)(5)), section 621(d)

• waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

• eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

**Increasing Institutional Capacity.** A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

- $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)

- necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)

- $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)

- $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816

- $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701

- $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)

- $5 million for DEA police training in South and Central Asia, section 1007.

Miscellaneous. Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might to used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act, or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b), 807.

\[145 \text{ I.e., Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).} \]

\[146 \text{ For a general discussion of trade sanctions legislation, see, Jurenas, Exempting Food and Agriculture Products from U.S. Economic Sanctions: Status and Implementation, CRS ISSUE BRIEF IB100061.} \]
FIG. 5a
II. Patent Law
   A. Infringement
   B. Invalidity
      1. Best Mode
      2. Enablement
   C. Laches
   D. Ownership
   E. Marking
   F. Intervening Rights
   G. Inequitable Conduct

FIG. 5b
FIG. 5d
Dear Tom, I notice that our Alpha product doesn't display any patient information. Did you consider marking the box?

From: Mr. Smith
Date: January 16, 1986

To: Mr. Johnson

FACSIMILE

H1 The Patent Act imposes a duty to mark on the equipment used in inter-state commerce.

H2 Fact issues: clear and continuous marking of patient information.

H3 Under 35 U.S.C. Sec. 287, patent owners must mark...
It appears that even the engineering manager, Mr. Johnson, was fully aware of the initial failure to mark at least three full months before any correction was made.

Dear Tom, I notice that our Alpha product doesn’t display any patient information. Did you consider making the change?
FIG. 6b

HN1 Under 35 U.S.C. Sec. 287, patent owners must mark their products covered by a patent with the patent number (or else give notice in lieu thereof) to avoid forfeiting their rights to damages. Whse Railway Appliance Co. v. Enterprise Railway Equip. ...
Q91: Was any of (your product lines) sold after February 30, 1983 (i.e., the filing date of the '212 patent) without having the patent number 5,551,212 affixed thereto?

Q93: Was your Alpha product line sold after February 30, 1983 without having the patent number 5,551,212 affixed thereto?

A93: Well, I'm not sure if we ever fixed any numbers to any of our products. We considered it, but couldn't find a large enough area on the product to place any text at all.
Mr. Smith: Your Honor, I’d like to now move to have Defendant’s Exhibit 22 entered into evidence.

Mr. Jones: Objection, Your Honor, this document clearly constitutes hearsay.

Judge: Off. Objection sustained.
ATTORNEY TERMINAL HAVING OUTLINE PREPARATION CAPABILITIES FOR MANAGING TRIAL PROCEEDING

CROSS-REFERENCE TO RELATED APPLICATIONS (Claim Of Benefit Under 35 U.S.C. 120)

This application is a continuation of U.S. Ser. No. 08/073,804, filed on Jun. 7, 1993, now abandoned by Bennett et al., which is a continuation-in-part application of U.S. application Ser. No. 08/036,488, filed Mar. 24, 1993, by Bennett et al. now U.S. Pat. No. 5,369,704.

INCORPORATION BY REFERENCE

The descriptive matter of the above-referred to parent U.S. application Ser. No. 08/036,488, filed Mar. 24, 1993, by Bennett et al. is incorporated herein by reference in its entirety, and is made part of this application. Also incorporated herein by reference in their entirety and made part of this application are pending U.S. applications by Bennett et al.: 1) Ser. No. 08/066,948, filed May 24, 1993, entitled "Audio and Video Transcription System for Manipulating Real-Time Testimony"; and 2) Ser. No. 08/065,132, filed May 20, 1993, entitled "Down-Line Transcription System Having Context Sensitive Searching Capability".

BACKGROUND OF THE INVENTION

This invention relates to a down-line transcription system used by attorneys for reviewing real-time transcription during a proceeding such as a trial or deposition; and, more particularly, it relates to a method and apparatus for interactively preparing an outline for use during such a proceeding based on case evidence and case law which may be locally or remotely located.

As is well known, legal proceedings such as a deposition or trial involve the participation of, among others, an examining attorney who asks questions and a witness who must answer ("testify") while under oath. To prepare for such proceedings, the examining attorney must review the applicable case law and the related case evidence. The attorney also consults experts, clients and other associate attorneys regarding specific issues of law and fact as proves necessary. During his investigation process the attorney takes notes, and makes copies of documents and legal cases regarding everything at issue. Based on these materials, the attorney attempts to develop a strategy, constructs an outline of possible lines of inquiry, drafts potential questions for the witness and organizes relevant documentary evidence for use as exhibits for the proceeding. During the entire process, the examining attorney attempts to anticipate all of the legal issues that might arise.

The entire preparation process often proves to be very time consuming and cyclical in nature. Every important fact uncovered leads to a new case law search. Similarly, every new legal issue leads to a need for additional facts that are found by conducting a case evidence search or are found by directly examining a witness. Because of this, lead attorneys on a case must be organized and skilled at memory recall.

The defending attorney must also attempt to understand the factual and legal issues in the case via case law and case evidence searching and through conversations with the client, expert witnesses, other attorneys and, most importantly, the witness to be deposed. During the entire process, the defending attorney's goal is to anticipate the strengths and weaknesses of the case and the factual evidence which may arise in the proceeding. The defending attorney must be well versed in all categories of the facts and law which might arise so as to be able to properly defend the witness. The defending attorney takes notes during his pre-investigation process to prepare the witness for the proceedings.

However, neither the examining attorney nor the defending attorney can anticipate everything. Typically, in the midst of a proceeding, the witness reveals something unexpected to one or both attorneys. The revelation could involve a new area of law which the attorneys know little if anything about. More often, the revelation suggests an unknown variant in a known category of law. The revelation also creates a need for additional documents for use during the proceeding to pursue the new issue. In all such situations, additional searching is needed. However, during the proceeding, because the attorneys do not have the luxury of time, outlining, legal researching, and factual evidence retrieval prove to be an impossible task.

Additionally, the examining attorney generally takes notes (1) on a legal pad of paper, (2) directly on copies of potentially relevant documents identified for use in the deposition, and (3) on Post-it® brand notes which are associated with the documents and other materials. During the proceeding, the attorney attempts to recreate the associations of the notes, the identified documents and draft questions with legal inquiries into the different categories of law. Because of disorganization, the attorney is often unable to use a great deal of the prepared information.

In complex litigation, the problems facing the attorneys are compounded. Because the preparation process becomes a very time consuming task, the lead examining (and defending) attorney delegates the task to an associate attorney on the case. The associate attorney, who often has lesser knowledge of the facts and law at issue, is faced with the task of retrieving the important case law and evidence which will be relevant in the upcoming proceeding. Because of lesser knowledge and inexperience, the associate attorney either over prepares or else complicates the matter by not cutting out the appropriate law or facts. In addition, because the associate attorney must brief the lead attorney during a relatively short time period before the proceeding, the lead attorney cannot grasp all of what is attempted to be conveyed. Similarly, the associate attorney may convey a misconstrued understanding of the law and the evidence because of inexperience. Either way, the lead attorney often does not find out all he needs until the proceeding is underway.

In the midst of the proceeding, the examining attorney is also confronted with the problem of recalling the testimony of former witnesses regarding the same subject matter now being addressed. If recalled, the examining attorney may use the prior testimony to his advantage. Also, after the deposition, the attorney is faced with the problem of reorganizing the materials in some type of saveable form for later use when a similar witness is deposed.

Hence, it would be highly desirable to solve the foregoing variety of problems enumerated in preparing for legal proceedings such as a deposition or trial by guiding the attorney in the preparation process while associating all notes, documents and law into a workable
format which requires minimal attorney interaction during the proceeding.

It is therefore an object of the present invention to provide a method and apparatus having interactive outlining capabilities based on tailorable, default outlines that provide immediate access to current case law, pre-typed tailorable and default questions while providing for association of case and witness specific notes, testimony, and other case evidence.

It is another object of the present invention to provide a method and apparatus for interactively selecting a pre-typed outline based on categories or subcategories of law, by providing for interactive queries based on specific facts and law at issue in a given lawsuit.

It is another object of the present invention to provide a method and apparatus for interactively selecting a pre-typed outline based on categories or subcategories of law which contains tailored potential questions that may be further tailored for managing depositions, trial and case evidence, law and attorney work product.

SUMMARY OF THE INVENTION

These and other objects of the present invention are achieved in a transcription network having an outline used by attorney terminals for managing a lawsuit. The outline contains a plurality of categorization entries related to issues in a specific lawsuit. At least one of the plurality of categorization entries relates to a first data item of case law information. Similarly, the outline comprises a second data item of case evidence information relating to at least one of the plurality of categorization entries. Other objects are also achieved with the outline provides for the association of the first and second data items.

Objects are also achieved in a method for preparing to take the testimony of a witness including the steps of storing case evidence in a database, associating the evidence in the computer database with a deposition question or witness answer, and viewing this association. In another embodiment, associating the evidence includes associating the evidence in real time. In a further embodiment, case evidence includes testimony, pleadings, or documents, and the database includes either a local or remote database.

Other objects are achieved in a method used by an attorney terminal for a given lawsuit which comprises the steps of accessing an outline library that includes a number of outline areas related to witness testimony, and selectively using at least one of the outline areas for use in a given lawsuit.

In one embodiment, the method includes associating a plurality of preset examination questions with at least one outline area and storing preset examination questions in a database. In a further embodiment, the method further includes the step of tailoring the stored examination question so as to direct questions to a specific witness to be deposed. In yet a further embodiment, the method includes retrieving the stored examination questions during the examination of the witness in real time by addressing the stored outline areas to automatically retrieve associated questions.

Other objects and further aspects of the present invention will become apparent in view of the following detailed description and claims with reference to the accompanying drawings.

BRIEF DESCRIPTION OF THE DRAWINGS

FIG. 1 is a perspective view which illustrates an overall system configuration in which attorney terminals operate in Outline, Pretrial and Timeline Modes to manage a lawsuit according to the present invention.

FIG. 2 is a perspective view which illustrates an overall system configuration in which attorney terminals operate in Deposition and Trial Modes to manage a lawsuit according to the present invention.

FIG. 3 is a detailed perspective view illustrating an attorney terminal in an Outline Mode configuration as used by an attorney to prepare for a deposition or trial proceeding according to the present invention.

FIG. 4a is a diagram illustrating the hierarchical structure of the outline library according to the present invention which is interactively used by the attorney terminals to create a tailored outline for a given lawsuit.

FIG. 4b is a detailed diagram illustrating the types and groupings of information contained within each hierarchical category, subcategory, etc., of the outline library according to the present invention.

FIG. 4c is a diagram illustrating an exemplary pointer structure under the groupings in the tailored outline according to the present invention which provides access to and association information for each data item of the tailored outline.

FIG. 5a is a detailed perspective view illustrating an attorney terminal which provides a Roman numeric outline display of the categories and subcategories contained in a tailored outline according to the present invention.

FIGS. 5b–5f are detailed perspective views of the attorney terminal of FIG. 5a which further illustrate how an attorney may move through, create, modify or otherwise use the hierarchical structure of the tailored outline according to the present invention.

FIG. 6a is a detailed perspective view of an attorney terminal which graphically displays specific groupings of case law information under certain subcategories of the outline library.

FIG. 6b is a detailed perspective view of the attorney terminal of FIG. 6a which illustrates the use of an edit window to fully display, modify, or create case law grouping information such as a headnote which is directly associated with a subcategory of the outline library.

FIGS. 7a–7c are detailed perspective views of an attorney terminal operating in the outline mode which graphically displays groupings of draft questions under a marking subcategory in the outline library, wherein the draft questions are selected, modified or added for use in a deposition or trial proceeding.

FIG. 7d is a detailed perspective view of an attorney terminal operating in the deposition mode which illustrates the use of a draft question as the basis for an actual question asked during a deposition or trial proceeding.

FIG. 8 is a perspective view illustrating the selection of categories, subcategories, etc., to be used during an upcoming deposition or trial, wherein, in view of the witness's anticipated knowledge, only those areas of the tailored outline considered pertinent are selected for later access during the proceeding.

FIG. 9 is perspective view providing further detail of the system configuration of attorney terminals operating in the evidence mode according to the present invention.
DESCRIPTION OF THE PREFERRED EMBODIMENT

FIGS. 1 and 2 are perspective views which illustrate overall system configurations in which attorney terminals operate in various modes to manage a lawsuit according to the present invention. In particular, FIG. 1 is a perspective view of a system configuration in which a second chair attorney prepares for a deposition or trial proceeding using an attorney terminal 21 which operates in an Outline Mode, Pretrial Mode, Timeline Mode and other modes.

Upon initiation of a new lawsuit, an attorney (generally the second chair attorney on the case) uses the attorney terminal 21 in its Outline Mode to prepare for conducting the new lawsuit. First, the attorney gains access to an outline library 43, and interactively responds to a query regarding: 1) the issues of the law from the Complaint of the new lawsuit; 2) the State and/or Federal laws at issue; 3) the specific court involving, if any, the names of the parties; 5) the party represented; and 5) other specific factual information relevant given the law at issue. Thereafter, a second query interactively extracts information as to the Answer in the lawsuit, including all defenses and counterclaims at issue. A third query captures information regarding defenses to any counterclaims raised.

As an added advantage to the querying process, a plaintiff's attorney may access the outline library 43 to interactively construct the Complaint. The information provided to construct the Complaint provides all of the lawsuit information needed in the first query, and, therefore, does not need to be asked again.

Similarly, a defending attorney might access the outline library 43 and, after responding to the first query using the Complaint, the defending attorney might interactively construct the Answer in lieu of the second query. During the interaction, all possible legal defenses to the charges in the Complaint aid the defending attorney in drafting the Answer. To complete the Answer, the defending attorney may then add counterclaims, if any, and selectively choose those defenses which are appropriate for the current lawsuit. Similarly, a Reply to the counterclaims may be interactively prepared by the plaintiff's attorney. Moreover, headings, notes, cases, pre-typed searches, and comments regarding each charge raised and all potential defenses thereto aid the attorneys in preparing the Complaint, Answer, or Reply.

From the queried information, the outline library 43 provides a tailored outline corresponding to the issues in the case for conducting and managing the lawsuit. Basically, the tailored outline provides a hierarchical structure for associating the law at issue, case evidence, and attorney work product so that the attorney can easily access information retrieved from a variety of sources. At the root of the hierarchical structure, the outline provides all of the major categories of law and fact at issue in the lawsuit. Branches of the hierarchical structure, i.e., subcategories, sub-subcategories, etc., provide further and further levels of legal/factual detail regarding the major categories or subcategories.

Through the hierarchical structure of the outline, the attorney can rapidly access a desired grouping of evidence, law and work product pertaining to a solitary legal or factual issue. However, access is not the only benefit. Additional benefits include ease of closing off an area of inquiry. By closing off a subcategory, all of the further levels below that subcategory (sub-subcategories, etc.) are closed off, rapidly minimizing the size of the working outline. Moreover, the mere listing of all the potential areas of law provides the attorney with a hierarchical checklist, reminding the attorney of what law might be at issue. Other benefits enhance the attorney's ability to prepare for a legal proceeding by providing: 1) virtually instant legal overviews (headnotes) of the suggested categories and subcategories of law without having to conduct a search; 3) immediate access to the burdens of proof required; 4) pre-typed legal search formulations for further legal inquiry via a case law library 63; 5) instant access to the seminal case regarding the categories or subcategories; 6) pre-typed potential questions to be asked based on the current case and witness; 7) pre-typed potential interrogatories and document requests relating to the categories or subcategories; 8) the ability to associate case evidence, work product (notes, pleadings or portions thereof), or related communications with the categories or subcategories; 9) sequential and interactive guidance of the attorney through the hierarchical categorizations of law based on the attorney's response; and 10) where beneficial, suggestions of evidentiary searches and other discovery tips such as, for example, pertinent local court discovery rules.

On an ongoing basis, while in the Outline Mode, the attorney terminal 21, such as might be used by a second chair attorney, utilizes the retrieved tailored outline to begin a second level of case specific tailoring governed by the discovery process. As further evidence is obtained through discovery, the attorney continues to pursue deeper levels of some categories at issue, while closing off others.

To aid in the discovery process, the Outline Mode helps formulate interrogatories, document requests, and questions for upcoming depositions. To formulate document requests and interrogatories, the attorney first analyzes the categories, subcategories, sub-subcategories, etc., to become familiar with the potential issues in the lawsuit through the headings provided, and begins to construct document requests and interrogatories from sample, partially-tailored interrogatories available at each level of hierarchy. Partial-tailoring automatically occurs upon retrieval of the tailored outline from the outline library 43 via the initial stage of querying by substituting specific lawsuit information where appropriate into the text of the sample document requests and interrogatories. Such tailoring minimizes the attorney's need for further modification. Upon completing the tailoring process within the hierarchical structure, the attorney terminal 21 extracts or "copies" all of the newly created document requests and interrogatories from the hierarchical structure and places them into draft discovery requests. After minimal further modification, the attorney is able to serve the requests on the opposing side.

The answers to the interrogatories are first placed into a case evidence library 91. From there, the attorney terminal 21, if so directed, automatically compares and updates the draft interrogatories in the tailored outline with those actually served, and then directly associates the received answers into the outline. In particular, the terminal 21 parses a text file of the served interrogatories into units of single interrogatories. Each of the served interrogatories are then compared to each draft interrogatory on an ordered word by word basis. The draft interrogatory providing the best match is dis-
played by the attorney terminal 21 along with the corresponding served interrogatory and a matching percentage (based on the number of matching words). Thereafter, the attorney terminal 21 replaces the draft interrogatory with the served interrogatory, and associates the answer thereafter. If the attorney does not detect a match, the attorney terminal 21 can be directed to display the draft interrogatory offering next best match. This process can continue until verification is received. If at any point during the verification process, however, the attorney detects that the served interrogatory has been newly added outside of the tailored outline, the attorney terminal 21 can be used to categorize that interrogatory within the appropriate hierarchical area(s) in the tailored outline. Once a draft interrogatory has been updated (or replaced) by a served interrogatory, it is taken out of consideration for further correspondence matching. Thus, the served interrogatories can be interactively imported back into the hierarchical structure of the tailored outline. If, however, the attorney makes all modifications to the draft interrogatories directly within the tailored outline, the importation process occurs more accurately to locate and associate the answers received.

After the importing process, the attorney is directed back through the hierarchical structure by the attorney terminal 21 to review the newly received interrogatories. By doing so, the attorney may choose to close off additional categories or subcategories of inquiry, or pursue others. In many circumstances, supplemental interrogatories may be in order after reviewing the responses. In such circumstances, the attorney may draft additional interrogatories, and, at some later time, extract the newly drafted requests for service. Moreover, any type of discovery request can be periodically drafted whenever the need arises. At any time, the attorney may extract a collection of the draft discovery requests for review, modification and service or use during a deposition or trial proceeding.

The attorney terminal 21 also automatically prepares draft document requests during a deposition or trial proceeding. For example, if during a deposition the examining attorney asks opposing counsel to produce documents which the witness has identified, the attorney terminal 21, monitoring the transcribed text, detects the question to the opposing counsel, detects the use of the word "produce", concludes that a formal request needs to be made, and prepares a draft document request based on the interchange between the attorney and the opposing counsel.

If during the process of reviewing responses the attorney recognizes that an unanticipated area of law might be at issue, the attorney merely gains access to the outline library 43, enters the unanticipated area of law, and the attorney's tailored outline is updated to include all of the categories and subcategories and related information regarding the unanticipated area of law for review.

Depending on the lawsuit budget and the number of items anticipated, the documents and things produced may be entered into the case evidence library in a variety of ways. Where possible, all documents received are immediately scanned and converted to text via an optical character recognition ("OCR") process. The scanned documents and the corresponding text are stored in the case evidence library 91. Summaries describing the "things" produced are also added to the library 91. In alternate situations, only summaries for all of the documents and things received are loaded into the case evidence library 91. In yet other situations, only summaries or scanning is used for documents and things identified as being significant.

The attorney interacts with the documents and things received for annotation and association into the hierarchical structure of the tailored outline. If the documents have been scanned, the attorney terminal 21 can be used to display all documents by Bates number for review by the attorney. If the corresponding text of the documents has been extracted, the attorney may search the corresponding text to identify document key words or names, for example. Doing so minimizes the quantity of documents that an attorney needs to review for a specific purpose. Although all documents may be scanned and converted, in many lawsuits, only specific documents may be scanned and/or converted. Summaries might also be used either as an annotation to scanned documents, or as a stand-alone index to the actual documents via the Bates numbers.

As each document is reviewed, the attorney may choose to add textual annotations thereto, and may also choose to associate documents with a specific categorization entry in the tailored outline. Furthermore, the attorney may choose to directly associate the document with a pre-typed or actual deposition question, a specific case law headnote, a treatise selection, or any other data stored within a given categorization entry.

To better automate the process of association, the attorney terminal 21 directs the attorney through the draft document requests in the hierarchical structure of the tailored outline. From the draft document requests extracted, the attorney modifies and serves the document requests. In a process identical to that available for interrogatories, the attorney terminal 21 provides for interactive importation of the served document requests into the tailored outline. Thereafter, on a document request by document request basis, each Bates stamped document produced can be scanned and immediately associated with the corresponding served document request in the hierarchical structure of the tailored outline. Thus, to review all documents relating, for example, to an oral contract, the attorney first uses the terminal 21 to access the categorization entry corresponding to oral contracts within the tailored outline. Upon accessing the entry, all of the documents stored therein (or associated therewith) can be directly accessed. Documents and things can also receive multiple associations under multiple categorization entries as proves necessary. This is accomplished using an associate/query command sequence via the command line 33. Similarly, associate/move or associate/delete command sequences can be used to modify associations.

During the reviewing process, the attorney marks all significant documents, and may annotate the documents as needed with text or voice. In addition, during the process, additional discovery requests or unanticipated areas of law may come to light. The discovery requests may be drafted and associated with specific documents and/or annotations for later extraction for formal service. Any unanticipated areas of law can be retrieved from the outline library 43 to supplement the tailorable outline.

The tailored outline also provides sample draft deposition questions within each category or subcategory (i.e., each categorization entry) of its hierarchical struc-
ture. The attorney can mark those which might prove advantageous for potential modification and use during an upcoming deposition or trial. If so desired, additional questions might also be drafted within the hierarchical structure. To aid in this process and because of the diversity of the backgrounds of potential witnesses, different subcategory groupings of questions are provided for the different types of witnesses. For example, technical questions might be grouped for technical witnesses being deposed which might be ignored for a non-technical witness. Similarly, questions for expert witness extracting opinions might be appropriately grouped.

In addition, as described in more detail below, during a deposition while operating in the Deposition Mode, questions and answers are automatically associated with the appropriate categories and subcategories in the hierarchical structure, providing further groupings of potential questions. Specific questions used during prior depositions can thereafter be selected and possibly refined for use in an upcoming deposition with a different witness.

Where appropriate, each category and subcategory of tailored outline provides instant access to headnotes, associated full text of seminal cases, and pre-typed search requests to supplement the attorney's understanding of the specific law at issue. The outline library 43 draws and updates such legal information via a case law library 63. At any time during the lawsuit, the attorney may copy and update the legal information contained in the tailored outline via a comparison process with the outline library 43 which is maintained as legally "current." Any differences detected are flagged and sequentially presented to the attorney via the terminal 21 for immediate consideration of possible impacts on the ongoing lawsuit. The tailored outline is thereafter updated to reflect the current state of the law.

Using the attorney terminal 21, the attorney can directly tap into further legal and evidentiary information of expert witnesses, associate attorneys and clients via communication over the link 23 with corresponding terminals 3, 4 and 5. For example, while contemplating a specific subcategory in the tailored outline, the attorney realizes that the client might possess needed factual information at issue. Instead of calling the client, the attorney types a message and associates therewith any information grouped within that subcategory as deemed necessary to clarify the request. Such information might include the specific discovery requests, documents, answers, etc., which raised the need for the information. The message and associated information is then forwarded to the client via the communication link 23 to the terminal 5. After reading the communication, the client responds via the link 23. Upon receipt of the response, the tailored outline automatically stores the client's response within the hierarchical category from which the request originated. In this way, further evidence or law can be collected to further tailor the outline.

Once discovery has been completed, the attorney uses the tailored outline to aid in the preparation of the pretrial order in a Pretrial Mode. First, in the Pretrial Mode, the terminal 21 automatically generates a list of all Exhibits and other documents or things which have been marked as significant. This list provides the attorney with a starting point for identifying a list of Exhibits for trial. Using the terminal 21, the attorney can immediately access all annotations and the subcategory or subcategories in which a potential Exhibit was associated. With such access, the attorney can readily determine whether the potential Exhibit should be removed from the list.

Similarly, designated deposition testimony may be easily identified while in the Pretrial Mode. Upon request, the terminal 21 automatically extracts all question and answer interchanges deemed during the deposition proceeding to be important, i.e., through marking. The terminal 21 displays all such important interchanges for review by the attorney to determine whether they might be useful at trial. All of the associated annotations to the interchanges are also available to aid in the determination.

The Pretrial Mode also provides for a draft set of jury instructions for the Pretrial Order. Specifically, operating from the tailored outline, the attorney terminal 21 automatically generates a set of draft jury instructions based on the categories and subcategories of law still at issue upon completion of the discovery process. Although the draft jury instructions are preferably stored within the hierarchical structure of the tailored outline, they may be interactively retrieved using the outline library 43.

The attorney terminal 21 also provides potential witness and expert witness lists while in the Pretrial Mode. All parties which have been deposed are immediately listed as potential candidates. Any party having been deposed which is removed from a list, automatically cues the terminal 21 to designate the deposition in a list of depositions, or portions thereof, to be read in at the trial. To further aid the attorney, the terminal 21 identifies those portions of the designated deposition transcripts which have been previously marked as significant as being the portions to be read into the record during the trial. The witness lists and designations, along with the other pretrial information generated, provide the attorney with a reasonable starting point when preparing the Pretrial Order.

At any time during the discovery process or thereafter, the attorney terminal 21 may also be used in a Timeline Mode. In the Timeline Mode, the terminal 21 automatically searches through the evidence referenced in the tailored outline to identify dates and times, and then places the references in a chronological order for attorney review. As a default, only the documents and things and portions of the depositions that have been marked as significant are considered for the search. However, the scope of the search can be broadened or narrowed to encompass other documents and the full transcripts of the proceedings.

The terminal 21 also provides for designation of a specific time frame searching restriction to limit the search to the time period of an important event, for example. Similarly, to limit the scope of a search, only a single subcategory or group of subcategories can be chosen so as to confine the search to the evidence associated with those subcategories. Lexical searching can be combined with time line searching to help focus the information retrieved.

Once a chronologically ordered time-line listing has been retrieved, the attorney terminal 21 provides for an interactive review of the evidence associated with each entry so that entries may be deleted or else summarized. Thereafter, the terminal 21 provides for the display and printout of the summarized remaining entries in a graphical time-line format.
FIG. 2 is perspective view of a system configuration in which first and second chair attorneys utilize the information obtained from the tailored outline in the Outline Mode to conduct a deposition or trial proceeding, while operating attorney terminals 19 and 21 in a Deposition or Trial Mode. In the illustrated configuration, a computer aides transcription ("CAT") system 11 provides real-time, down-line transcription for down-line review by the attorney terminals 19 and 21. As questioning is conducted, the attorney terminals 19 and 21 operate within the hierarchical structure of the tailored outline so as to retrieve the transcript (the Q & A's), storing it into the hierarchical structure as the proceeding is taking place. Operation within the hierarchical structure occurs naturally because the attorneys use the hierarchical structure of the tailored outline as the basis for conducting the questioning. Moving through the structure may either be managed by the first or second chair attorneys.

As will suggest itself, the Deposition Mode need not be used to automatically retrieve the transcript into the tailored outline. Instead, an attorney (or paralegal) may categorize the Q & A's ("questions and answers") after the deposition has ended. The attorney may also choose to only categorize those Q & A's believed to be significant. This post-proceeding categorization process takes place directly via interactive review of the transcript while moving through the hierarchical structure of the tailored outline. As an intermediate step, the attorney may manually mark-up the transcript, and have a paralegal perform the interactive post-proceeding categorization.

In one embodiment, deposition transcripts, annotations, scanned documents, etc., and other case evidence is stored in the case evidence library 91. The supplemental library 92 stores draft discovery, jury instructions, etc. Similarly, all case law, treatise selections, etc., are stored in the case law library 63. The outline library 43 stores the hierarchical structure of the tailored outline which provides pointers to and associations between the case law, case evidence and supplemental information stored in respective libraries 63, 91 and 92. These libraries may be in entirely separate databases, or in allocated portions of a single database. In an alternate embodiment, the tailored outline stores all of the case evidence, case law, and supplemental information directly into the hierarchical structure of the tailored outline.

Upon interacting with outline library 43, the attorney terminal 21 may extract and store the tailored outline locally. However, the tailored outline may be fully stored and maintained by the outline library 43, alleviating the need for local maintenance.

Specifically, at a trial or deposition, a stenographic recorder 13 converts key-strokes entered by a court reporter via a keyboard 15 into digital codes. The digital codes are intended to correspond to the words spoken at the deposition or trial. The stenographic recorder 13 communicates the key-stroke codes to the CAT system 11 via a link 17. Upon receipt, the CAT system 11 attempts to transcribe the key-stroke codes into the exact text of the words which were spoken to provide for a real-time textual display of the transcript. To do so, the CAT system 11 communicates with a number of libraries, dictionary, index and tables stored in a database 25. The CAT system 11 transmits the exact and, where necessary, phoneme text down-line to the attorney terminals 19 and 21 via a communication link 23 for real-time review. Further detail regarding code-to-text conversion process and the down-line attorney terminals can be found in the pending parent U.S. application Ser. No. 08/036,488, filed Mar. 24, 1993, which is incorporated herein by reference.

In addition to the textual transcript which is generated, the CAT system 11 also provides access to audio and video transcripts which may also be fully or selectively associated into the hierarchical structure of the tailored outline. The CAT system 11 utilizes a tape recorder 8 and a video camera 7 as a basis for creating the audio and video transcripts. Further detail regarding the creation and association of the audio and video transcripts can be found in pending U.S. application Ser. No. 08/066,948, filed May 24, 1993, entitled "Audio and Video Transcription System for Manipulating Real-Time Testimony", by Bennett et al., which is incorporated herein by reference.

If unanticipated areas of law arise at a deposition when terminals 19, 21 are in a Deposition Mode, the attorney terminals 19 or 21 may choose to update the tailored outline and access the law via the outline library 43, or may choose a direct search via the case law library 63. The advantages of the former option include the associated retrieval of not only headnotes and seminal cases, but also the pre-typed questions for immediate use during the proceeding. Similarly, the case evidence library 91 can be further searched during the proceeding as the need arises. Further detail regarding searching of the current transcript, case law library 63, and case evidence library 91 can be found in pending U.S. application Ser. No. 08/065,132, filed May 20, 1993, entitled "Down-Line Transcription System Having Context Sensitive Searching Capability", by Bennett et al., which is incorporated herein by reference.

While in the Deposition or Trial Mode, experts, other attorneys and clients may receive the transcripts down-line and/or may communicate to the attorney terminals 19 and 21 via the terminals 3, 4, and 5 via the link 23. During the proceeding while in the Deposition or TrialModes, all such communications are directly associated into the hierarchical structure of the tailored outline as similarly occurs in the Outline Mode.

Referring to FIG. 3, in the Outline Mode, an outline window 41 is created which covers a substantial portion of a screen 27 of attorney terminals such as the terminal 21. The attorney may build an outline 39 entirely from scratch using a keyboard 29, a mouse 31, and a command line 33. Basically, the building process involves listing each legal (and sometimes factual) category at issue and subcategories thereof into a typical Roman numeric format of the outline 39. Thereafter, associated within the hierarchical structure of the categories, pre-typed questions can be added to prepare for a deposition or trial, legal research might be obtained from the case law library 63, specific documents might be scanned or summarized and associated therewith, etc., as described above.

Instead of starting completely from scratch, however, the attorney might begin the process by copying an outline or portions thereof from a similar lawsuit. By copying, the attorney can quickly and easily make modifications for the current lawsuit, while taking advantage of all of the legal information and work product contained therein.

In addition, the attorney can build the outline 39 as described above through interactive session(s) with the
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Outline library 43. The outline library 43 may be stored either remotely or locally.

Referring to FIG. 4a, the outline library 43 is hierarchically structured by category 45, subcategory 47, sub-subcategory 49, and so on. Broad areas of law provide the category 45 entries. Each category 45 entry may be broken down into one or more subcategory 47 entries, each of which in turn are broken down into one or more sub-subcategory 49 entries, and so on. For example, the category 45 includes a patent law entry 51. The patent law entry 51 is further broken down to subcategory 47 entries of infringement 53, invalidity 55, laches 57, etc. The subcategory "invalidity" 55 is broken down into sub-subcategory 49 entries of "best mode" 59 and enablement 60. Under each sub-subcategory area may be one or more sub-sub-subcategories, and so on. In some cases, the categories used in the outline may be a reference to an area of evidentiary inquiry which is not an area of law. For example, the category 45 could contain an entry "Background" having subcategory 47 entries for each witness or companies involved. Sub-subcategory 49 entries could include "Educational History", "Employment History", "Company Origin", etc.

Through the querying process between the attorney and the outline library 43, the attorney terminal 21 extracts a tailored outline for only those category, subcategory, etc., entries with indicated relevance in the particular lawsuit at issue. For example, in a lawsuit involving a patent count and an antitrust counterclaim, only the patent 51 and antitrust 50 entries in the category 45 would be included in the tailored outline. Moreover, in addition to selecting appropriate category 45 entries, the early query process also provides for automatic selection of the subcategory 47, sub-subcategory 49, etc., entries where possible.

Referring to FIG. 4b, each entry in the outline library 43 contains a hierarchical framework of groupings of information for use by the attorney to manage a lawsuit. In particular, each category, subcategory, etc., entry, such as an entry 101, in the outline library 43 is hierarchically and directly associated with a relevance query grouping 103, a case law grouping 105, a discovery grouping 107, and a case evidence grouping 109. Where appropriate, the relevance query grouping 103 contains library pointers to a variety of textual queries stored in the supplemental library 92 that are used to determine whether a specific entry, the entry 103, is relevant in the case at issue.

The case law grouping 105 provides the attorney with a concise overview of the law at issue (i.e., the law listed in the entry 103). The case law grouping 105 consists of: 1) a headnote pointer structure 121, i.e., pointers to headnotes stored within the supplemental library 92 which provide an overview of the law at issue and identifying the associated burdens of proof; 2) a seminal case pointer structure 123, i.e., pointers to a seminal case or cases regarding the entry 103 which are stored within the case law library 63; 3) a selected treatise covering the entry 125, i.e., pointers to selected treatises regarding the entry 103 which are stored in the supplemental library 92; 4) a preset search structure 127, i.e., pointers to a list of search requests stored in the supplemental library 92 which are designed, for example, to retrieve the most recent relevant cases from the case law library 63 which relate to the entry 101; 5) a search context structure 129, i.e., a pointer or pointers to search context information stored within the supplemental library 92 which, for example, provides default log-in and library information for the case law library 63 to accelerate any searching conducted within the entry 101. If, however, the entry 101 happens to be an evidentiary entry, the entire case law grouping 105 may be empty. Where appropriate, prior to extracting the tailored outline from the outline library 43, the case law information provided by the case law grouping 105 receives specific tailoring to remove unnecessary details of case law which through the querying process prove to have no relevance in the specific lawsuit at issue.

Similarly, the discovery grouping 107 provides the attorney with a draft interrogatory pointer structure 141, a draft document requests pointer structure 143, and a draft question pointer structure 145 to access data items from the supplemental library 92 which the attorney may use to assist in the discovery process relating to the entry 101. Prior to extracting the tailored outline from the outline library 43, the draft discovery of the discovery grouping 107 receives specific tailoring by weaving the lawsuit specific information obtained through the querying process into draft discovery, and by removing discovery determined by the querying process to be irrelevant in the current lawsuit. Where beneficial, all of the draft discovery listings include tips and tactics regarding the discovery process of the entry 101.

The case evidence grouping 109 provides empty pointer structures to data items which the attorney adds to the case evidence library 91 over the entire duration of the lawsuit. Specifically, for served interrogatories and responses thereto which relate to the entry 101, an interrogatory pointer structure 161 is provided. For the questions and corresponding answers recorded during a deposition or trial relating to the entry 101, a Q&A pointer structure 163 is provided. Similarly, a document and things pointer structure 165 is provided for storing pointers to the produced documents and things relating to the entry 101. In addition, other pointer structures might also be included such as, for example, a work product pointer structure 167 (for pointing to annotations, notes, pleadings, etc.) and miscellaneous communications pointer structure 169 (for pointing to communications received from experts, other attorneys, clients and the so called Artificial Intelligence routines of the attorney terminals).

Additional groupings such as a pretrial grouping 171 (which contains pointers to a set of jury instructions 173) may also be provided by the outline library 43. Moreover, other groupings might be added by the attorney manually. Groupings that the attorney decides are unnecessary may be easily removed from the tailored outline upon extraction from the outline library 43 or at any time thereafter. If the attorney later determines that an unextracted or deleted grouping is needed, the tailored outline can be appropriately updated by interactively revisiting the outline library 43. Because many lawsuits span a year or more, the attorney may also periodically revisit the outline library 43 to update the grouping and data items thereunder. Of particular significance here involves updating the case law grouping 105. All of the specifics regarding the changes or additions made to the tailored outline can be reviewed interactively by the attorney as the update takes place, or after the update has been completed. The update review allows the attorney to consider the impact of the update changes and additions.
The outline library also contains preset associations between the groupings of the various categorization entries where appropriate to assist the attorney in evaluating the tailored outline which has been extracted. For example, a specific draft interrogatory under one categorization entry might have preset associations with a headnote from the same entry, and with a treatise selection from a different categorization entry. In this way, the attorney can quickly display the legal basis behind the draft interrogatory. With the preset association framework provided by the outline library, the attorney need only create supplemental associations with specific case evidence, work product, etc., which comes to light during the lawsuit.

As previously articulated, although in the embodiment described in relation to FIG. 4b only structures of pointers to information are associated with a given categorization entry, in an alternate embodiment, instead of pointer structures, the actual information is stored within the hierarchical structure of the tailored outline. In addition, the pointer structures are merely link-lists of pointers; however, various other data structures for associating pointers might also be used.

Once a tailored outline with its associated information groupings is extracted from the outline library, the attorney might further tailor the outline by: 1) manually adding new category, subcategory, etc., entries; 2) adding to or modifying the contents of any of the groupings provided thereunder; 3) combining groupings or portions thereof; and 4) adding new groupings. Moreover, as previously stated, at anytime thereafter, the attorney may gain access to the outline library to update or extract additional entries from the outline library into the attorney's tailored outline.

Specifically, if the tailored outline is to be stored and maintained within the outline library, the extraction process involves the copying of the selected hierarchy of the categorization entries (along with associated information groupings), i.e., the tailored outline, into a working file stored within the outline library. Although not necessary, at any time thereafter, the attorney may choose to down-load the tailored outline, or portions thereof, for separate storage and maintenance. Alternatively, the extraction process might involve the direct down-loading of those portions of the outline library selected as being part of the tailored outline. In such circumstances, permanent or intermediate storage and maintenance of the tailored outline within the outline library would not be needed.

The attorney utilizes the tailored outline to begin filling the case evidence grouping of each entry in the tailored outline. For example, scanned documents are first directly stored into the case evidence library. Upon reviewing a given document, the attorney may identify an appropriate categorization entry, and store a pointer to that document in the document and things pointer structure. During the filling process, the attorney marks evidence entered as significant, annotates, and makes specific associations where beneficial. For example, during a deposition, the attorney may annotate a given answer, or, while reviewing documents, the attorney might annotate a specific document. Annotations are stored in the case evidence library and pointed to via the set of work product pointers.

Annotations are directly associated for example with a seminal case, an interrogatory, or any other unit of data within the entry groupings. Associations may also be made between any such elements of information provided by the various groupings under the entry. For example, an association might be created between a document pointed to by the pointer structure and a headnote from the pointers structure, or between a Q&A in one depostion with a Q&A from another deposition via the pointer structure.

FIG. 4c is a diagram providing an exemplary illustration of the pointer structures identified in FIG. 4b. Specifically, a pointer structure (which is representative of any of the pointer structures of FIG. 4b) provides direct indexing of all data items within a specific grouping area, and indirect indexing of all associated data items. A pointer table provides the basis for the indexing. The pointer table contains entries for every data item contained within the specific grouping. For example, if the pointer structure happened to be the headnote pointer structure, each entry into the table would correspond to a particular headnote associated with the categorization entry (FIG. 4b).

Each entry in the table consists of two fields: 1) a data item pointers field—each field entry for storing a pointer to a single data item, such as a data item associated with the specific grouping; and 2) an association stack pointers field—each field entry storing a pointer to an association stack of pointers, such as an association stack. For example, if the pointer structure happened to be the headnote pointer structure, pointers to the text of each headnote would be stored in the data item pointers fields. A data item, i.e., in this example a single headnote, can be easily located via a pointer stored in an entry of the fields. Similarly, to identify all associations made with the data item, a corresponding entry provides a pointer to the association stack which, in turn, provides a list of pointers each of which points to an associated data item. For example, a pointer entry stores a pointer which points to a data item which has been associated with the data item.

When a new data item is added under a given grouping, a new entry is added to the table. If no associations exist to the data item, the newly added association stack pointers field contains no pointer to an association stack. When an association is made, a new association stack is created with a single entry which contains a pointer to the association, and the pointer to the association stack is placed in the newly added association stack pointers field. In addition, the same process occurs for the data item being associated. For example, although not shown, wherever the data item is directly referenced, an association stack will be created (or added to) to include an association to the data item.

FIG. 5a is a detailed perspective view illustrating an attorney terminal which provides a Roman numeric display of the categories and subcategories contained in a tailored outline according to the present invention. As previously described, the tailored outline might have: 1) originated in whole or in part from the outline library; 2) been copied from another lawsuit; or 3) created manually in whole or in part.

To move through the tailored outline using the Roman numeric display, a single click (button selection) of the mouse causes a deeper level of the hierarchical structure, i.e., the subcategories A-II, to either appear if they are not currently being displayed, or disappear if they are being
displayed. In other words, the single clicking of the mouse 31 acts to expand or collapse a branch in the hierarchical structure of the tailored outline 39. Similarly, the attorney may expand or collapse any categorization level in the tailored outline 39. For example, referring to FIG. 5b, the attorney single clicks on the "Invisibility" subcategory entry 203, and the sub-subcategories 1-2 appear. Single clicking on the entry 203 a second time would likewise collapse the tailored outline back to the level shown in FIG. 5a.

While using the Roman numeric display, the information contained within any category, subcategory, etc., in the tailored outline 39 can be accessed by "double clicking" the mouse 31, i.e., two sequential button selections of the desired category, subcategory, etc. After double clicking, the screen 23 displays the underlying groupings of the selection as illustrated in FIG. 5c. FIG. 5c also illustrates the use of the single mouse clicking to expand the Case Law grouping to reveal the types of data A-E contained therein. By double clicking on any of the types of data A-E, a stack window 211, for sum-marily (one line per entry) displaying all of the items of the selected type of data, and an edit window 213, for fully displaying a selected item and providing full editing capability therefor, are opened as is illustrated in FIG. 5d. In particular, upon selecting the "Headnote" type of data 205 (FIG. 5c), the stack window 211 displays a stacked listing of single sentence summaries of each headnote (HN), such as headnotes 221, 223, 225, and 227 in FIG. 5d, pointed to within the specifically selected categorization entry (i.e., category, subcategory, etc.).

Upon double clicking the mouse 31 a given entry in the stack window 211, the edit window 213 opens to display (and editing) of the full text of the headnote (FIG. 5d). Additional headnotes may be added via the command line 33 and the edit window 213. Headnotes might also be modified or deleted via the edit window 213. Headnotes determined to have particular signifi-
mance might also be marked, annotated, or associated with any other data item or items within the tailored outline. All associations between data items stored in the libraries 63 and 92 are actually associations between pointers to those data items. The tailored outline contains the pointer associations within the hierarchy of the pointer structures.

In downloading the tailored outline (or portions thereof) to the attorney terminals, the attorney has several choices. The attorney may choose to download only the pointers and structure of the tailored outline without the actual data items within the libraries 63, 91, and 92. Specific access to the actual data items stored in the libraries 63, 91, or 92 would be managed via the link 23. Alternatively, the attorney may choose to also download all of the case evidence library 91, and all of the related case law and supplemental data items from the libraries 63 and 92. Instead of downloading all data items, however, the attorney might only download load the data items currently considered relevant, for example, in an upcoming deposition.

In order to delete from the hierarchical structure of the tailored outline 39, the attorney need only single click the mouse 31 to identify the categorization entry to be deleted, and then select a delete command from the command line 33. Deleting the categorization entry also causes all deeper levels in the hierarchical structure to be deleted. In other words, deleting a category results in the deletion of corresponding subcategories, sub-subcategories, and sub-sub-subcategories, and so on. In this way, the attorney can quickly and easily close off all branches in the hierarchy of the tailored outline 39.

Instead of deleting an entire branch, however, the attorney might choose to only delete a specific grouping or one type of data contained therein. Following the same process as before, the attorney merely selects a group or a type of data and the delete command from the command line 33.

As previously described, at any time, the attorney may revisit the outline library 43 to add to the tailored outline 39. Manual additions might also be made. To do so, the attorney enters an outline edit mode via the command line 33, and then manually edits the displayed tailored outline as desired. By double clicking on a newly added categorization entry, a display such as is shown in FIG. 5c appears which provides access to the edit window 213 illustrated in FIG. 5d for adding specific data items under the types of data provided.

To aid the attorney in identifying whether a sub-level in the hierarchy exists for a given categorization entry, italics are used to illustrate a dead-end. For example, referring back to FIG. 5b, if the "Laches" entry labelled "C" had no further sub-levels of categorization thereunder, the entry would appear as "Laches," i.e., in italics. Similarly, to indicate that a categorization entry has no groupings of data thereunder, an underline is provided. Italics are also used to indicate that a grouping of data (FIG. 5c) has no data items thereunder, i.e., the pointer structures contain no entries. Both the italics and underline aid the attorney in parsing through, modifying or otherwise constructing the tailored outline 39.

Instead of using the interactive process, the attorney might request a printout of the entire outline or portion thereof, and redline the printout to eliminate or add to the tailored outline. The redlined version can be given to a paralegal or secretary who makes the modifications in the manner discussed above. Once the tailored outline has been completed, the entire contents of the tailored outline 39 can also be printed out in outline form for record keeping or to provide for manual access.

FIGS. 5e and 5f more clearly illustrate the association and annotation process. FIG. 5e provides a perspective view of an exemplary situation under which an attorney might desire to associate data items within the hierarchical structure of the tailored outline. Specifically, for example, during the review of scanned documents via the window 214, the attorney identifies a document 232 which tips off the attorney that the legal issue of meaning might be involved. The attorney directs the attorney terminal 21 to display the marking headnotes, such as the headnote 221, in the window 211. This direction may occur through the Roman numeric outline as described above, or via a more graphical display mode illustrated and described in detail below.

After reviewing the headnotes, the attorney decides to generally associate the document 232 into the evidence grouping of the marking categorization entry, and to specifically associate the document 232 with the headnote 221. To accomplish this, the attorney merely selects an associate command 34 from the command line 33. Upon selecting the associate command 34, the association is indicated visually with an "@" character 222 placed in front of both the document 232 and the headnote 221. A pointer to the document is stored into the tailored outline (i.e., into the document and things pointer structure 165), and an association is made (as
described in relation to FIG. 4c) with both the docu-
ment 232 and the headnote 221.

After associating two data items, if only one of the
data items is currently being displayed, the other can
easily be accessed and displayed. For example, when
the attorney terminal 211 displays only the headnote 221,
the attorney need only select a display association com-
mand (not shown) from the command line 33 to cause
the associated document, in this situation the document
232, to be located and displayed. To view multiple
associations, the window 211 displays a stack of all
associated data items pointed to by a particular associa-
tion stack, such as the association stack 189 (FIG. 4c).
Through the window 211, the attorney may pick and
choose those associated data items for full display by
double clicking the mouse 31 on a selection.

FIG. 5/ provides a perspective view of an exemplary
situation under which an attorney might desire to anno-
tate data items within the hierarchical structure of the
tailored outline. As in the previous example, while re-
viewing scanned documents, the attorney encounters
the document 232, and decides that a textual annotation
is needed. The attorney adds the textual annotation via
the window 234 by selecting an annotate command 36
from the command line 33. The window 234 appears
and allows the attorney to type, store and directly asso-
ciate the illustrated annotation. An annotation is merely
a note that is directly associated with a data item.
Therefore, once created, all annotations are treated as
any other data item having an association. In addition to
textual data items, audio and video data items are also
supported.

Although the Roman numeric display provided by
the attorney terminals provides relatively simple access
to all items of all of the types of data contained within
the tailored outline 39, in many situations, a more selec-
tive graphical approach is preferred. FIGS. 6a, 6b, 7a
and 7b illustrate the basic functionality of the graphical
display of the tailored outline 39, which proves useful in
situations where repeated access to specific groupings
of data is common. FIG. 8 illustrates the use of selective
marking of the outline library 43 of categorization entries and data contained therein. Selective marking
provides for corresponding selective display of the out-
line library 43. Combining the graphical display with
selective marking provides the attorney with easier access
to only the pertinent information within the tai-
lored outline 43.

Specifically, FIG. 6a is a detailed perspective view of
an attorney terminal which graphically displays specific
groupings of case law information under certain subcat-
egories of the outline library. In a graphical display
mode, the attorney terminal screen is sectioned into three
areas: 1) the command line 33; 2) a graphical dis-
play window 235, and 3) a stack window 254. The
graphical display window 253 provides two levels of
hierarchical display of categorization entries. For exam-
ple, on an upper level 255, the category "Patent Law"
is displayed. Below the Patent category, on a lower level 257, the subcategories "Invalidity", "La-
ches", "Ownership" and "Marking" are displayed.
To select other categorizations on the same level not
currently displayed, slide bars 259 and 261 are provided.
For example, to change to the Antitrust category (not
shown), the attorney uses the slide bar 259 to step or
scan through all of the categories available in the tai-
lored outline 39 to identify the Antitrust category entry.
As the slide bar 259 is moved, the block at the level 255
displays the name of each newly selected category. The
categories are arranged in alphabetical order, aiding the
attorney in locating the desired category. In addition,
via double clicking on a slide bar button 260, a direct
textual search for the desired categorization entry might
also be made.

Similarly, the attorney moves the slide bar 261 to step
or parse through an alphabetical listing of available
subcategories at the lower level 257 (although an alpha-
betized subcategory display is not shown to aid in the
labelling process of a Marking subcategory 263). A slide
bar button 262 also provides direct textual categoriza-
tion searching, via a double clicking of the left button of
the mouse 31.

To move up and down through the hierarchical
structure, the attorney merely selects and drags a block
from one of the levels 255 or 257 to the other. The
graphical display window 253 responds by stepping up
or down through the hierarchy as directed. For exam-
ple, if the attorney selects and drags the Invalidity sub-
category to the upper level 255, the graphical window
253 would only display: 1) the Invalidity subcategory in
place of the Patent Law category at the upper level 255;
and 2) at the lower level 257, the sub-subcategories of
"Best Mode", "Enablement", etc.

To display the groupings, types of data, or specific
items contained by any categorization entry, as with the
Roman numeric display, the attorney merely double
clicks the mouse 31 on the desired block at either of the
levels 255 or 257. Doing so causes that block to be
displayed at the upper level 255, while the lower level
257 displays the groupings of data. Double clicking on
a specific grouping causes that grouping to move to the
upper level 255 while displaying the types of data at
the lower level 257. Thereafter, double clicking on a spe-
cific type of data causes the stack window 254 to dis-
play the data items listed (i.e., pointed to) thereunder.
Alternately, to display groupings and items there-
under, a default configuration can be pre-selected via a
display command 265 of the command line 33. Upon
selecting the display command 265, a pull-down menu
appears which provides for the pre-selection of the
various groupings for display. Checking a grouping
causes a side pull-down menu 267 to appear for pre-
selection of the specific type of data to be displayed.
Multiple groupings may be checked (pre-selected), and
multiple types of data may also be checked from each
checked grouping. Once pre-selection has been com-
pleted, upon clicking the right button of the mouse 31 to
identify a particular categorization entry, the items of
all of the pre-selected types of data from each pre-
selected grouping of the categorization entry are dis-
played in the stack window 254.

For example, if an attorney pre-selects only the case
law grouping and headnotes ("notes"), seminal cases
("cases"), treatise selections ("treatise") and preset
searches and search context ("searches"), and then se-
lects the marking subcategory 263 with the right button
of the mouse 31, the stack window 254 displays head-
notes 269 and 271, a treatise selection 273, and a seminal
case 275.

Any of the entries in the stack window 254 can be
selected, via a double click of the mouse 31, for full
display in the edit window illustrated in FIG. 6b. As
shown, the edit window 269 overlaps the stack window
254, but might instead overlap the graphical window
253 or both, depending on the circumstances, to pro-
vide for the display of other information. Similarly,
after a categorization selection has been made, the attorney will generally close or hide the graphical display window 253 to provide room for the display of other information.

The categorization entries available for display within the graphical display window 253 can be limited to only those entries marked as pertinent, as detailed below in reference to FIG. 8. Similarly, those groupings, types of data, and corresponding items which have been marked as pertinent can also be selectively displayed.

The pre-selection settings and the selective pertinence marking not only provides for selective display of the tailored outline 39, but can also be used individually or in combination for limiting searching. In particular, upon selecting a search command from the command line 33, a default configuration may be made or modified which limits searching within the tailored outline 39 to areas which have been pre-selected. Similarly, a separate default configuration may also limit searching to those categorization entries, groupings, types of data, and items which have been marked as pertinent.

FIG. 7a is a detailed perspective view of an attorney terminal which graphically displays groupings of draft questions in the stack window 254 from the marking subcategory 263, for use in a deposition or trial proceeding. In preparing for a deposition or trial, although the Roman numeric display might be used, the attorney uses the graphical display window 253, stack window 254, and edit window 282 (FIG. 7b) to gather questions for use during an upcoming deposition.

The attorney first uses the graphical window 253 to locate the desired areas to be used based on the characteristics of the witness. An expert witness, for example, might be able to testify regarding the technical details of specific law or fact, while an eye witness might only offer a present sense impression regarding other factual issues relating to possibly other areas of law. FIG. 8, described below, further illustrates the process of limiting the categorization entries for a specific witness.

Once a categorization entry has been selected such as, for example, the marking subcategory 263, the attorney clicks the right button of the mouse 31, to display the default settings of the display command 265. In response, the stack window 254 displays the draft questions 281, 283, 285 and 287 associated with the subcategory marking 263 for potential use during the deposition or trial proceeding. As with all stack window 254 displays, additional entries in the stack (i.e., additional draft questions) can be accessed by a scrolling process.

By double clicking on a specific draft question such as the draft question 281, referring to FIG. 7b, an edit window appears for displaying the full text of the draft question. In this form, the attorney may modify the question if so desired via a variety of typical editing commands available through the command line 33. The command line 33 also provides for opening a clear edit window so that the attorney may draft a question from scratch. In addition, specific documents, case law, etc., may be directly associated with draft questions for reference during the deposition. Thus, the attorney utilizes the attorney terminal 21 in the outline mode to prepare for an upcoming deposition or trial proceeding.

Referring to FIG. 7e, during the deposition or trial proceeding, the attorney terminals are used in the deposition mode to recall the draft questions to aid the questioning process. To begin, the examining attorney merely selects a categorization entry for conducting questioning as previously described by locating and double clicking the mouse 31. For example, double clicking on the marking entry 263 causes the stack of draft questions to appear in the window 254. Thereafter, the attorney may use the draft questions and associations thereto in the questioning process.

Upon completing all of the questioning under a given categorization entry, the attorney merely locates and selects via the window 253 another categorization entry to display other draft questions related thereto. This process continues until all questioning regarding all categorization entries has been exhausted.

In addition to providing access to the corresponding draft questions, associations, case law and case evidence, the process of moving through the tailored outline while in the deposition mode also serves to automatically categorize all actual questions and answers asked during the proceeding. For example, all Q&A's transcribed while under the marking categorization entry 263 are automatically added to the Q&A pointer structure 163 (FIGS. 4b and 4c).

The second chair attorney using the terminal 21 can also control the display of the terminal 19 used by the first chair attorney. For example, the second chair (associate) examining attorney can step through the hierarchical structure of the tailored outline instead of the first chair examining attorney while in the deposition mode. As categorization entries are selected, the draft Q&A's can be displayed on both attorney terminals 19 and 21 under the control of the second chair attorney. Moreover, without controlling the first chair attorney's display, the second chair attorney can also transmit specific draft Q&A's as messages to the first chair examining attorney during the proceeding.

The examining attorney may also choose to only use the tailored outline for specific areas of the tailored outline, or for unanticipated areas of law that are uncovered and retrieved during the proceeding. As a result, in such circumstances, automatic categorization is not used. After the proceeding, the attorneys (or their paralegals) may then manually categorize all of the Q&A's or only those Q&A's considered significant.

FIG. 7d is a perspective diagram of the attorney terminal 19 operating in the deposition mode on a draft question retrieved from the tailored outline as illustrated in FIG. 7a. By double clicking on a retrieved draft question, the question 281, the edit window 282 enters an edit mode to display the full text of the question 281 as shown. In a transcription window 295, the terminal 19 displays a question 291 and a corresponding answer 293 which constitute real-time transcription received from the CAT system 11 (FIG. 2). As can be appreciated from the illustration, the examining attorney may use draft questions, such as the question 281, to directly formulate actual questions, such as the question 291, during the proceeding.

An attorney switches from the real-time transcription display (FIG. 7d) to the tailored outline display (FIG. 7a) as necessary to seek out and use draft questions during a deposition. The command line 33 provides for such switching between displays.

In addition, within the draft question, parenthesis are used to provide instructions to help the attorney understand a draft question. Brackets are used to indicate that further tailoring (modification) of the bracketed words might be in order. In addition, specific instructions or "tips" may be provided to instruct the user as to the formulation of a line of questioning.
Although not shown, the graphical display window also uses italics and underlining convention established with the Roman numeric display. Italics are used to indicate categorization dead-ends, while underlining indicates that underlying grouping items do not exist. In addition, when providing only a selective display of the information marked as pertinent, the italics and underlining convention applies only to the marked information in the tailored outline 39. For example, if items exist but none are marked as pertinent under a given subcategory, the subcategory will be displayed with an underline.

FIG. 8 is a perspective view illustrating the selection of categories, subcategories, etc., to be used during an upcoming deposition or trial, wherein, in view of the witness's anticipated knowledge, only those areas of the tailored outline considered pertinent are selected for later access during the proceeding. To select a section of the tailored outline 39 for inclusion in the deposition or trial proceeding, the attorney selects a pertinent mode from the command line 33, and scrolls through categorization entries to mark the desired entries via a single clicking of the mouse 31. Single clicking also causes the sub-categorization levels to appear if they exist for a more specific selection. Moreover, single clicking the categorization entry a second time causes the sub-categorization levels to disappear from the display, and causes the categorization entry to be unmarked as not being pertinent if no sub-categorization entry thereunder has been marked.

Double clicking of the mouse 31 acts to provide access to the underlying groupings as described in relation to FIG. 5c above. These too may be marked as pertinent, as can the underlying types of data and actual data items. However, if the groupings, types of data, and data items listed contain no pertinence marking, all will be considered marked as pertinent if the corresponding categorization entry is marked.

For example, the attorney may believe that because the deponent was not working at the plaintiff's company until a date after the assignment document was executed, the deponent will probably have no knowledge of an assignment. The attorney may then choose not to select "ownership" for selective display in the tailored outline for this particular witness. It also may be that the attorney has elected not to challenge ownership and therefore the ownership area is not included.

After selection, a bar background of a contrast color is placed around the selected categorization entry such as entries 301, 303, 305 and 307. If the attorney changes his mind, a selection may be un-selected by placing the cursor over the selection and again single clicking the mouse 31.

In an identical process, all of the information contained within any selected category, subcategory, etc., can be further screened to simplify the use of the tailored outline for a given witness during the deposition or trial proceeding. For example, specific draft questions can be selected, while the other discovery groupings might be ignored.

Thus, only those categorization entries and underlying data items anticipated to be relevant for a given witness are marked as pertinent for selective display and possibly selective searching during the deposition or trial proceeding. The pertinence marking is saved in a configuration file under the witnesses last name for later loading during the deposition.

The pertinence marking process is also automatically applied while in the Pretrial Mode to enumerate the documents and things, and the deposition designations to be used at trial. In particular, concurrent with the generation of the draft Exhibit and deposition designations lists, a pretrial configuration is generated which provides for selective display and searching of only those items selected in the Pretrial Mode. The pretrial configuration may be directly used at trial or might be loaded as a starting point in the continued narrowing of the tailored outline 39 for trial. Similarly, an attorney might desire to have specific pertinence selections stored for personal use outside of the trial or deposition context.

After the attorney has generated a witness specific pertinence marking configuration, the attorney can begin (or continue) to review and associate the pertinent evidence and pertinent case law with the pertinent draft questions. Questions might also have been selected as pertinent from previous depositions for reuse. Conflicting answers to reused questions can then immediately be pointed out by the attorney on the transcript record, forcing the witness to change his testimony or say that the previous witness was wrong. In either case, the veracity of one of the witnesses becomes a beneficial issue.

Typically, the attorney will have a paralegal prepare a witness kit which is merely a file and index of a copy of all documents which were authored by or addressed to the deponent. The attorney will review the documents in the witness kit for potential deposition exhibits as well as for formulating potential questions to add to the outline 39. If such documents have been scanned into the tailored outline 39, the witness kit review may take place fully on the attorney terminal. Therein, the attorney's notes or annotations can be directly made and reviewed to the scanned image. Associating a scanned document image to a specific question or questions may provide the attorney with direct reference to the basis for the inquiry, for example. Similarly, documents, annotations, questions, case law, etc., might be associated with a communication from another terminal: 1) as illustrated in FIG. 2, to help guide the first chair attorney using the terminal 19 in conducting the questioning; or 2) as illustrated in FIG. 1, to help clarify the requests for information or receipts thereof.

Furthermore, if during the attorney's perusal of the documentary evidence, he wishes to review case law to understand the import of a certain document, the attorney may use the tailored outline 39 to retrieve the law.

FIG. 9 is a perspective view providing further detail of the system configuration of attorney terminals operating in the Evidence Mode according to the present invention. In a trial or deposition proceeding, attorney terminals automatically track the status of the entry of Exhibits into the record.

Specifically, during a proceeding while in the Evidence Mode, the attorney terminal displays Exhibit entry information 321 in the stack window 254 while displaying the ongoing transcribed text of the proceeding in the transcription window 295. Each entry in the stack window 254 includes an indication of the exhibit number, date, time, and description of the results of the attempted entry.

When an attorney uses the term "Exhibit" during a deposition or at trial, the use of the word triggers an analysis of the status of that Exhibit number's use in the lawsuit, for example, as occurs in response to a tran-
scribed statement 331 from a moving attorney. If the use of an Exhibit is detected, the attorney terminal compares the Exhibit number to a list of Exhibits already entered into the record. This list is contained in the chronologically ordered listing displayed in the stack window 251. If the Exhibit number already exists, the attorney terminal 21 considers the use acceptable and continues the monitoring process. If, however, as illustrated, the Exhibit number does not exist, the attorney terminal 21 further analyzes the context of the usage to determine whether a proper attempt has been made to enter the Exhibit into the record, and, if so, whether objections were stated, and whether the attempt was successful.

To determine whether a proper attempt to enter the Exhibit has occurred, the attorney terminal analyzes the unit of speech containing the usage of the new Exhibit number, i.e., most likely the current question being asked, to determine whether the attorney is attempting to enter the Exhibit into the record. In FIG. 9, the unit of speech is the transcribed statement 331. Specifically, the determination is made based on the existence of key terms such as "mark" for a deposition proceeding and "move" for trial. If the use of the term "Exhibit" is determined to be for an attempted entry into the record, the terminal 21 updates the Exhibit list and displays a message to the attorney indicating that a new Exhibit has been added, for example, as illustrated by a new entry 237. If the determination is incorrect, the message acts as a warning to the attorney that an improper attempted entry of the Exhibit has been made. Similarly, if the determination is made that the new Exhibit has been improperly used, i.e., without proper entry, the attorney terminal 21 displays a warning message to that effect.

Upon determining that a proper attempt to enter an Exhibit has been made, the terminal 21 automatically evaluates the subsequent units of speech, i.e., transcribed speech units 333 and 335, to identify any related objections, and, if so and at trial, to identify the judge's ruling. Upon identifying any objections raised, the attorney terminal 21 adds the objections to the new entry, entry 337, in the Exhibit list. If the judge makes a ruling, as is illustrated by the unit 335, that ruling is associated with the Exhibit list. The Exhibit list contained within the stack window 254 also automatically, directly associates the corresponding exchanges between the parties and the judge, i.e., the units 331, 333 and 335, for later review. Upon double clicking on any of the exhibit list entries, as with any stack window 254 entry, an edit window (not shown) is used to provide for modifying the entry if necessary. In addition, upon clicking the right button of the mouse 31, the transcription window 295 automatically displays the associated corresponding exchanges.

In addition, it is also contemplated that the tailored outline 39 may directly store all lawsuit information including case evidence, case law and work product. However, as FIGS. 4b and 4c illustrate, the tailored outline 39 merely points to the separate lawsuit information. The tailored outline 39 and lawsuit information can be stored locally (within the attorney terminal), remotely (at possibly a dial-up location), or distributed between the two. Storage remotely carries the advantage of creating a common access point for use by all of the attorneys on the lawsuit. A remote, common access point provides for easier back-up and maintenance than that required in a distributed system. One drawback, however, is that the access may sometimes be slow or unavailable because of faulty or nonexistent communication links. To accommodate such situations, the attorney terminals may use the pertinent selection process to extract for local storage portions of the remotely stored tailored outline 39 before going to a deposition. Upon returning, the newly added information in the extracted local portion of the tailored outline 39 is automatically extracted into the remote tailored outline 39 to bring it up-to-date.

In addition, as generally illustrated by FIGS. 7a-c, any data items contained within the tailored outline can be used inside or outside of a legal proceeding. For example, by selecting a preset search request with the corresponding search context from the pointer structures 127 and 129, in a similar process as described in FIGS. 7a-c, a search request may be executed immediately or after minor modification to perform either a boolean or natural language search on the case law library 63. Similarly, draft jury instructions might be accessed, displayed, modified, and printed for preparing a Pretrial Order.

During a proceeding, should a particular categorization entry not be contained in the selected tailored outline 39, the attorney may use an attorney terminal to access the outline library 43 to retrieve generic Q's, law, etc., during a deposition. For example, if during the deposition the examining attorney asks:

Q78. Now what makes you think that my client copied your invention?

A78. Your client stole my product out of my engineering department.

The examining attorney immediately searches his brain for the law of slander and libel. What does he need to prove? He may or may not know. The questioning continues:

Q79. Did you tell anyone about this?
A79. Yes, I told my sales force.

Q80. Did you tell your independent sales reps about this?
A80. Yes. The examining attorney decides that he desires more testimony on this issue in the next 5 minutes before the witness counsel, the defending attorney, walks the witness outside for counseling regarding the law.

While the first chair struggles for questions, the second chair attorney may use the terminal 21 to quickly access the categorization entries in the outline library 43 regarding the law of slander and libel. Instant access is provided to case law information, i.e., the types of data contained under the case law grouping and to associated draft questions which may have been at least partially tailored to the lawsuit at issue. Thereafter, the second chair attorney may send the draft questions and case law information in whole or in part to the first chair examining attorney along the link 23 (FIG. 2). In addition, although not as desirable, the first chair attorney may manage direct access to the outline library 43 himself without assistance from the second chair attorney 29 and

Although the second chair attorney is illustrated as being physically located at the legal proceeding in FIG. 2, the second chair attorney might also be remotely located. Similarly, any of the other attorneys, paralegals, experts, or clients might also step in to assist the attorney(s) during the deposition, these individuals being either locally or remotely located.
Moreover, it is obvious that the embodiments of the present invention described hereinabove are merely illustrative and that other modifications and adaptations may be made without departing from the scope of the appended claims.

We claim:

1. A transcription system used to convert words spoken during a transcription proceeding to a textual form for real time display and categorization comprising:
   transcription means for producing, in real time, transcript signals representative of spoken words;
   outliner means providing for the creation and modification of an outline of categories which relate to the transcription proceeding;
   selection means for displaying during the transcription proceeding a selected category from the outline of categories; and
   association means for automatically classifying in real time all transcript signals produced by said transcription means as belonging to the category currently selected and displayed.

2. The transcription system of claim 1 wherein the selection means also provides for the automatic display of previously categorized information upon selection of a category from the outline of categories.

3. The transcription system of claim 1 further comprising:
   a communication network for receiving communications; and

said association means also automatically classifying in real time each communication received via said communication network as belonging to the category currently selected and being displayed.

4. The transcription system of claim 1 wherein the selection means also provides for the automatic display of previously categorized draft questions upon selection of a category from the outline of categories.

5. A transcription system used to convert words spoken during a transcription proceeding to a textual form for real time display comprising:
   transcription means for producing, in real time, transcript signals representative of spoken words;
   a communication network for receiving communications;
   outliner means providing for the creation and modification of an outline of categories which relate to the transcription proceeding;
   selection means for automatically displaying of one category of previously categorized information from the outline of categories; and
   association means for automatically classifying in real time each communication received via said communication network as belonging to the category currently selected and being displayed.

6. The transcription system of claim 5 wherein said association means also automatically classifies in real time all transcript signals produced by said transcription means as belonging to the category currently selected and displayed.
The USA PATRIOT Act: A Legal Analysis

April 15, 2002

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The USA PATRIOT Act: A Legal Analysis

Summary

The USA PATRIOT Act passed in the wake of the September 11 terrorist attacks. It flows from a consultation draft circulated by the Department of Justice, to which Congress made substantial modifications and additions. The stated purpose of the Act is to enable law enforcement officials to track down and punish those responsible for the attacks and to protect against any similar attacks.

The Act grants federal officials greater powers to trace and intercept terrorists’ communications both for law enforcement and foreign intelligence purposes. It reinforces federal anti-money laundering laws and regulations in an effort to deny terrorists the resources necessary for future attacks. It tightens our immigration laws to close our borders to foreign terrorists and to expel those among us. Finally, it creates a few new federal crimes, such as the one outlawing terrorists’ attacks on mass transit; increases the penalties for many others; and institutes several procedural changes, such as a longer statute of limitations for crimes of terrorism.

Critics have suggested that it may go too far. The authority to monitor e-mail traffic, to share grand jury information with intelligence and immigration officers, to confiscate property, and to impose new book-keeping requirements on financial institutions, are among the features troubling to some.

The Act itself responds to some of these reservations. Many of the wiretapping and foreign intelligence amendments sunset on December 31, 2005. The Act creates judicial safeguards for e-mail monitoring and grand jury disclosures; recognizes innocent owner defenses to forfeiture; and entrusts enhanced anti-money laundering powers to those regulatory authorities whose concerns include the well being of our financial institutions.

This report, stripped of its citations and footnotes, is available in an abbreviated form as The USA PATRIOT Act: A Sketch, CRS Rep.No. RS21203. In addition, much of the information contained here may also be found under a different arrangement in a report entitled, Terrorism: Section by Section Analysis of the USA PATRIOT Act, CRS Rep.No. RL31200 (Dec. 10, 2001). A wider array of terrorism-related analysis appears on the CRS terrorism electronic briefing book page.
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The USA PATRIOT Act: A Legal Analysis

Introduction

Congress passed the USA PATRIOT Act (the Act) in response to the terrorists’ attacks of September 11, 2001.1 The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to further close our borders to foreign terrorists and to detain and remove those within our borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it is not without safeguards, critics contend some of its provisions go too far. Although it grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough.


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1 P.L. 107-56, 115 Stat. 272 (2001); its full title is the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT).”

2 H.R. 2975 was introduced by Representative Sensenbrenner for himself and Representatives Conyers, Hyde, Coble, Goodlatte, Jenkins, Jackson-Lee, Cannon, Meehan, Graham, Bachus, Wexler, Hostettler, Keller, Issa, Hart, Flake, Schiff, Thomas, Goss, Rangel, Berman and Lofgren; S.1510 by Senator Daschle for himself and Senators Lott, Leahy, Hatch, Graham, Shelby and Sarbanes.

3 H.R. 3004 was introduced by Representative Oxley for himself and Representatives LaFalce, Leach, Maloney, Roukema, Bentsen, Hooley, Bereuter, Baker, Bachus, King, Kelly, Gillmore, Cantor, Riley, Latourette, Green (of Wisconsin), and Grucci; and reported out of the House Financial Services Committee with amendments on October 15, 2001, H.R.Rep.No. 107-250. H.R. 3004, as reported out, included Internet gambling amendments that were not included in H.R. 2975/H.R.3108.
ed. Oct. 24, 2001), and H.R. 3162 was sent to the President who signed it on October 26, 2001.

Criminal Investigations: Tracking and Gathering Communications

A portion of the Act addresses issues suggested originally in a Department of Justice proposal circulated in mid-September. The first of its suggestions called for amendments to federal surveillance laws, laws which govern the capture and tracking of suspected terrorists’ communications within the United States. Federal law features a three tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications.

The tiers reflected the Supreme Court’s interpretation of the Fourth Amendment’s ban on unreasonable searches and seizures. The Amendment protects private conversations, \( \text{Berger v. New York, } 388 \text{ U.S. } 41 \text{ (1967); } \text{Katz v. United States, } 389 \text{ U.S. } 347 \text{ (1967).} \) It does not cloak information, even highly personal information, for which there is no individual justifiable expectation of privacy, such as telephone company records of calls made to and from an individual's home, \( \text{Smith v. Maryland, } 442 \text{ U.S. } 735 \text{ (1979), or bank records of an individual's financial dealings, } \text{United States v. Miller, } 425 \text{ U.S. } 435 \text{ (1976).} \)

Congress responded to \( \text{Berger} \) and \( \text{Katz} \), with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications, 18 U.S.C. 2511. At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious

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4 The Department’s proposal, dated September 20, 2001, came with a brief section by section analysis. Both the proposal (Draft) and analysis (DoJ) were printed as an appendix in \( \text{Administration's Draft Anti-Terrorism Act of 2001, Hearing Before the House Comm. on the Judiciary, } 107\text{th Cong., 1st Sess. } 54 \text{ (2001).} \)


6 “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,” \( \text{U.S. Const. Amend. IV.} \)

7 Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
criminal cases. When approved by senior Justice Department officials, law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.9

8 “The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of” one or more predicate offense, 18 U.S.C. 2516.

9 The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery in bank and credit applications generally; renewals and discounts), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement). 1751 (presidential and presidential staff assassination, kidnaping, or assault). 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnaping, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or naturalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations, 18 U.S.C. 2518. The court notifies the parties to any conversations seized under the order after the order expires, 18 U.S.C. 2518(8).

Below Title III, the next tier of privacy protection covers some of those matters which the Supreme Court has described as beyond the reach of the Fourth Amendment protection – telephone records, e-mail held in third party storage, and the like, 18 U.S.C. 2701-2709 (Chapter 121). Here, the law permits law enforcement access, ordinarily pursuant to a warrant or court order or under a subpoena in some cases, but in connection with any criminal investigation and without the extraordinary levels of approval or constraint that mark a Title III interception, 18 U.S.C. 2703.

Least demanding and perhaps least intrusive of all is the procedure that governs court orders approving the government’s use of trap and trace devices and pen registers, a kind of secret “caller id”, which identify the source and destination of calls made to and from a particular telephone, 18 U.S.C. 3121-3127 (Chapter 206). The orders are available based on the government’s certification, rather than a finding of the court, that the use of the device is likely to produce information relevant to the investigation of a crime, any crime, 18 U.S.C. 3123. The devices record no more than the identity of the participants in a telephone conversation, but neither the orders nor the results they produce need ever be revealed to the participants.

The Act modifies the procedures at each of the three levels. It:

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offense involving counterfeiting punishable under 18 U.S.C. 471, 472, or 473; (e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States; (f) any offense including extortionate credit transactions under 18 U.S.C. 892, 893, or 894; (g) a violation of 31 U.S.C. 5322 (dealing with the reporting of currency transactions); (h) any felony violation of 18 U.S.C. 2511 and 2512 (interception and disclosure of certain communications and to certain intercepting devices); (i) any felony violation of 18 U.S.C. ch. 71 (obscenity); (j) 49 U.S.C. 60123(b) (destruction of a natural gas pipeline), 46502 (aircraft piracy); (k) 22 U.S.C. 2778 (Arms Export Control Act); (l) the location of any fugitive from justice from an offense described in this section; (m) a violation of 8 U.S.C. 1324, 1327, or 1328; (n) any felony violation of 18 U.S.C. 922, 924 (firearms); (o) any violation of 26 U.S.C. 5861 (firearms); (p) a felony violation of 18 U.S.C. 1028 (production of false identification documents), 1542 (false statements in passport applications), 1546 (fraud and misuse of visas, permits, and other documents) or a violation of 8 U.S.C. 1324, 1327, or 1328 (smuggling of aliens); (p) 229 (chemical weapons), 2332 (terrorist violence against Americans overseas), 2332a (weapons of mass destruction), 2332b (multinational terrorism), 2332d (financial transactions with countries supporting terrorism), 2339A (support of terrorist), 2332B (support of terrorist organizations); (r) any conspiracy to commit any of these, 18 U.S.C. 2516(1)(crimes added by the Act in italics). Other than telephone face to face conversations (i.e., electronic communications), the approval of senior Justice Department officials is not required and an order may be sought in any felony investigation, 18 U.S.C. 2516(3).

10 Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
• permits pen register and trap and trace orders for electronic communications (e.g., e-mail)

• authorizes nationwide execution of court orders for pen registers, trap and trace devices, and access to stored e-mail or communication records

• treats stored voice mail like stored e-mail (rather than like telephone conversations)

• permits authorities to intercept communications to and from a trespasser within a computer system (with the permission of the system’s owner)

• adds terrorist and computer crimes to Title III’s predicate offense list

• reenforces protection for those who help execute Title III, ch. 121, and ch. 206 orders

• encourages cooperation between law enforcement and foreign intelligence investigators

• establishes a claim against the U.S. for certain communications privacy violations by government personnel

• terminates the authority found in many of the these provisions and several of the foreign intelligence amendments with a sunset provision (Dec. 31, 2005).

Pen Registers and Trap and Trace Devices. In section 216, the Act allows court orders authorizing trap and trace devices and pen registers to be used to capture source and addressee information for computer conversations (e.g., e-mail) as well as telephone conversations, 18 U.S.C. 3121, 3123. In answer to objections that e-mail header information can be more revealing than a telephone number, it creates a detailed report to the court, 18 U.S.C. 3123(a)(3).11

11 “Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public the agency shall ensure that a record will be maintained which will identify – (i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of the such device.

“(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof),” section 216(b)(1).
The use of pen registers or trap and trace devices was limited at one time to the judicial district in which the order was issued, 18 U.S.C. 3123 (2000 ed.). Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States, 18 U.S.C. 3123(b)(1)(C), 3127(2).\textsuperscript{12}

**Communications Records and Stored E-Mail.** With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber, 18 U.S.C. 2703(a),(b). A warrant will also suffice to seize records describing telephone and other communications transactions without customer notice, 18 U.S.C. 2703(c). In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation, officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records, 18 U.S.C. 2703(b),(c). They can obtain a limited amount of record information (subscribers' names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena, 18 U.S.C. 2703(c)(1)(C). There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial, 18 U.S.C. 2705.

In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider’s customer records, 18 U.S.C. 2703(c)(1)(C).\textsuperscript{13}

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.

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\textsuperscript{12} The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” *DoJ* at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

\textsuperscript{13} Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user's true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” *DoJ* at §107.
Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

The Act, in section 209, treats voice mail like e-mail, that is, subject to the warrant or court order procedure, rather than to the more demanding coverage of Title III once required, United States v. Smith, 155 F.3d 1050, 1055-56 (9th Cir. 1998).

Finally, the Act resolves a conflict between chapter 121 and the federal law governing cable companies. Government entities may have access to cable company customer records only under a court order following an adversary hearing if they can show that the records will evidence that the customer is or has engaged in criminal activity, 47 U.S.C. 511(h). When cable companies began offering telephone and other communications services the question arose whether the more demanding cable rules applied or whether law enforcement agencies were entitled to ex parte court orders under the no-notice procedures applicable to communications providers. The Act makes it clear that the cable rules apply when cable television viewing services are

14 Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

15 See e.g., DoJ at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement’s access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

**Electronic Surveillance.** To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202.¹⁶ A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(i). Yet only the interloper's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.¹⁷

**Criminal Investigators' Access to Foreign Intelligence Information.** The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism.¹⁸ It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that “the purpose for the surveillance is to obtain foreign intelligence information,” 50 U.S.C. 1804(a)(7)(B) (2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps “the purpose” might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation

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¹⁶ 18 U.S.C. 229 (chemical weapons), 2332 (terrorist acts of violence committed against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2332d (financial transactions with countries which support terrorists), 2339A (providing material support to terrorists), and 2339B (providing material support to terrorist organizations).

¹⁷ “Because service providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves as permitted under current law, they often have no way to exercise their rights to protect themselves from unauthorized attackers. Moreover, such attackers can target critical infrastructures and engage in cyberterrorism,” DoJ at §106. Elsewhere the Act defines “electronic surveillance” for purposes of the Foreign Intelligence Surveillance Act (FISA) to emphasize that the law enforcement authority for this intruder surveillance does not confer similar authority for purposes of foreign intelligence gathering, section 1003 (50 U.S.C. 1801(f)(2)).

Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment's warrant clause. It is here that the “primary purpose” notion originated. In *United States v. Truong Dinh Hung*, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, “as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.” Subsequent case law, however, is not as clear as it might be: see e.g., *United States v. Duggan*, 743 F.2d 59, 77 (2d Cir. 1984)(“FISA permits federal officials to obtain orders authorizing electronic surveillance ‘for the purpose of obtaining foreign intelligence information.’ The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying officials’s belief that the information sought is the type of foreign intelligence information described”); *United States v. Pelton*, 835 F.2d 1067, 1075-76 (4th Cir. 1987)(“We also reject Pelton’s claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial”); *United States v. Sarkissian*, 841 F.2d 959, 907-8 (9th Cir. 1988)(“Defendants rely on the primary purpose test articulated in *United States v. Truong Dinh Hung*. . . . One other court has applied the primary purpose test. Another court has rejected it . . . distinguishing *Truong*. A third court has declined to decide the issue. We also decline to decide the issue”); *United States v. Johnson*, 952 F.2d 565, 572 (1st Cir. 1991)(“Appellants attack the government's surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance”).

Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” DoJ at §153.
demanding standard than the “a purpose” threshold proposed by the Justice Department, but a clear departure from the original “the purpose” entry point. FISA once described a singular foreign intelligence focus prerequisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k), 1825(k).  

**Protective Measures.** The Act reenforces two kinds of safeguards, one set designed to prevent abuse and the other to protect those who assist the government. The sunset clause is perhaps the best known of the Act’s safeguards. Under the direction of section 224, many of the law enforcement and foreign intelligence authorities granted by the Act expire as of December 31, 2005. The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter

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21 "(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. (2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, infra, quoting, 50 U.S.C. 1801.

22 “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210[subpoenas for communications provider customer records], 211[access to cable company communication service records], 213[sneak and peek], 216[pen register and trap and trace device amendments], 221[trade sanctions], and 222[assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005. "(b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers' communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices). Variants of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees, but could not recover against the United States. Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice's Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government's request until a court order authorizing access can be obtained. Another allows providers to disclose customer records to protect the provider's rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others. A third section,
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

**Foreign Intelligence Investigations**

Although both criminal investigations and foreign intelligence investigations are conducted in the United States, criminal investigations seek information about unlawful activity; foreign intelligence investigations seek information about other countries and their citizens. Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough.

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA), something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President's authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, *United States v. United States District Court*, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage

§110.

28 Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

29 Thus in the name of assisting in the execution of Title III, chapter 121, or chapter 206 order, the courts may not cite the Act as the basis for an order compelling a service provider to make system modifications or provide any other technical assistance not already required under 18 U.S.C. 2518(4), 2706, or 3124(c), see, H.R.Rep.No. 107-236, at 62-3 (2001) (emphasis added) (“This Act is not intended to affect obligations under Communications Assistance for Law Enforcement Act [which addresses law enforcement-beneficial system modifications and the compensation to be paid for the changes], nor does the act impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance”).

30 *E.g.*, As amended by section 902 of the Act, “‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2)(language added by the Act in italics).

31 50 U.S.C. 1801 *et seq.*
In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs. There were and still are extra

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33 “As used in this subchapter: (a) ‘Foreign power’ means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

‘(b) ‘Agent of a foreign power’ means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C).

“(c) ‘International terrorism’ means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnapping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

“(d) ‘Sabotage’ means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

“(e) ‘Foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans (“United States persons,” i.e., citizens or permanent resident aliens). The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

- permits “roving” surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)
- increases the number of judges on the FISA court from 7 to 11
- allows application for a FISA surveillance or search order when gathering foreign intelligence is a significant reason for the application rather than the reason
- authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations
- sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses
- carries a sunset provision
- establishes a claim against the U.S. for certain communications privacy violations by government personnel
- expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to – (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States,” 50 U.S.C. 1801.

34 Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
FISA. FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases. It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

Search and Surveillance for Intelligence Purposes. Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, Draft at §151.36

Section 901 of the Act address a concern raised during the 106th Congress relating to the availability of the FISA orders and the effective use of information gleaned from the execution of a FISA order.37 It vests the Director of Central

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36 See also, DoJ at §151, “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order’s minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed (50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

37 See e.g., S.Rep.No. 106-352, at 3, 6, 7 (2000) (“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application
process, as interpreted by the OIPR is administratively burdensome and, at times, extremely slow. Many applications undergo months of scrutiny before submission to the court because the OIPR prescribes standards and restrictions not imposed by the statute. ... In particular, the OIPR has been criticized for an overly restrictive interpretation of the FISA 'currency' requirement. This is the issue of how recent a subject's activities must be to support a finding of probable cause that the subject is engaged in clandestine intelligence gathering activities. ... While existing law does not specifically address "past activities," it does not preclude, and legislative history supports, the conclusion that past activities may be part of the totality of circumstances considered by the FISC in making a probable cause determination. ... By definition, information collected pursuant to a court order issued under the Foreign Intelligence Surveillance Act is foreign intelligence not law enforcement information. Accordingly, the Committee wants to clarify that the FISA 'take' can and must be shared by the Federal Bureau of Investigation with appropriate intelligence agencies. For the intelligence mission of the United States to be successful, there must be a cooperative and concerted effort among intelligence agencies. Any information collected by one agency under foreign intelligence authorities that could assist another agency in executing its lawful mission should be shared fully and promptly. Only then can the United States Government pursue aggressively important national security targets including, for example, counterterrorist and counternarcotics targets); see also, 147 Cong.Rec. S799-803 (daily ed. Feb. 24, 2000)(remarks of Sens. Specter, Torricelli and Biden).
Section 214 adjusts the language of the FISA pen register-trap and trace authority to permit its use to capture source and destination information relating to electronic communications (e.g., e-mail) as well as telephone communications, 50 U.S.C. 1842(d). The section makes it clear that requests for a FISA pen register-trap and trace order, like requests for other FISA orders, directed against Americans (U.S. persons) may not be based solely on activities protected by the First Amendment, 50 U.S.C. 1842, 1843.

**Third Party Cooperation and Tangible Evidence.** As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target's activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.

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39 Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise be entitled to confidentiality. Section 505, in response to the Justice Department's suggestion, allows FBI field offices to make the requests, see DoJ at §157 (“At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports”).

40 When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court’s order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.’ This would enhance the FBI’s ability to monitor international terrorists and intelligence officers who are...
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian.\footnote{The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigative contexts. The time and difficulty involved in getting such pleadings before the Court usually outweighs the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” DoJ at §156.}

The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities,\footnote{Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).} in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B));
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a);
- the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a);
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v;
to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.\(^{43}\)

**Access to Law Enforcement Information.** Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community’s access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, Draft at §103.\(^{44}\)

\(^{43}\) H.R.Rep.No. 107-205, at 60-1 (2001) (“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

“The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

“Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual’s credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding—without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information”

\(^{44}\) See also, DoJ at §103, “This section facilities the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, Draft at §354.45

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, Draft at §154.46

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion.47 It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions.”

45 See also, DoJ at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.” Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officers.

46 See also, DoJ at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”

47 Blair v. United States, 250 U.S. 273, 281 (1919)(the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
These officers may receive: (1) “foreign intelligence information” that is, information regardless of whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

Critics may protest that the change could lead to the use of the grand jury for intelligence gathering purposes, or less euphemistically, to spy on Americans. The proposal was never among those scheduled to sunset, but earlier versions of the section followed the path used for most other disclosures of grand jury material: prior

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48 These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

49 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25 Harvard Journal of Law & Public Policy 699, 719-20 (2002)(“There is a significant danger that the rule permitting disclosure will be treated as the de facto authorization of an expansion of the grand jury’s investigative role to encompass seeking material relevant only to matters of national security, national defense, immigration, and so forth. The grand jury’s awesome powers should not be unwittingly extended to a much wider range of issues. . . Since the grand jury operates in secret, there are no public checks on the scope of its investigations, and witnesses are not permitted to challenge its jurisdiction. Only the supervising court is in a position to keep the grand jury’s investigation within proper bounds. Requiring judicial approval of foreign intelligence and counterintelligence information disclosures would provide a natural check against the temptation to manipulate the grand jury to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6 (Nov. 2001)(“The grand jury secrecy rule is a rule of policy which has always had exceptions, and it has been frequently modified. The secrecy rule has no credible claim to constitutional stature”).
Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification. By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

Increasing Institutional Capacity. As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a

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52 Duncan v. Walker, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted) (“It is our duty to give effect, if possible, to every clause and word of a statute. United States v. Menasche, 348 U.S. 528, 538-539 (1955) (quoting Montclair v. Ramsdell, 107 U.S. 147, 152 (1883)); see also Williams v. Taylor, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); Market Co. v. Hoffman, 101 U.S. 112, 115 (1879) (As early as in Bacon's Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage. By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

53 Draft at §154, “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained by as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”
computerized translation capability to be used in foreign intelligence gathering.\(^{54}\) Section 907 instructs the Director of the Central Intelligence, in consultation with the Director of the FBI, to report on the creation of a National Virtual Translation Center. The report is to include information concerning staffing, allocation of resources, compatibility with comparable systems to be used for law enforcement purposes, and features which permit its efficient and secure use by all of the intelligence agencies.

**Money Laundering**

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture.\(^{55}\) The Act bolsters federal efforts in each area.

**Regulation.** Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.\(^{56}\)

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\(^{54}\) “The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

“The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so,” S.Rep.No. 107-63, at 11 (2001).


\(^{56}\) *See e.g.*, 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
Records and Reports. For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler’s checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to files SARs as well,57 reflecting Congress’ view that the information provided the IRS may be valuable for other law enforcement purposes.58 This concern is likewise

58 H.R.Rep.No. 107-250, at 38-9 (2001) (“Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

“Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a ‘Safeguard Procedures Report’ which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

“While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement
reflected in section 357 which asks the Secretary of the Treasury to report on the Internal Revenue Service’s role in the administration of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311 et seq.), and what transfers of authority, if any, are appropriate.

Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action. 59 Section 355 expands the immunity to cover disclosures in

authorities as the various reports mandated by the Bank Secrecy Act, which can typically be retrieved electronically from a database maintained by the Treasury Department. The differential access to the two kinds of reports is made anomalous by the fact that Form 8300 elicits much the same information that is required to be disclosed by the Bank Secrecy Act. For example, just as Form 8300 seeks the name, address, and social security number of a customer who engages in a cash transaction exceeding $10,000 with a trade or business, Currency Transaction Reports (CTRs) mandated by the Bank Secrecy Act require the same information to be reported on a cash transaction exceeding $10,000 between a financial institution and its customer”).

59 “Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

“First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor from civil liability applies in arbitration, as well as judicial, proceedings. Second, it amends section 5318(g)(3) to clarify the safe harbor’s coverage of voluntary disclosures (that is, those not covered by the SAR regulatory reporting requirement). The language in section 5318(g)(3)(A) providing that ‘any financial institution that *** makes a disclosure pursuant to *** any other authority *** shall not be liable to any person’ is not intended to avoid the application of the reporting and disclosure provisions of the Federal securities laws to any person, or to insulate any issuers from private rights of actions for disclosures made under the Federal securities laws.

“Subsection [351](b) amends section 5318(g)(2) of title 31--which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed--to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee’s official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
employment references to other insured depository financial institutions provided disclosure is not done with malicious intent.\textsuperscript{60}

The Financial Crimes Enforcement Network (FinCEN), a component within the Treasury Department long responsible for these anti-money laundering reporting and record-keeping requirements, 31 C.F.R. pt. 103, was administratively created in 1990 to provide other government agencies with an “intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes,” 55 Fed.Reg. 18433 (May 2, 1990).

The Act, in section 361, makes FinCEN a creature of statute, a bureau within the Treasury Department, 31 U.S.C. 310. Section 362 charges it with the responsibility of establishing a highly secure network to allow financial institutions to file required reports electronically and to permit FinCEN to provide those institutions with alerts and other information concerning money laundering protective measures, 31 U.S.C. 310 note.

\textbf{Special Measures.} In extraordinary circumstances involving international financial matters, the Act grants the Secretary of the Treasury, in consultation with other appropriate regulatory authorities, the power to issue regulations and orders involving additional required “special measures” and additional “due diligence” requirements to combat money laundering. The special measure authority, available under section 311, comes to life with the determination that particular institutions, jurisdictions, types of accounts, or types of transactions pose a primary money

\textsuperscript{60} 31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 67 (2001).
These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

61 31 U.S.C. 5318A. The circumstances considered in the case of a suspect jurisdiction are: evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction’s banking regulation; the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

62 The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’ including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

“Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate
business transactions.

“Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

“Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

“The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

“The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

“The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

“The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent’ account for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information that it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

“The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

“The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed
Due Diligence. Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.63

by regulation, order, or otherwise as permitted by law. However, if the Secretary proceeds by issuing an order, the order must be accompanied by a notice of proposed rulemaking relating to the imposition of the special measure, and may not remain in effect for more than 120 days, except pursuant to a regulation prescribed on or before the end of the 120-day period. The fifth special measure may be imposed only by regulation,” H.R.Rep.No. 107-250, at 68-9.

63 See generally, H.R.Rep.No. 107-250, at 71-2 (“Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

“The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

“The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

“For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
**General Regulatory Matters.** The Act establishes several other regulatory mechanisms directed at the activities involving U.S. financial institutions and foreign individuals or institutions. Section 313, for instance, in another restriction on correspondent accounts for foreign financial institutions, prohibits U.S. financial institutions from maintaining correspondent accounts either directly or indirectly for foreign shell banks (banks with no physical place of business) which have no affiliation with any financial institution through which their banking activities are subject to regulatory supervision.

The Act, in section 325, empowers the Secretary of the Treasury to promulgate regulations to prevent financial institutions from allowing their customers to conceal their financial activities by taking advantage of the institutions’ concentration account practices.

The Secretary of the Treasury is instructed in section 326 to issue regulations for financial institutions’ minimum new customer identification standards and record-
keeping and to recommend a means to effectively verify the identification of foreign customers.\textsuperscript{67}

\textsuperscript{67} 31 U.S.C. 5318(l); H.R.Rep.No. 107-250, at 62-3 (2001) ("Section [326](a) amends 31 U.S.C. 5318 by adding a new subsection governing the identification of account holders. Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a ‘street name’ or omnibus account in the broker-dealer's name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to ‘look through’ the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund's customers. Thus, the fund would not be required to ‘look through’ the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature.

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

Reports to Congress. Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

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exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings. 69

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

International Cooperation. Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers. 70

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (i.e., the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.


70 H.R.Rep.No. 107-250, at 67 (2001) (“This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury’s progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

“The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime”).
**Crimes.** Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, smuggling, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
Section 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds 'by, to or through a financial institution.' For the purposes of both statutes, the term 'financial institution' is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

The definition of 'financial institution' in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of 'commercial bank' or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad--say to a Mexican bank--and launders them through a series of financial transactions, the government conceivably could not rely on the definition of a 'financial institution' in 1956(c)(6) to establish that the transaction was a 'financial transaction' within the meaning of 1956(c)(4)(B) (defining a 'financial transaction' as a transaction involving the use of a 'financial institution'), or that it was a 'monetary transaction' within the meaning of 1957(f) (defining 'monetary transaction' as, inter alia, a transaction that would be a 'financial transaction' under 1956(c)(4)(B)).

Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launders the proceeds of one of the crimes set forth on a list of 'specified unlawful activities.' 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),” H.R.Rep.No. 107-250, at 38 (2000).

Violations of the special measures and special due diligence requirements of sections 311 and 312 are subject to both civil and criminal penalties by virtue of section 363's amendments to 31 U.S.C. 5321(a) and 5322. The amendments authorize civil penalties and criminal fines of twice the amount of the transaction but not more than $1 million. Criminal offenders would be subject to a fine in the same amount.

71 “[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(e)(6); 18 U.S.C. 1957(f).

The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business.

Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.

Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents. They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

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73 “The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business.

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“Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive,” H.R.Rep.No. 107-250, at 54 (2001).

74 “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
• 18 U.S.C. 476 (taking impressions of tools used for obligations and securities) from 10 to 25 years;
• 18 U.S.C. 477 (possessing or selling impressions of tools used for obligations or securities) from 10 to 25 years;
• 18 U.S.C. 484 (connecting parts of different notes) from 5 to 10 years;
• 18 U.S.C. 493 (bonds and obligations of certain lending agencies) from 5 to 10 years;
• 18 U.S.C. 478 (foreign obligations or securities) from 5 to 20 years;
• 18 U.S.C. 479 (uttering counterfeit foreign obligations or securities) from 3 to 20 years;
• 18 U.S.C. 480 (possessing counterfeit foreign obligations or securities) from 1 to 20 years;
• 18 U.S.C. 481 (plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities) from 5 to 25 years;
• 18 U.S.C. 482 (foreign bank notes) from 2 to 20 years; and
• 18 U.S.C. 483 (uttering counterfeit foreign bank notes) from 1 to 20 years.

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

**Bulk Cash.** Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act’s bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting. 

The section appears to be the product of reactions to the Supreme Court’s decision in *United States v. Bajakian*, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court’s

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75 “For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).
As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency—representing the proceeds of drug trafficking and other criminal offenses—is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad. . . .

Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United States without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute,” H.R.Rep.No. 107-250 at 36-7 (2001).

Section 5317 of title 31 once called for civil forfeiture of property traceable to a violation of 31 U.S.C. 5316 (reports on exporting or importing money instruments worth $10,000 or more). Section 372 of the Act recasts section 5317 to provide for civil and criminal forfeitures for violations of 31 U.S.C. 5316, of 31 U.S.C. 5313 (reports on domestic coins and currency transactions involving $10,000 or more) and of 31 U.S.C. 5324 (structuring transactions to evade reporting requirements (smurfing)).

Extraterritorial Jurisdiction. The Act makes 18 U.S.C. 1029, the federal statute condemning various crimes involving credit cards, PIN numbers and other access devices, applicable overseas if the card or device is issued by or controlled by an American bank or other entity and some article is held in or transported to or through the United States during the course of the offense, section 377. The change was part of the original Justice Department proposals. Justice explained that, “[financial crime] admits of no border, utilizing the integrated global financial network for ill purposes. This provision would apply the financial crimes prohibitions to conduct committed abroad, so long as the tools or proceeds of the crimes pass through or are in the United States,” DoJ at §408. The section, however, appears to limit the otherwise applicable extraterritorial jurisdiction implicit in section 1029, since federal courts would likely recognize extraterritorial jurisdiction over a violation of the statute.

Examination of forfeiture in false reporting cases under the Constitution's Excessive Fines Clause. As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency—representing the proceeds of drug trafficking and other criminal offenses—is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad. . . .
under either circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.77

**Venue.** Section 1004 relies on *dicta* in *United States v. Cabrales*, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering,78 in the state and district in which the monetary transaction takes place. The Supreme Court in *Cabrales* held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in *dicta*, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.79

**Forfeiture.** Forfeiture is the government confiscation of property as a consequence of crime.80 The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 *et seq.* (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

**Constitutional Considerations.** The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 *et seq.*, which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the

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78 “The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed,” *U.S.Const.* Art.III, §2, cl.3.

79 “[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,” *U.S.Const.* Amend. VI.

79 See also, *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnaping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.

jurisdiction of the United States, belonging to any foreign individual, foreign entity, or foreign country whom they determine to have planned, authorized, aided or engaged in an attack on the United States by a foreign country or foreign nationals. The section also permits the government to present secretly (ex parte and in camera) any classified information upon which the forfeiture was based should the decision be subject to judicial review. The Justice Department requested the section as a revival of the President's powers in times of unconventional wars. By virtue of section 316, property owners may initiate a challenge to a confiscation by filing a claim under the rules applicable in maritime confiscations. The section permits two defenses to forfeiture – that the property is not subject to confiscation under section 106 or that the claimant is entitled to the innocent owner defense of 18 U.S.C. 983(d). The characterization of the defenses as “affirmative defense” indicates that the claimant bears the burden of proof. The innocent owner defenses of 18 U.S.C. 983(d) are probably not available in cases under section 106, since that section is explicitly

81 “This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App.U.S.C. §5(b).

“This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress's war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

“The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2),” DoJ at §159.

82 “An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
The Justice Department also recommended enactment of an overlapping provision which ultimately passed as section 806 of the Act without any real discussion of the relationship of the two sections. Section 806 authorizes confiscation of all property, regardless of where it is found, of any individual, entity, or organization engaged in domestic or international terrorism (as defined in 18 U.S.C. 2331), against the United States, Americans or their property, 18 U.S.C.

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83 18 U.S.C. 983(i)(2)(D).

84 “The exclusion of certain provisions of Federal law from the definition of the term ‘civil forfeiture statute’ in section 983(i) of title 18, United States Code, shall not be construed to deny an owner of property the right to contest the confiscation of assets of suspected international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C) subchapter II of chapter 5 of title 5, United States Code (commonly known as the ‘Administrative Procedure Act’).” Sec. 316(c)(1).

85 “Current law does not contain any authority tailored specifically to the confiscation of terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available current forfeiture laws require detailed tracing that is quite difficult for accounts coming through the banks of countries used by many terrorists.

‘This section increases the government's ability to strike at terrorist organizations' economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001,” DoJ, at §403. The House Report on H.R. 2975 which contained versions of both sections is no more explicit on the relation of the two sections.

86 “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5)(as amended by section 802 of the Act).

Section 806 as discussed below also calls for the more common confiscation of property derived from and or facilitating acts of domestic or international terrorism against the United States or its citizens. Confiscations under 806 may be challenged under the procedures of 18 U.S.C. 983, since they are not exempted there. To the extent that forfeiture under section 806 is based on international rather than domestic terrorism, claimants may also use the procedures of section 316.

Confiscation based solely on the fact that the property is owned by a criminal offender, rather than that it is derived from or facilitates some crime is fairly uncommon. It is the mark of common law forfeiture of estate. At common law, a felon forfeited all of his property. Most contemporary forfeiture statutes employ statutory forfeiture, a more familiar presence in American law, which consists of the confiscation of things whose possession is criminal, of the fruits of crime, and of the means of crime – untaxed whiskey, the drug dealer’s profits, and the rum runner’s ship.

Three characteristics set forfeiture of estate apart. The property is lost solely by reason of its ownership by a felon. All of a felon’s property is confiscated, not merely that which is related to the crime for which he is convicted. Finally, it occasions attainder which negates the felon’s right to hold property or for title to property to pass through him to his heirs. It was with this in mind, that the Framers declared that “no attainder of treason shall work corruption of blood or forfeiture exception during the life of the person attainted.” And for this reason, President Lincoln insisted that the confiscated real estate of Confederate supporters should revert their heirs at death.

87 Austin v. United States, 509 U.S. 602, 611-12 (1993)(“Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture . . . . Of England’s three kinds of forfeiture, only the third took hold in the United States”).


89 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal in personam proceedings following criminal conviction as a means of accomplishing confiscation.
Neither section 106 nor 806 require conviction of the terrorist property owner.\(^90\) Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers.\(^91\) The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners.\(^92\) Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them.\(^93\) The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate

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\(^{90}\) Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c)(“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act”).

\(^{91}\) *Silesian American Corp. V. Clark*, 332 U.S. 469 (1947); cf., *Societe Internationale v. Rogers*, 357 U.S. 197, 211 (1958)(“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).

\(^{92}\) *Zittman v. McGrath*, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’”).

any presumption of remedial purposes.\textsuperscript{94} The same has been said of the applicability of the ex post facto clause.\textsuperscript{95}

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO.\textsuperscript{96} If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

\textit{Other Forfeiture Amendments.} In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.\textsuperscript{97}


\textsuperscript{95} See \textit{e.g.}, \textit{United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.)}, 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law's demands, \textit{Landgraf v. USI Film Products}, 511 U.S. 244, 265-66 (1994).

\textsuperscript{96} \textit{DoJ}, at §403.

\textsuperscript{97} 18 U.S.C. 1956(b). \textit{Cf.}, H.R.Rep.No. 107-250, at 54-5 (2001) (“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas.\(^98\) Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted

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\(^98\) 18 U.S.C. 981(k).  H.R.Rep.No. 107-250, at 57-8 (2001)("Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank's customers.

"Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank's correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

"The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests").
defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation.\footnote{99}

Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here.\footnote{100} Section 320 enlarges this provisions to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. \(1956(c)(7)(B)\), and continues the reciprocal felony requirements.\footnote{101} This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.\footnote{102}

\footnote{99} Cf., H.R.Rep. No. 107-250, at 58-9 (2001) (“Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of ‘substitute assets’ when the defendant has placed the property otherwise subject to forfeiture ‘beyond the jurisdiction of the court.’ Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

“This section amends 21 U.S.C. 853 to make clear that a court in a criminal case may issue a repatriation order—either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court’s authority under 21 U.S.C. 853(e) to restrain property—so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both”).

\footnote{100} 18 U.S.C. 981(a)(1)(B).

\footnote{101} H.R.Rep. No. 107-250, at 56 (2001)(“This section is intended to reinforce the United States’ compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act”).

\footnote{102} H.R.Rep. No. 107-250, at 59-60 (2001)(“Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country.

“This specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
A fugitive may not challenge a federal forfeiture.\textsuperscript{103} Section 322 applies this fugitive disenitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in “order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.”

to contest the restraining order could do so on the ground that 28 U.S.C. 2467 was not properly applied to the particular case, but could not oppose the restraining order on any ground that could also be raised in the proceedings pending in a foreign court. This provision prevents a litigant from taking ‘two bites at the apple’ by raising objections to the basis for the forfeiture in the Federal court that he also raised, or is entitled to raise, in the foreign court where the forfeiture action is pending. It complements the existing provision in section 2467(e) providing that the Federal court is bound by the findings of fact of the foreign court, and may not look behind such findings in determining whether to enter an order enforcing a foreign forfeiture judgment.

“This section also amends 28 U.S.C. 2467 to make clear that it is not necessary to prove that the person asserting an interest in the property received actual notice of the forfeiture proceedings. As is the case with respect to forfeitures under U.S. law, it is sufficient if the foreign nation takes steps to provide notice, in accordance with the principles of due process. See Gonzalez v. United States, 1997 WL 278123 (S.D.N.Y. 1997) (‘the [G]overnment is not required to ensure actual receipt of notice that is properly mailed’); Albajon v. Gugliotta , 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant's identifications, and mailed after claimant released from jail, is sufficient to satisfy due process, even if claimant never received notice); United States v. Schiavo , 897 F. Supp. 644, 648 49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; due process satisfied even if he did not receive the notice).

“Finally, 28 U.S.C. 2467 is amended to authorize the enforcement of a forfeiture judgment based on any foreign offense that would constitute an offense giving rise to a civil or criminal forfeiture of the same property if the offense had been committed in the United States. This is one of two safeguards that the statute contains against the enforcement of judgments that the United States does not consider appropriate for enforcement: if the judgment is based on an act that would not constitute a crime in the United States, such as removing assets from the reach of a repressive regime, it could not be enforced. In addition, section 2467 already provides that a foreign judgment may only be enforced by a Federal court at the request of the United States, and only after the Attorney General has certified that the judgment was obtained in accordance with the principles of due process. Thus, neither a foreign Government nor a foreign private party could enforce a foreign judgment on its own under this provision.’).

Note that the safeguard to which the report refers is the range of foreign offenses that will support an enforceable confiscation order, \textit{i.e.,} drug offenses and crimes on the money laundering predicate offense list, and that the amendment narrows that safeguard by adding additional foreign offenses, \textit{i.e.,} any foreign equivalent of a federal crime which would support a confiscation order.

\textsuperscript{103} 28 U.S.C. 2466.
Alien Terrorists and Victims

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

**Border Protection.** The border protection provisions:

- authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401

- authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402

- remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404

- authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405

- authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.

- instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007

- direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418

- express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414

- add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415

- call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416

- limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
• instruct the Attorney General to report on the feasibility of using biometric scanners to help prevent terrorists and other foreign criminals from entering the country, section 1008

• authorize appropriations of $250,000 for the FBI to determine the feasibility of providing airlines with computer access to the names of suspected terrorists, section 1009

• authorize reciprocal sharing of the State Department’s visa lookout data and related information with other nations in order to prevent terrorism, drug trafficking, slave marketing, and gun running, section 413

**Detention and Removal.** Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity, 8 U.S.C. 1227 (a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(iv). Aliens may be inadmissible for any number of terrorism-related reasons, 8 U.S.C. 1182 (a)(3)(B). Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported.


Section 411 defines “terrorist organization” to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the Federal Register as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C.

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104 As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).
1182(a)(3)(B)(iv). Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).

Prior law made representatives of terrorist organizations designated by the Secretary under section 219 (8 U.S.C. 1189) inadmissible, 8 U.S.C. 1182(a)(3)(B)(i) (IV)(2000 ed.). And so they remain. Section 411 makes representatives of political, social or similar groups, whose public endorsements of terrorist activities undermines U.S. efforts to reduce or eliminate terrorism, inadmissible as well, 8 U.S.C. 1882(a)(3) (B)(i)(IV).

An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in “premeditated, politically motivated violence perpetrated against noncombatant targets,” or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security or endanger some individual or the general public. The Attorney General's determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

Victims. The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

- permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421\(^{105}\)
- extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422\(^{106}\)

\(^{105}\) “The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

\(^{106}\) “The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks. The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application. Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

“Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 31.

“Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.


107 “Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

“The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

“The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death),” H.R.Rep.No. 107-236, at 68 (2001).

108 “Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien’s 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien’s 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
Other Crimes, Penalties, & Procedures

New Crimes. The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department, the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offense for certain individuals—such as convicted felons, illegal aliens, and fugitives—to possess biological toxins or agents, 18 U.S.C. 175b. Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.

109 “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . . .” DoJ at §305.

110 The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

111 “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2)(“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.\(^{112}\)

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D). The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

\(^{112}\) U.S. Const. Art.III, §2, cl.3 (“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . .”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . . .”); United States v. Cabrales, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from Cabrales when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnapping occurred notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999)(“By way of comparison, last Term in Cabrales we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).
• chemical weapons offenses, 18 U.S.C. 229;
• terrorist attacks on mass transportation, 18 U.S.C. 1993;
• sabotage of a nuclear facility, 42 U.S.C. 2284; and
• sabotage of interstate pipelines, 49 U.S.C. 60123(b).

And it adds expert advice or assistance to the types of assistance that may not be provided under section 2339A. This last addition may encounter the same First Amendment vagueness problems some courts have found in assistance which takes the form of “training” and “personnel,” Humanitarian Law Project v. Reno, 205 F.3d 1130, 1137-136 (9th Cir. 2000). Finally, the section announces that a prosecution for violation of section 2339A (support of terrorists) may be brought where the support is provided or where the predicate act of terrorism occurs. There may be some question whether the Constitution permits prosecution where the predicate act occurs.  

Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.


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113 The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of ‘material support or resources’ is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’),” DoJ at 306.


115 “The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill (‘Federal terrorism offenses’) is used in identifying the relevant crimes,” DoJ, at §304.

New Penalties. The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. 3571(b),(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense.\textsuperscript{117}

The proposal, however, failed to identify the critical elements that would trigger the alternative.\textsuperscript{118} Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

- for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

- for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

\textsuperscript{117} “Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersede lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,”\textit{DoJ}, at §302.

\textsuperscript{118} “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense,”\textit{Draft} at §302.
• for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;

• for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;

• for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;

• for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and

• for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism. 119 Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:

• arson committed within a federal enclave, 18 U.S.C. 81;
• killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);
• destruction of communications facilities, 18 U.S.C. 1362;
• destruction of property within a federal enclave, 18 U.S.C. 1363;
• causing a train wreck, 18 U.S.C. 1922;
• providing material support to a terrorist, 18 U.S.C. 2339A;
• torture committed overseas under color of law, 18 U.S.C. 2340A;
• sabotage of a nuclear facility, 42 U.S.C. 2284;

119 “The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §§846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

“This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.
When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years). The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission), a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

120 Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

121 “Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.

“This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders). 122

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

**Other Procedural Adjustments.** In other procedural adjustments designed to facilitate criminal investigations, the Act:

- increases the rewards for information in terrorism cases
- expands the Posse Comitatus Act exceptions
- authorizes “sneak and peek” search warrants
- permits nationwide and perhaps worldwide execution of warrants in terrorism cases
- eases government access to confidential information
- allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
- lengthens the statute of limitations applicable to crimes of terrorism
- clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
- adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B. 123

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122 It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, e.g., damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

123 When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001)(remarks of Rep. Sensenbrenner); for general background, see, Doyle, *McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys*, CRS REP.NO. RL30060 (Dec. 14, 2001).
Rewards. The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L.105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism.124

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

Posse Comitatus. The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.125

Delayed notification of a search (sneak and peek). Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take

124 The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct threat assessments for federal agencies, and to reimburse federal agencies for the costs of detaining terrorist suspects overseas.

125 For a general discussion of the Posse Comitatus Act, see, Doyle, The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law, CRS REP.NO. 95-964 (June 1, 2000).
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, Richards v. Wisconsin, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, Wilson v. Arkansas, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, Dalia v. United States, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, cf., United States v. Miller, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, United States v. Freitas, 800 F.2d 1451, 1453 (9th Cir. 1986).126
Amendment, demands that surreptitious entries be closely circumscribed,” United States v. Freitas (Freitas I), 800 F.2d 1451, 1455-456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, United States v. Freitas (Freitas II), 856 F.2d 1425 (9th Cir. 1988).

“No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in Dalia v. United States, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in Dalia, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property. . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. See United States v. New York Telephone Co., 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . . Although the Freitas I court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in United States v. Villegas, 899 F.2d 1324 (1999). Although the Freitas I court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in Villegas. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the Freitas I court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” United States v. Pangburn, 983 F.2d 449, 453-55 (2d Cir. 1993).

In Simons, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
The Justice Department urged that the conflict be resolved with a uniform rule which permitted sneak and peek warrants under the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage.\footnote{129}{The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities," DoJ at §353.}

The Act, in section 213, stops short of the Justice Department proposal. Characterized as a codification of the Second Circuit decision, 147 Cong.Rec. H7197 (daily ed. Oct. 23, 2001), the Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C. 3103a. Its sneak and peek authorization reaches all federal search and seizure warrants where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (e.g., risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (e.g., jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, i.e., in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation.\footnote{130}{Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department’s initial proposal, the Department’s justification does not address the question.} The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean...
constitutionally “reasonable,” that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

**Nationwide terrorism search warrants.** The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either “within or outside the district,” (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases. The provision may anticipate execution both in this country and overseas. The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage. Neither Rule 41 nor any other provision of federal

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131 The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

132 The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

133 *United States v. Barona*, 56 F.3d 1087, 1092 (9th Cir. 1995)(“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994)(“if American law enforcement officials substantially participated in the search or if the

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” F.R.Crim.P. 41, *Advisory Committee Notes: 1990 Amendment*. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

**Terrorists’ DNA.** The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards *per se*.  

Existing federal law allowed the Attorney General to collect samples from foreign officials conducting the search were actually acting as agents for their American counterparts’); *United States v. Maturo*, 982 F.2d 57, 61 (2d Cir. 1992)(“where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials” or “where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials”); *United States v. Mitro*, 880 F.2d 1480, 1482 (1st Cir. 1989)(“where American agents participated in the foreign search or the foreign officers acted as agents for their American counterparts”); *United States v. Mount*, 757 F.2d 1315, 1318 (D.C.Cir. 1985)(“if American officials or officers participated in some significant way”); *United States v. Marzano*, 537 F.2d 257, 270 (7th Cir. 1976)(declining to adopt the “joint venture” standards, but finding level of American participation in the case before it insignificant); *United States v. Morrow*, 537 F.2d 120, 139 (5th Cir. 1976)(“if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts”); each of the decisions also suggests that evidence secured in a manner which shocked the conscience of the court would be excluded.

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134 The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, see, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), reprinted, 78 *Cong.Rec.* 4982-983 (1934)(“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.)(confering judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

federal prisoners convicted of a variety of violent crimes, 42 U.S.C. 14135a. The Act enlarges the predicate offense list to include any crime of violence or any terrorism offense, section 503.136

**Access to Educational Records.** Finally, the Act calls for an ex parte court order procedure under which senior Justice Department officials may seek authorization to collect educational records relevant to an investigation or prosecution of a crime of terrorism, section 507 (as an exception to the confidentiality requirements of the General Education Provisions Act, 20 U.S.C. 1232g), section 508 (as an exception to the confidentiality requirements of the National Education Statistics Act, 20 U.S.C. 9007).

**Statute of Limitations.** Prosecution for murder in violation of federal law may be initiated at any time, 18 U.S.C. 3281. A five year statute of limitations applied for most other federal crimes before passage of the Act, with a few exceptions. Among the relevant exceptions were an eight year statute of limitations for several terrorist offenses, 18 U.S.C. 3286,137 and a ten year statute of limitations for a few arson and explosives offenses, 18 U.S.C. 3295. The Justice Department recommended the elimination of a statute of limitations in terrorism cases.138

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136 Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples form convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes,” DoJ at §353.


137 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

138 “This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

“This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in
The Act takes less dramatic action in section 809. It eliminates the statute of limitations for any crime of terrorism\textsuperscript{139} that risks or results in a death or serious bodily injury, 18 U.S.C. 3286. In the absence of such a risk or result, all other terrorism offenses become subject to the eight year statute of limitations unless already covered by the ten year statute for explosives and arson offenses, 18 U.S.C. 3286.

Application of the statute of limitations rarely provokes a constitutional inquiry. Nevertheless, due process precludes prosecution when it can be shown that pre-indictment delay “caused substantial prejudice to [a defendant’s] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.”\textsuperscript{140} Moreover, a judicial difference of opinion has appeared in those cases connection with the September 11, 2001 terrorist attacks. The constitutionality of such retroactive applications of changes in statutes of limitations is well-settled. See, e.g., \textit{United States v. Grimes}, 142 F.3d 1342, 1350-51 (11th Cir. 1998); \textit{People v. Frazer}, 982 P.2d 180 (Cal. 1999).

“Existing federal law (18 U.S.C. §3282) bars prosecuting most offenses after five years. 18 U.S.C. §3286, as currently formulated, extends the limitation period for prosecution for certain offenses that may be committed by terrorists – but only to eight years. While this is a limited improvement over the five-year limitation period for most federal offenses, it is patently inadequate in relation to the catastrophic human and social costs that frequently follow from such crimes as destruction of aircraft (18 U.S.C. §32), aircraft hijackings ([49] U.S.C. §§46502, 46504-06, attempted political assassinations (18 U.S.C. §§351, 1116, 1751), or hostage taking (18 U.S.C. §1203). These are not minor acts of misconduct which can properly be forgiven or forgotten merely because the perpetrator has avoided apprehension for some period of time. Anomalously, existing law provides longer limitation periods for such offenses as bank frauds and certain artwork thefts (18 U.S.C.§§3293-94) than it does for crimes characteristically committed by terrorists.

“In many American jurisdictions, the limitation periods for prosecution for serious offenses are more permissible than those found in federal law, including a number of states which have no limitation period for the prosecution of felonies generally. While this section does not go so far, it does eliminate the limitation period for prosecution of the major crimes that are most likely to be committed by terrorists (‘Federal terrorism offenses’), as specified in section 309 of this bill,” \textit{DoJ} at 301.

\textsuperscript{139} As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 (sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period.\footnote{141} Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.\footnote{142}

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (Grimes, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (Frazer, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

**Extraterritoriality.** Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States or elsewhere. . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.\footnote{143}

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnaping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.

\footnote{141} United States v. De La Matta, 266 F.3d 1275, 1286 (11th Cir. 2001); United States v. Grimes, 142 F.3d 1342, 1351 (11th Cir. 1998); United States v. Morrow, 177 F.3d 272, 294 (5th Cir. 1999); Falter v. United States, 23 F.2d 420, 425-26 (2d Cir. 1928).

\footnote{142} People v. Frazer, 24 Cal.4th 737, 759, 982 P.2d 180, 1294, 88 Cal.Rptr.2d 312, 327 (1999).

\footnote{143} United States v. Layton, 855 F.2d 1388 (9th Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); United States v. Benítez, 741 F.2d 1312 (11th Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.144

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

Victims. Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11th Victim Compensation Fund legislation before it passed the Act. Consequently, the Act’s victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 et seq., and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 et seq.

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a nonciviilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:

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• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year)(42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d) (5)), section 621(d)

• waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

• eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
• makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

• prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

• allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

• reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

• makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

• allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603(b)(1)), section 624(b)

• establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

**Increasing Institutional Capacity.** A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

- $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)

- necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)

- $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)

- $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816

- $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701

- $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)

- $5 million for DEA police training in South and Central Asia, section 1007.

**Miscellaneous.** Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might to used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
The USA PATRIOT Act: A Legal Analysis

April 15, 2002

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Summary

The USA PATRIOT Act passed in the wake of the September 11 terrorist attacks. It flows from a consultation draft circulated by the Department of Justice, to which Congress made substantial modifications and additions. The stated purpose of the Act is to enable law enforcement officials to track down and punish those responsible for the attacks and to protect against any similar attacks.

The Act grants federal officials greater powers to trace and intercept terrorists’ communications both for law enforcement and foreign intelligence purposes. It reenforces federal anti-money laundering laws and regulations in an effort to deny terrorists the resources necessary for future attacks. It tightens our immigration laws to close our borders to foreign terrorists and to expel those among us. Finally, it creates a few new federal crimes, such as the one outlawing terrorists’ attacks on mass transit; increases the penalties for many others; and institutes several procedural changes, such as a longer statute of limitations for crimes of terrorism.

Critics have suggested that it may go too far. The authority to monitor e-mail traffic, to share grand jury information with intelligence and immigration officers, to confiscate property, and to impose new book-keeping requirements on financial institutions, are among the features troubling to some.

The Act itself responds to some of these reservations. Many of the wiretapping and foreign intelligence amendments sunset on December 31, 2005. The Act creates judicial safeguards for e-mail monitoring and grand jury disclosures; recognizes innocent owner defenses to forfeiture; and entrusts enhanced anti-money laundering powers to those regulatory authorities whose concerns include the well being of our financial institutions.

This report, stripped of its citations and footnotes, is available in an abbreviated form as The USA PATRIOT Act: A Sketch, CRS Rep.No. RS21203. In addition, much of the information contained here may also be found under a different arrangement in a report entitled, Terrorism: Section by Section Analysis of the USA PATRIOT Act, CRS Rep.No. RL31200 (Dec. 10, 2001). A wider array of terrorism-related analysis appears on the CRS terrorism electronic briefing book page.
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The USA PATRIOT Act: A Legal Analysis

Introduction

Congress passed the USA PATRIOT Act (the Act) in response to the terrorists’ attacks of September 11, 2001. The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to further close our borders to foreign terrorists and to detain and remove those within our borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it is not without safeguards, critics contend some of its provisions go too far. Although it grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough.


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1 P.L. 107-56, 115 Stat. 272 (2001); its full title is the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT).”

2 H.R. 2975 was introduced by Representative Sensenbrenner for himself and Representatives Conyers, Hyde, Coble, Goodlatte, Jenkins, Jackson-Lee, Cannon, Meehan, Graham, Bachus, Wexler, Hostettler, Keller, Issa, Hart, Flake, Schiff, Thomas, Goss, Rangel, Berman and Lofgren; S.1510 by Senator Daschle for himself and Senators Lott, Leahy, Hatch, Graham, Shelby and Sarbanes.

3 H.R. 3004 was introduced by Representative Oxley for himself and Represenatives LaFalce, Leach, Maloney, Roukema, Bentsen, Hooley, Bereuter, Baker, Bachus, King, Kelly, Gillmore, Cantor, Riley, Latourette, Green (of Wisconsin), and Grucci; and reported out of the House Financial Services Committee with amendments on October 15, 2001, H.R.Rep.No. 107-250. H.R. 3004, as reported out, included Internet gambling amendments that were not included in H.R. 2975/H.R.3108.
ed. Oct. 24, 2001), and H.R. 3162 was sent to the President who signed it on October 26, 2001.

**Criminal Investigations: Tracking and Gathering Communications**

A portion of the Act addresses issues suggested originally in a Department of Justice proposal circulated in mid-September. The first of its suggestions called for amendments to federal surveillance laws, laws which govern the capture and tracking of suspected terrorists’ communications within the United States. Federal law features a three-tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications.

The tiers reflected the Supreme Court’s interpretation of the Fourth Amendment’s ban on unreasonable searches and seizures. The Amendment protects private conversations, *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967). It does not cloak information, even highly personal information, for which there is no individual justifiable expectation of privacy, such as telephone company records of calls made to and from an individual's home, *Smith v. Maryland*, 442 U.S. 735 (1979), or bank records of an individual's financial dealings, *United States v. Miller*, 425 U.S. 435 (1976).

Congress responded to *Berger* and *Katz*, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications, 18 U.S.C. 2511. At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious

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6 “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,” *U.S. Const. Amend. IV*.

7 Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
criminal cases. When approved by senior Justice Department officials, law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.

8 "The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of” one or more predicate offense, 18 U.S.C. 2516.

9 The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement), 1751 (presidential and presidential staff assassination, kidnapping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnaping, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or nationalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
Title III court orders come replete with instructions describing the permissible
duration and scope of the surveillance as well as the conversations which may be
seized and the efforts to be taken to minimize the seizure of innocent conversations,
18 U.S.C. 2518. The court notifies the parties to any conversations seized under the
order after the order expires, 18 U.S.C. 2518(8).

Below Title III, the next tier of privacy protection covers some of those matters
which the Supreme Court has described as beyond the reach of the Fourth
Amendment protection – telephone records, e-mail held in third party storage, and the
like, 18 U.S.C. 2701-2709 (Chapter 121). Here, the law permits law enforcement
access, ordinarily pursuant to a warrant or court order or under a subpoena in some
cases, but in connection with any criminal investigation and without the extraordinary
levels of approval or constraint that mark a Title III interception, 18 U.S.C. 2703.

Least demanding and perhaps least intrusive of all is the procedure that governs
court orders approving the government’s use of trap and trace devices and pen
registers, a kind of secret “caller id”, which identify the source and destination of
calls made to and from a particular telephone, 18 U.S.C. 3121-3127 (Chapter 206).
The orders are available based on the government's certification, rather than a finding
of the court, that the use of the device is likely to produce information relevant to the
investigation of a crime, any crime, 18 U.S.C. 3123. The devices record no more than
the identity of the participants in a telephone conversation, but neither the orders nor
the results they produce need ever be revealed to the participants.

The Act modifies the procedures at each of the three levels. It:

offense involving counterfeiting punishable under 18 U.S.C. 471, 472, or 473; (e) any offense
involving fraud connected with a case under title 11 or the manufacture, importation,
receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or
other dangerous drugs, punishable under any law of the United States; (f) any offense
including extortionate credit transactions under 18 U.S.C. 892, 893, or 894; (g) a violation
of 31 U.S.C. 5322 (dealing with the reporting of currency transactions); (h) any felony
violation of 18 U.S.C. 2511 and 2512 (interception and disclosure of certain communications
and to certain intercepting devices); (i) any felony violation of 18 U.S.C. ch. 71 (obscenity);
(j) 49 U.S.C. 60123(b) (destruction of a natural gas pipeline), 46502 (aircraft piracy); (k) 22
U.S.C. 2778 (Arms Export Control Act); (l) the location of any fugitive from justice from an
offense described in this section; (m) a violation of 8 U.S.C. 1324, 1327, or 1328; (n) any
felony violation of 18 U.S.C. 922, 924 (firearms); (o) any violation of 26 U.S.C. 5861
(firearms); (p) a felony violation of 18 U.S.C. 1028 (production of false identification
documents), 1542 (false statements in passport applications), 1546 (fraud and misuse of visas,
permits, and other documents) or a violation of 8 U.S.C. 1324, 1327, or 1328 (smuggling of
aliens); (p) 229 (chemical weapons), 2332 (terrorist violence against Americans overseas),
2332a (weapons of mass destruction), 2332b (multinational terrorism), 2332d (financial
transactions with countries supporting terrorism), 2339A (support of terrorist), 2332B
(support of terrorist organizations); (r) any conspiracy to commit any of these, 18 U.S.C.
2516(1) (crimes added by the Act in italics). Other than telephone face to face conversations
(i.e., electronic communications), the approval of senior Justice Department officials is not
required and an order may be sought in any felony investigation, 18 U.S.C. 2516(3).

10 Or more precisely, they reveal no more than the identity of the numbers assigned to the
telephone lines activated for a particular communication.
permits pen register and trap and trace orders for electronic communications (e.g., e-mail)

authorizes nationwide execution of court orders for pen registers, trap and trace devices, and access to stored e-mail or communication records

treats stored voice mail like stored e-mail (rather than like telephone conversations)

permits authorities to intercept communications to and from a trespasser within a computer system (with the permission of the system’s owner)

adds terrorist and computer crimes to Title III’s predicate offense list

reenforces protection for those who help execute Title III, ch. 121, and ch. 206 orders

encourages cooperation between law enforcement and foreign intelligence investigators

establishes a claim against the U.S. for certain communications privacy violations by government personnel

terminates the authority found in many of the these provisions and several of the foreign intelligence amendments with a sunset provision (Dec. 31, 2005).

**Pen Registers and Trap and Trace Devices.** In section 216, the Act allows court orders authorizing trap and trace devices and pen registers to be used to capture source and addressee information for computer conversations (e.g., e-mail) as well as telephone conversations, 18 U.S.C. 3121, 3123. In answer to objections that e-mail header information can be more revealing than a telephone number, it creates a detailed report to the court, 18 U.S.C. 3123(a)(3).11

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11 “Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public the agency shall ensure that a record will be maintained which will identify – (i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of the such device.

“(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof),” section 216(b)(1).
The use of pen registers or trap and trace devices was limited at one time to the judicial district in which the order was issued, 18 U.S.C. 3123 (2000 ed.). Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States, 18 U.S.C. 3123(b)(1)(C), 3127(2).12

Communications Records and Stored E-Mail. With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber, 18 U.S.C. 2703(a),(b). A warrant will also suffice to seize records describing telephone and other communications transactions without customer notice, 18 U.S.C. 2703(c). In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation, officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records, 18 U.S.C. 2703(b),(c). They can obtain a limited amount of record information (subscribers' names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena, 18 U.S.C. 2703(c)(1)(C). There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial, 18 U.S.C. 2705.

In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider’s customer records, 18 U.S.C. 2703(c)(1)(C).13

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.

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12 The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” DoJ at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

13 Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user's true identity... this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” DoJ at §107.
Previously, only a federal court in the district in which the e-mail was stored could issue the order. Under section 220, federal courts in the district where an offense under investigation occurred may issue orders applicable “without geographic limitation,” 18 U.S.C. 2703.14

The Act, in section 209, treats voice mail like e-mail, that is, subject to the warrant or court order procedure, rather than to the more demanding coverage of Title III once required, United States v. Smith, 155 F.3d 1050, 1055-56 (9th Cir. 1998).

Finally, the Act resolves a conflict between chapter 121 and the federal law governing cable companies. Government entities may have access to cable company customer records only under a court order following an adversary hearing if they can show that the records will evidence that the customer is or has engaged in criminal activity, 47 U.S.C. 511(h). When cable companies began offering telephone and other communications services the question arose whether the more demanding cable rules applied or whether law enforcement agencies were entitled to ex parte court orders under the no-notice procedures applicable to communications providers.15 The Act makes it clear that the cable rules apply when cable television viewing services are

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14 Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

15 See e.g., DoJ at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement’s access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

**Electronic Surveillance.** To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202. A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(i). Yet only the interloper's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.

**Criminal Investigators' Access to Foreign Intelligence Information.**

The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism. It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that “the purpose for the surveillance is to obtain foreign intelligence information,” 50 U.S.C. 1804(a)(7)(B)(2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps “the purpose” might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation

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16 18 U.S.C. 229 (chemical weapons), 2332(terrorist acts of violence committed against Americans overseas), 2332a(use of weapons of mass destruction), 2332b(acts of terrorism transcending national boundaries), 2332d(financial transactions with countries which support terrorists), 2339A(providing material support to terrorists), and 2339B(providing material support to terrorist organizations).

17 “Because service providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves as permitted under current law, they often have no way to exercise their rights to protect themselves from unauthorized attackers. Moreover, such attackers can target critical infrastructures and engage in cyberterrorism,” DoJ at §106. Elsewhere the Act defines “electronic surveillance” for purposes of the Foreign Intelligence Surveillance Act (FISA) to emphasize that the law enforcement authority for this intruder surveillance does not confer similar authority for purposes of foreign intelligence gathering, section 1003 (50 U.S.C. 1801(f)(2)).

Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment's warrant clause. It is here that the “primary purpose” notion originated. In United States v. Truong Dinh Hung, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, “as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.”

Subsequent case law, however, is not as clear as it might be: see e.g., United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984) (“FISA permits federal officials to obtain orders authorizing electronic surveillance ‘for the purpose of obtaining foreign intelligence information.’ The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying officials’s belief that the information sought is the type of foreign intelligence information described”); United States v. Pelton, 835 F.2d 1067, 1075-76 (4th Cir. 1987) (“We also reject Pelton’s claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial”); United States v. Sarkissian, 841 F.2d 959, 907-8 (9th Cir. 1988) (“Defendants rely on the primary purpose test articulated in United States v. Truong Dinh Hung. . . . One other court has applied the primary purpose test. Another court has rejected it . . . distinguishing Truong. A third court has declined to decide the issue. We also decline to decide the issue”); United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1991) (“Appellants attack the government’s surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance”).

Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” DoJ at §153.

The Justice Department sought FISA surveillance and physical search authority on the basis of “a” foreign intelligence purpose. Section 218 of the Act insists that foreign intelligence gathering be a “significant purpose” for the request for the FISA surveillance or physical search order, 50 U.S.C. 1804(a)(7)(B), 1823(a)(7)(B), a more
“(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, infra, quoting, 50 U.S.C. 1801.

“(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210 [subpoenas for communications provider customer records], 211 [access to cable company communication service records], 213 [sneak and peek], 216 [pen register and trap and trace device amendments], 221 [trade sanctions], and 222 [assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005. The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter

21 “(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, infra, quoting, 50 U.S.C. 1801.

22 “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210 [subpoenas for communications provider customer records], 211 [access to cable company communication service records], 213 [sneak and peek], 216 [pen register and trap and trace device amendments], 221 [trade sanctions], and 222 [assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005.

“(b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers' communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices).\textsuperscript{23} Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees,\textsuperscript{24} but could not recover against the United States.\textsuperscript{25} Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice's Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government's request until a court order authorizing access can be obtained.\textsuperscript{26} Another allows providers to disclose customer records to protect the provider's rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others.\textsuperscript{27} A third section,

\begin{itemize}
\item 18 U.S.C. 2511, 2701, and 3121 (2000 ed.), respectively.
\item 18 U.S.C. 2520 and 2707 (2000 ed.).
\item Prior law already granted service providers immunity for disclosure of customer records in compliance with a court access order, 18 U.S.C. 2703(f).
\item “Existing law contains no provision that allows providers of electronic communications service to disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies that threaten death or serious bodily injury. This section amends 18 U.S.C. §2702 to authorize such disclosures if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.

“Current law also contains an odd disconnect: a provider may disclose the contents of the customer's communications in order to protect its rights or property but the current statute does not expressly permit a provider to voluntarily disclose non-content records (such as a subscriber's login records). 18 U.S.C. 2702(b)(5). This problem substantially hinders the ability of providers to protect themselves from cyber-terrorists and criminals. Yet the right to disclose the contents of communications necessarily implies the less intrusive ability to disclose non-content records. In order to promote the protection of our nation's critical infrastructures, this section's amendments allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems,” DoJ at
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

Foreign Intelligence Investigations

Although both criminal investigations and foreign intelligence investigations are conducted in the United States, criminal investigations seek information about unlawful activity; foreign intelligence investigations seek information about other countries and their citizens. Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough.

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA), something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President's authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, United States v. United States District Court, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage.

§110.

28 Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

29 Thus in the name of assisting in the execution of Title III, chapter 121, or chapter 206 order, the courts may not cite the Act as the basis for an order compelling a service provider to make system modifications or provide any other technical assistance not already required under 18 U.S.C. 2518(4), 2706, or 3124(c), see, H.R.Rep.No. 107-236, at 62-3 (2001) (emphasis added) (“This Act is not intended to affect obligations under Communications Assistance for Law Enforcement Act [which addresses law enforcement-beneficial system modifications and the compensation to be paid for the changes], nor does the act impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance”).

30 E.g., As amended by section 902 of the Act, “‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2)(language added by the Act in italics).

31 50 U.S.C. 1801 et seq.
lockers, 50 U.S.C. 1861-1863 (2000 ed.). Intelligence authorities gained narrow passages through other privacy barriers as well.\textsuperscript{32} 

In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs.\textsuperscript{33} There were and still are extra


\textsuperscript{33}“As used in this subchapter: (a) ‘Foreign power’ means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

“(b) ‘Agent of a foreign power’ means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person’s presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, on behalf of a foreign power; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C).

“(c) ‘International terrorism’ means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnaping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

“(d) ‘Sabotage’ means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

“(e) ‘Foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans ("United States persons," i.e., citizens or permanent resident aliens). The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

- permits “roving” surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)
- increases the number of judges on the FISA court from 7 to 11
- allows application for a FISA surveillance or search order when gathering foreign intelligence is a significant reason for the application rather than the reason
- authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations
- sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses
- carries a sunset provision
- establishes a claim against the U.S. for certain communications privacy violations by government personnel
- expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to – (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States,” 50 U.S.C. 1801.

34 Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
**FISA.** FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases.\(^{35}\) It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

**Search and Surveillance for Intelligence Purposes.** Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, *Draft at §151.*

Section 901 of the Act address a concern raised during the 106th Congress relating to the availability of the FISA orders and the effective use of information gleaned from the execution of a FISA order.\(^{37}\) It vests the Director of Central


\(^{36}\) See also, DoJ at §151, “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order’s minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed (50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

\(^{37}\) See e.g., S.Rep.No. 106-352, at 3, 6, 7 (2000)(“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application
process, as interpreted by the OIPR is administratively burdensome and, at times, extremely slow. Many applications undergo months of scrutiny before submission to the court because the OIPR prescribes standards and restrictions not imposed by the statute. . . . In particular, the OIPR has been criticized for an overly restrictive interpretation of the FISA ‘currency’ requirement. This is the issue of how recent a subject’s activities must be to support a finding of probable cause that the subject is engaged in clandestine intelligence gathering activities. . . . While existing law does not specifically address “past activities,” it does not preclude, and legislative history supports, the conclusion that past activities may be part of the totality of circumstances considered by the FISC in making a probable cause determination. . . . By definition, information collected pursuant to a court order issued under the Foreign Intelligence Surveillance Act is foreign intelligence not law enforcement information. Accordingly, the Committee wants to clarify that the FISA ‘take’ can and must be shared by the Federal Bureau of Investigation with appropriate intelligence agencies. For the intelligence mission of the United States to be successful, there must be a cooperative and concerted effort among intelligence agencies. Any information collected by one agency under foreign intelligence authorities that could assist another agency in executing its lawful mission should be shared fully and promptly. Only then can the United States Government pursue aggressively important national security targets including, for example, counterterrorist and counternarcotics targets”); see also, 147 Cong.Rec. S799-803 (daily ed. Feb. 24, 2000)(remarks of Sens. Specter, Torricelli and Biden).

38 “When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevance, an additional factual showing that the communications device has been used to contact an ‘agent of a foreign power’ engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the ‘agent of a foreign power’ prong from the predication, and thus makes the FISA authority more closely track the criminal authority,” DoJ at §155.
Section 214 adjusts the language of the FISA pen register-trap and trace authority to permit its use to capture source and destination information relating to electronic communications (e.g., e-mail) as well as telephone communications, 50 U.S.C. 1842(d). The section makes it clear that requests for a FISA pen register-trap and trace order, like requests for other FISA orders, directed against Americans (U.S. persons) may not be based solely on activities protected by the First Amendment, 50 U.S.C. 1842, 1843.

**Third Party Cooperation and Tangible Evidence.** As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target's activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.

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39 Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise to be entitled to confidentiality. Section 505, in response to the Justice Department's suggestion, allows FBI field offices to make the requests, see DoJ at §157 (“At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports’

40 When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court's order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.’ This would enhance the FBI's ability to monitor international terrorists and intelligence officers who are
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian. The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities, in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B);
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a);
- the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a);
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v;

41 The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigative contexts. The time and difficulty involved in getting such pleadings before the Court usually outweighs the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” DoJ at §156.

42 Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.43

**Access to Law Enforcement Information.** Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community’s access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, Draft at §103.44

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43 H.R.Rep.No. 107-205, at 60-1 (2001) (“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

“The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

“Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual’s credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding—without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information”.

44 See also, DoJ at §103, “This section facilities the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, Draft at §354.  

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, Draft at §154.

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion. It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions.”

45 See also, DoJ at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.” Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officers

46 See also, DoJ at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”

47 Blair v. United States, 250 U.S. 273, 281 (1919)(the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
affairs are conducted in private and outside the presence of the court. Only the
attorney for the government, witnesses under examination, and a court reporter may
attend its proceedings, F.R.Crim.P. 6(d). Matters occurring before the grand jury are
secret and may be disclosed by the attending attorney for the government and those
assisting the grand jury only in the performance of their duties; in presentation to a
successor grand jury; or under court order for judicial proceedings, for inquiry into
misconduct before the grand jury, or for state criminal proceedings, F.R.Crim.P. 6(e).

The Act, in section 203(a), allows disclosure of matters occurring before the
grand jury to “any federal law enforcement, intelligence, protective, immigration,
national defense, or national security” officer to assist in the performance of his
official duties, F.R.Crim.P. 6(e)(3)(C)(i)(V).\footnote{48}

Critics may protest that the change could lead to the use of the grand jury for
intelligence gathering purposes, or less euphemistically, to spy on Americans.\footnote{49} The
proposal was never among those scheduled to sunset, but earlier versions of the
section followed the path used for most other disclosures of grand jury material: prior

\footnote{48} These officers may receive: (1) “foreign intelligence information” that is, information
regardless whether it involves Americans or foreign nationals that “[a] relates to the ability
of the United States to protect against – (aa) actual or potential attack or other grave hostile
acts of a foreign power or an agent of a foreign power; (bb) sabotage or international
terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence
activities by an intelligence service or network of a foreign power;” or [b] “with respect to a
foreign power or foreign territory that relates to – (aa) the national defense or security of the
United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P.
6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that
is, [a] “information relating to the capabilities, intentions, or activities of foreign governments
or elements thereof, foreign organizations, or foreign persons, or international terrorist
activities” or [b] “information gathered and activities conducted, to protect against espionage,
other intelligence activities, sabotage, or assassinations conducted on behalf of foreign
governments or elements thereof, foreign organizations, or foreign persons, or international
terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in
italics).

\footnote{49} Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on
Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25
HARVARD JOURNAL OF LAW & PUBLIC POLICY 699, 719-20 (2002)(“There is a significant
danger that the rule permitting disclosure will be treated as the de facto authorization of an
expansion of the grand jury’s investigative role to encompass seeking material relevant only
to matters of national security, national defense, immigration, and so forth. The grand jury’s
awesome powers should not be unwittingly extended to a much wider range of issues. . .
Since the grand jury operates in secret, there are no public checks on the scope of its
investigations, and witnesses are not permitted to challenge its jurisdiction. Only the
supervising court is in a position to keep the grand jury’s investigation within proper bounds.
Requiring judicial approval of foreign intelligence and counterintelligence information
disclosures would provide a natural check against the temptation to manipulate the grand jury
to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist
Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6
(Nov. 2001)(“The grand jury secrecy rule is a rule of policy which has always had exceptions,
and it has been frequently modified. The secrecy rule has no credible claim to constitutional
stature”).
Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

Law enforcement officials may share Title III information with the intelligence community under the same conditions, section 203(b), although the grand jury and Title III sharing provisions differ in at least three important respects. The court need not be notified of Title III disclosures. On the other hand, the authority for sharing Title III information expires on December 31, 2005, section 224, and agencies and their personnel guilty of intentional improper disclosures may be subject to a claim for damages and disciplinary action, 18 U.S.C. 2520.

The third subsection of section 203 remains something of an enigma. It speaks in much the same language as its counterparts. It allows law enforcement officials to share information with the intelligence community, “notwithstanding any other provisions of law,” section 203(d). It either swallows the other subsections, or supplements them. Several factors argue for its classification as a supplement. Congress is unlikely to have crafted subsections (a), (b) and (c) only to completely

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50 Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

51 “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification. By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

**Increasing Institutional Capacity.** As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a

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52 *Duncan v. Walker*, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted) (“It is our duty to give effect, if possible, to every clause and word of a statute. *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)); see also *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879) (As early as in Bacon's Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

53 *Draft* at §154, “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”
computerized translation capability to be used in foreign intelligence gathering.\textsuperscript{54} Section 907 instructs the Director of the Central Intelligence, in consultation with the Director of the FBI, to report on the creation of a National Virtual Translation Center. The report is to include information concerning staffing, allocation of resources, compatibility with comparable systems to be used for law enforcement purposes, and features which permit its efficient and secure use by all of the intelligence agencies.

**Money Laundering**

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture.\textsuperscript{55} The Act bolsters federal efforts in each area.

**Regulation.** Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.\textsuperscript{56}

\textsuperscript{54} “The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

“The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so,” S.Rep.No. 107-63, at 11 (2001).

\textsuperscript{55} For a brief overview, see, Murphy, *Money Laundering: Current Law and Proposals*, CRS REP.NO. RS21032 (DEC. 21, 2001).

\textsuperscript{56} See e.g., 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
**Records and Reports.** For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler’s checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to files SARs as well, reflecting Congress’ view that the information provided the IRS may be valuable for other law enforcement purposes. This concern is likewise

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58 H.R.Rep.No. 107-250, at 38-9 (2001)(“Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

“Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a ‘Safeguard Procedures Report’ which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

“While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement
reflected in section 357 which asks the Secretary of the Treasury to report on the Internal Revenue Service’s role in the administration of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311 et seq.), and what transfers of authority, if any, are appropriate.

Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action.59 Section 355 expands the immunity to cover disclosures in

59 “Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

“First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor from civil liability applies in arbitration, as well as judicial, proceedings. Second, it amends section 5318(g)(3) to clarify the safe harbor’s coverage of voluntary disclosures (that is, those not covered by the SAR regulatory reporting requirement). The language in section 5318(g)(3)(A) providing that ‘any financial institution that *** makes a disclosure pursuant to *** any other authority *** shall not be liable to any person’ is not intended to avoid the application of the reporting and disclosure provisions of the Federal securities laws to any person, or to insulate any issuers from private rights of actions for disclosures made under the Federal securities laws.

“Subsection [351](b) amends section 5318(g)(2) of title 31--which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed--to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee’s official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
employment references to other insured depository financial institutions provided disclosure is not done with malicious intent.\footnote{31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 66 (2001).}

The Financial Crimes Enforcement Network (FinCEN), a component within the Treasury Department long responsible for these anti-money laundering reporting and record-keeping requirements, 31 C.F.R. pt. 103, was administratively created in 1990 to provide other government agencies with an “intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes,” 55 Fed.Reg. 18433 (May 2, 1990).

The Act, in section 361, makes FinCEN a creature of statute, a bureau within the Treasury Department, 31 U.S.C. 310. Section 362 charges it with the responsibility of establishing a highly secure network to allow financial institutions to file required reports electronically and to permit FinCEN to provide those institutions with alerts and other information concerning money laundering protective measures, 31 U.S.C. 310 note.

**Special Measures.** In extraordinary circumstances involving international financial matters, the Act grants the Secretary of the Treasury, in consultation with other appropriate regulatory authorities, the power to issue regulations and orders involving additional required “special measures” and additional “due diligence” requirements to combat money laundering. The special measure authority, available under section 311, comes to life with the determination that particular institutions, jurisdictions, types of accounts, or types of transactions pose a primary money
laundry concern. These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

61 31 U.S.C. 5318A. The circumstances considered in the case of a suspect jurisdiction are: evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction’s banking regulation; the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

62 The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’ including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

“Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate
business transactions.

“Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

“Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

“The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

“The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

“The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

“The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information that it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

“The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

“The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed
Due Diligence. Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.63

by regulation, order, or otherwise as permitted by law. However, if the Secretary proceeds by issuing an order, the order must be accompanied by a notice of proposed rulemaking relating to the imposition of the special measure, and may not remain in effect for more than 120 days, except pursuant to a regulation prescribed on or before the end of the 120-day period. The fifth special measure may be imposed only by regulation,” H.R.Rep.No. 107-250, at 68-9.

63 See generally, H.R.Rep.No. 107-250, at 71-2 (“Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

“The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

“The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

“For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
**General Regulatory Matters.** The Act establishes several other regulatory mechanisms directed at the activities involving U.S. financial institutions and foreign individuals or institutions. Section 313, for instance, in another restriction on correspondent accounts for foreign financial institutions, prohibits U.S. financial institutions from maintaining correspondent accounts either directly or indirectly for foreign shell banks (banks with no physical place of business\(^{64}\)) which have no affiliation with any financial institution through which their banking activities are subject to regulatory supervision.\(^{65}\)

The Act, in section 325, empowers the Secretary of the Treasury to promulgate regulations to prevent financial institutions from allowing their customers to conceal their financial activities by taking advantage of the institutions’ concentration account practices.\(^{66}\)

The Secretary of the Treasury is instructed in section 326 to issue regulations for financial institutions’ minimum new customer identification standards and record-
Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a ‘street name’ or omnibus account in the broker-dealer's name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to ‘look through’ the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund’s customers. Thus, the fund would not be required to ‘look through’ the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature. 68

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

Reports to Congress. Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.69

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

International Cooperation. Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.70 

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (i.e., the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.


70 H.R.Rep.No. 107-250, at 67 (2001)(“This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury's progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

“The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime”).
**Crimes.** Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, smuggling, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
expands 18 U.S.C. 1956 to cover financial transactions conducted in foreign financial institutions.\textsuperscript{71}

Section 329 makes it a federal crime to corruptly administer the money laundering regulatory scheme. Offenders are punishable by imprisonment for not more than 15 years and a fine of not more than three times the amount of the bribe.

Section 5326 of title 31 authorizes the Secretary of the Treasury to impose temporary, enhanced reporting requirements upon financial institutions in areas victimized by substantial money laundering activity (geographic targeting regulations and orders). Section 353 makes it clear that the civil sanctions, criminal penalties, and prohibitions on smurfing (structuring transactions to evade reporting requirements) apply to violations of the regulations and orders issued under 31 U.S.C. 5326.\textsuperscript{72} It also extends the permissible length of the temporary geographical orders from 60 to 180 days.

Violations of the special measures and special due diligence requirements of sections 311 and 312 are subject to both civil and criminal penalties by virtue of section 363's amendments to 31 U.S.C. 5321(a) and 5322. The amendments authorize civil penalties and criminal fines of twice the amount of the transaction but not more than $1 million. Criminal offenders would be subject to a fine in the same amount.

\textsuperscript{71} “[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

“The definition of ‘financial institution’ in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of ‘commercial bank’ or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad--say to a Mexican bank--and launders them through a series of financial transactions, the government conceivably could not rely on the definition of a ‘financial institution’ in 1956(c)(6) to establish that the transaction was a ‘financial transaction’ within the meaning of 1956(c)(4)(B) (defining a ‘financial transaction’ as a transaction involving the use of a ‘financial institution’), or that it was a ‘monetary transaction’ within the meaning of 1957(f) (defining ‘monetary transaction’ as, inter alia, a transaction that would be a ‘financial transaction’ under 1956(c)(4)(B)).

“Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launders the proceeds of one of the crimes set forth on a list of ‘specified unlawful activities.’ 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),” H.R.Rep.No. 107-250, at 38 (2000).

Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.73

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents.74 They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

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73 “The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business.

“Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.

“Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive,” H.R.Rep.No. 107-250, at 54 (2001).

74 “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

**Bulk Cash.** Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act’s bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting.75

The section appears to be the product of reactions to the Supreme Court’s decision in *United States v. Bajakian*, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court’s

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75 “For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).
As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency – representing the proceeds of drug trafficking and other criminal offenses – is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad. . . .

Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United States without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

Extraterritorial Jurisdiction. The Act makes 18 U.S.C. 1029, the federal statute condemning various crimes involving credit cards, PIN numbers and other access devices, applicable overseas if the card or device is issued by or controlled by an American bank or other entity and some article is held in or transported to or through the United States during the course of the offense, section 377. The change was part of the original Justice Department proposals. Justice explained that, “[f]inancial crime[] admits of no border, utilizing the integrated global financial network for ill purposes. This provision would apply the financial crimes prohibitions to conduct committed abroad, so long as the tools or proceeds of the crimes pass through or are in the United States,” DoJ at §408. The section, however, appears to limit the otherwise applicable extraterritorial jurisdiction implicit in section 1029, since federal courts would likely recognize extraterritorial jurisdiction over a violation of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United States without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute,” H.R.Rep.No. 107-250 at 36-7 (2001).
under either circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.77

**Venue.** Section 1004 relies on *dicta* in *United States v. Cabrales*, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering,78 in the state and district in which the monetary transaction takes place. The Supreme Court in *Cabrales* held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in *dicta*, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.79

**Forfeiture.** Forfeiture is the government confiscation of property as a consequence of crime.80 The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 et seq. (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

**Constitutional Considerations.** The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 et seq., which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the

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78 “The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.” *U.S.Const.* Art.III, §2, cl.3.

“[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,” *U.S.Const.* Amend. VI.

79 See also, *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnaping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.

80 For general background information, see, Doyle, *Crime and Forfeiture*, CRS REP.NO. 97-139A (Oct. 11, 2000).
jurisdiction of the United States, belonging to any foreign individual, foreign entity, or foreign country whom they determine to have planned, authorized, aided or engaged in an attack on the United States by a foreign country or foreign nationals. The section also permits the government to present secretly (ex parte and in camera) any classified information upon which the forfeiture was based should the decision be subject to judicial review. The Justice Department requested the section as a revival of the President's powers in times of unconventional wars. By virtue of section 316, property owners may initiate a challenge to a confiscation by filing a claim under the rules applicable in maritime confiscations. The section permits two defenses to forfeiture – that the property is not subject to confiscation under section 106 or that the claimant is entitled to the innocent owner defense of 18 U.S.C. 983(d). The characterization of the defenses as “affirmative defense” indicates that the claimant bears the burden of proof. The innocent owner defenses of 18 U.S.C. 983(d) are probably not available in cases under section 106, since that section is explicitly

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81 “This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App.U.S.C. §5(b).

“This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress's war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

“The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2),” DoJ at §159.

82 “An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
excepted from the coverage of 18 U.S.C. 983. The challenge proceedings permit the court to admit evidence, such as hearsay evidence, that would not otherwise be admissible under the Federal Rules of Evidence if the evidence is reliable and if national security might be imperiled should dictates of the Federal Rules be followed, §316(b). The section recognizes the rights of claimants to proceed alternatively under the Constitution or the Administrative Procedure Act.

The Justice Department also recommended enactment of an overlapping provision which ultimately passed as section 806 of the Act without any real discussion of the relationship of the two sections. Section 806 authorizes confiscation of all property, regardless of where it is found, of any individual, entity, or organization engaged in domestic or international terrorism (as defined in 18 U.S.C. 2331), against the United States, Americans or their property, 18 U.S.C.

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83 18 U.S.C. 983(i)(2)(D).

84 “The exclusion of certain provisions of Federal law from the definition of the term ‘civil forfeiture statute’ in section 983(i) of title 18, United States Code, shall not be construed to deny an owner of property the right to contest the confiscation of assets of suspected international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C) subchapter II of chapter 5 of title 5, United States Code (commonly known as the ‘Administrative Procedure Act’).” Sec. 316(c)(1).

85 “Current law does not contain any authority tailored specifically to the confiscation of terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available current forfeiture laws require detailed tracing that is quite difficult for accounts coming through the banks of countries used by many terrorists.

‘This section increases the government’s ability to strike at terrorist organizations’ economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001,” DoJ, at §403. The House Report on H.R. 2975 which contained versions of both sections is no more explicit on the relation of the two sections.

86 “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
Section 806 as discussed below also calls for the more common confiscation of property derived from and or facilitating acts of domestic or international terrorism against the United States or its citizens. Confiscations under 806 may be challenged under the procedures of 18 U.S.C. 983, since they are not exempted there. To the extent that forfeiture under section 806 is based on international rather than domestic terrorism, claimants may also use the procedures of section 316.

Confiscation based solely on the fact that the property is owned by a criminal offender, rather than that it is derived from or facilitates some crime is fairly uncommon. It is the mark of common law forfeiture of estate. At common law, a felon forfeited all of his property. Most contemporary forfeiture statutes employ statutory forfeiture, a more familiar presence in American law, which consists of the confiscation of things whose possession is criminal, of the fruits of crime, and of the means of crime – untaxed whiskey, the drug dealer’s profits, and the rum runner’s ship.

Three characteristics set forfeiture of estate apart. The property is lost solely by reason of its ownership by a felon. All of a felon’s property is confiscated, not merely that which is related to the crime for which he is convicted. Finally, it occasions attainder which negates the felon’s right to hold property or for title to property to pass through him to his heirs. It was with this in mind, that the Framers declared that “no attainder of treason shall work corruption of blood or forfeiture exception during the life of the person attainted.” And for this reason, President Lincoln insisted that the confiscated real estate of Confederate supporters should revert their heirs at death.

of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5)(as amended by section 802 of the Act).

87 Austin v. United States, 509 U.S. 602, 611-12 (1993)(“Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture . . . . Of England’s three kinds of forfeiture, only the third took hold in the United States”).


89 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal in personam proceedings following criminal conviction as a means of accomplishing confiscation.
Neither section 106 nor 806 require conviction of the terrorist property owner.\textsuperscript{90} Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers.\textsuperscript{91} The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners.\textsuperscript{92} Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them.\textsuperscript{93} The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate

\textsuperscript{90} Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c) (“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act”).

\textsuperscript{91} Silesian American Corp. V. Clark, 332 U.S. 469 (1947); cf., Societe Internationale v. Rogers, 357 U.S. 197, 211 (1958) (“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).

\textsuperscript{92} Zittman v. McGrath, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’”).

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806 , the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO. If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

Other Forfeiture Amendments. In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.


95 See e.g., United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.), 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994).

96 DoJ, at §403.

97 18 U.S.C. 1956(b). C.f., H.R.Rep.No. 107-250, at 54-5 (2001)(“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
American Bank, 191 F.3d 30 (1st Cir. 1999).

“The second provision, modeled on 18 U.S.C. 1345(b), gives the district court the power to restrain property, issue seizure warrants, or take other action necessary to ensure that a defendant in an action covered by the statute does not dissipate the assets that would be needed to satisfy a judgment.

“This section also authorizes a court, on the motion of the Government or a State or Federal regulator, to appoint a receiver to gather and protect assets needed to satisfy a judgment under sections 1956 and 957, and the forfeiture provisions in sections 981 and 982. This authority is intended to apply in three circumstances: (1) when there is a judgment in a criminal case, including an order of restitution, following a conviction for a violation of section 1956 or 1957; (2) when there is a judgment in a civil case under section 1956(b) assessing a penalty for a violation of either section 1956 or 1957; and (3) when there is a civil forfeiture judgment under section 981 or a criminal forfeiture judgment, including a personal money judgment, under section 982.

“The amendment also makes section 1956(b) applicable to violations of section 1957. It applies to conduct occurring before the effective date of the Act”).

18 U.S.C. 981(k). H.R.Rep.No. 107-250, at 57-8 (2001)(“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank's customers.

“Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank’s correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

“The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”).
defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation.\(^99\)

Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here.\(^100\) Section 320 enlarges this provisions to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements.\(^101\) This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.\(^102\)

\(^99\) Cf., H.R.Rep.No. 107-250, at 58-9 (2001) ("Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of ‘substitute assets’ when the defendant has placed the property otherwise subject to forfeiture ‘beyond the jurisdiction of the court.’ Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

“This section amends 21 U.S.C. 853 to make clear that a court in a criminal case may issue a repatriation order--either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. 853(e) to restrain property--so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both.

\(^100\) 18 U.S.C. 981(a)(1)(B).

\(^101\) H.R.Rep.No. 107-250, at 56 (2001)("This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act").

\(^102\) H.R.Rep.No. 107-250, at 59-60 (2001)("Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country.

“Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
A fugitive may not challenge a federal forfeiture.\textsuperscript{103} Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in “order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.”

to contest the restraining order could do so on the ground that 28 U.S.C. 2467 was not properly applied to the particular case, but could not oppose the restraining order on any ground that could also be raised in the proceedings pending in a foreign court. This provision prevents a litigant from taking ‘two bites at the apple’ by raising objections to the basis for the forfeiture in the Federal court that he also raised, or is entitled to raise, in the foreign court where the forfeiture action is pending. It complements the existing provision in section 2467(e) providing that the Federal court is bound by the findings of fact of the foreign court, and may not look behind such findings in determining whether to enter an order enforcing a foreign forfeiture judgment.

“This section also amends 28 U.S.C. 2467 to make clear that it is not necessary to prove that the person asserting an interest in the property received actual notice of the forfeiture proceedings. As is the case with respect to forfeitures under U.S. law, it is sufficient if the foreign nation takes steps to provide notice, in accordance with the principles of due process. See Gonzalez v. United States, 1997 WL 278123 (S.D.N.Y. 1997) (‘the [G]overnment is not required to ensure actual receipt of notice that is properly mailed’); Albajon v. Gugliotta, 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant’s identifications, and mailed after claimant released from jail, is sufficient to satisfy due process, even if claimant never received notice); United States v. Schiavo, 897 F. Supp. 644, 648 49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; due process satisfied even if he did not receive the notice).

“Finally, 28 U.S.C. 2467 is amended to authorize the enforcement of a forfeiture judgment based on any foreign offense that would constitute an offense giving rise to a civil or criminal forfeiture of the same property if the offense had been committed in the United States. This is one of two safeguards that the statute contains against the enforcement of judgments that the United States does not consider appropriate for enforcement: if the judgment is based on an act that would not constitute a crime in the United States, such as removing assets from the reach of a repressive regime, it could not be enforced. In addition, section 2467 already provides that a foreign judgment may only be enforced by a Federal court at the request of the United States, and only after the Attorney General has certified that the judgment was obtained in accordance with the principles of due process. Thus, neither a foreign Government nor a foreign private party could enforce a foreign judgment on its own under this provision.”). Note that the safeguard to which the report refers is the range of foreign offenses that will support an enforceable confiscation order, \textit{i.e.}, drug offenses and crimes on the money laundering predicate offense list, and that the amendment narrows that safeguard by adding additional foreign offenses, \textit{i.e.}, any foreign equivalent of a federal crime which would support a confiscation order.

\textsuperscript{103} 28 U.S.C. 2466.
**Alien Terrorists and Victims**

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

**Border Protection.** The border protection provisions:

- authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401
- authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402
- remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404
- authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405
- authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.
- instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007
- direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418
- express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414
- add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415
- call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416
- limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
• instruct the Attorney General to report on the feasibility of using biometric scanners to help prevent terrorists and other foreign criminals from entering the country, section 1008

• authorize appropriations of $250,000 for the FBI to determine the feasibility of providing airlines with computer access to the names of suspected terrorists, section 1009

• authorize reciprocal sharing of the State Department’s visa lookout data and related information with other nations in order to prevent terrorism, drug trafficking, slave marketing, and gun running, section 413

Detention and Removal. Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity, 8 U.S.C. 1227 (a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(iv). Aliens may be inadmissible for any number of terrorism-related reasons, 8 U.S.C. 1182 (a)(3)(B). Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported.


Section 411 defines “terrorist organization” to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the Federal Register as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C.

104 As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).
Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).


An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in “premeditated, politically motivated violence perpetrated against noncombatant targets,” or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security or endanger some individual or the general public. The Attorney General's determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

VICTIMS. The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

- permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421;
- extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422.

105 “The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

106 “The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks.

“The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application.

“Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
• preservation of certain immigration benefits available to alien family members that would be otherwise lost as a consequence of the death of a victim of September 11, section 423

• limited easing of age restrictions on visas available to aliens under 21 years of age for those whose 21st birthday occurred immediately before or soon after September 11, section 424

• temporary administrative relief for alien family members of a victim of September 11 who are not otherwise entitled to relief under the Act, section 425

the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

“Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 31.

“Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.


107 “Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

“The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

“The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death),” H.R.Rep.No. 107-236, at 68 (2001).

108 “Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien’s 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien’s 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
• a denial of benefits of the Act to terrorists and their families, section 427

• authority for the Attorney General to establish evidentiary standards to implement the alien victim provisions of the Act, section 426.

Other Crimes, Penalties, & Procedures

New Crimes. The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department, the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offense for certain individuals — such as convicted felons, illegal aliens, and fugitives — to possess biological toxins or agents, 18 U.S.C. 175b. Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.

109 “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . . .” DoJ at §305.

110 The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

111 “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2) (“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The USA PATRIOT Act: A Legal Analysis

April 15, 2002

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The USA PATRIOT Act: A Legal Analysis

Summary

The USA PATRIOT Act passed in the wake of the September 11 terrorist attacks. It flows from a consultation draft circulated by the Department of Justice, to which Congress made substantial modifications and additions. The stated purpose of the Act is to enable law enforcement officials to track down and punish those responsible for the attacks and to protect against any similar attacks.

The Act grants federal officials greater powers to trace and intercept terrorists’ communications both for law enforcement and foreign intelligence purposes. It reenforces federal anti-money laundering laws and regulations in an effort to deny terrorists the resources necessary for future attacks. It tightens our immigration laws to close our borders to foreign terrorists and to expel those among us. Finally, it creates a few new federal crimes, such as the one outlawing terrorists’ attacks on mass transit; increases the penalties for many others; and institutes several procedural changes, such as a longer statute of limitations for crimes of terrorism.

Critics have suggested that it may go too far. The authority to monitor e-mail traffic, to share grand jury information with intelligence and immigration officers, to confiscate property, and to impose new book-keeping requirements on financial institutions, are among the features troubling to some.

The Act itself responds to some of these reservations. Many of the wiretapping and foreign intelligence amendments sunset on December 31, 2005. The Act creates judicial safeguards for e-mail monitoring and grand jury disclosures; recognizes innocent owner defenses to forfeiture; and entrusts enhanced anti-money laundering powers to those regulatory authorities whose concerns include the well being of our financial institutions.

This report, stripped of its citations and footnotes, is available in an abbreviated form as The USA PATRIOT Act: A Sketch, CRS Rep.No. RS21203. In addition, much of the information contained here may also be found under a different arrangement in a report entitled, Terrorism: Section by Section Analysis of the USA PATRIOT Act, CRS Rep.No. RL31200 (Dec. 10, 2001). A wider array of terrorism-related analysis appears on the CRS terrorism electronic briefing book page.
The USA PATRIOT Act: A Legal Analysis

Introduction

Congress passed the USA PATRIOT Act (the Act) in response to the terrorists’ attacks of September 11, 2001. The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to further close our borders to foreign terrorists and to detain and remove those within our borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it is not without safeguards, critics contend some of its provisions go too far. Although it grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough.


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1 P.L. 107-56, 115 Stat. 272 (2001); its full title is the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT).”

2 H.R. 2975 was introduced by Representative Sensenbrenner for himself and Representatives Conyers, Hyde, Coble, Goodlatte, Jenkins, Jackson-Lee, Cannon, Meehan, Graham, Bachus, Wexler, Hostettler, Keller, Issa, Hart, Flake, Schiff, Thomas, Goss, Rangel, Berman and Lofgren; S.1510 by Senator Daschle for himself and Senators Lott, Leahy, Hatch, Graham, Shelby and Sarbanes.

3 H.R. 3004 was introduced by Representative Oxley for himself and Representatives LaFalce, Leach, Maloney, Roukema, Bentsen, Hooley, Bereuter, Baker, Bachus, King, Kelly, Gillmore, Cantor, Riley, Latourette, Green (of Wisconsin), and Grucci; and reported out of the House Financial Services Committee with amendments on October 15, 2001, H.R.Rep.No. 107-250. H.R. 3004, as reported out, included Internet gambling amendments that were not included in H.R. 2975/H.R.3108.
The Department’s proposal, dated September 20, 2001, came with a brief section by section analysis. Both the proposal (Draft) and analysis (DoJ) were printed as an appendix in Administration's Draft Anti-Terrorism Act of 2001, Hearing Before the House Comm. on the Judiciary, 107th Cong., 1st Sess. 54 (2001).

**Criminal Investigations: Tracking and Gathering Communications**

A portion of the Act addresses issues suggested originally in a Department of Justice proposal circulated in mid-September. The first of its suggestions called for amendments to federal surveillance laws, laws which govern the capture and tracking of suspected terrorists’ communications within the United States. Federal law features a three tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications.

The tiers reflected the Supreme Court’s interpretation of the Fourth Amendment’s ban on unreasonable searches and seizures. The Amendment protects private conversations, *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967). It does not cloak information, even highly personal information, for which there is no individual justifiable expectation of privacy, such as telephone company records of calls made to and from an individual’s home, *Smith v. Maryland*, 442 U.S. 735 (1979), or bank records of an individual’s financial dealings, *United States v. Miller*, 425 U.S. 435 (1976).

Congress responded to *Berger* and *Katz*, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications, 18 U.S.C. 2511. At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious

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4 The Department’s proposal, dated September 20, 2001, came with a brief section by section analysis. Both the proposal (Draft) and analysis (DoJ) were printed as an appendix in Administration's Draft Anti-Terrorism Act of 2001, Hearing Before the House Comm. on the Judiciary, 107th Cong., 1st Sess. 54 (2001).


6 “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,” U.S. Const. Amend. IV.

7 Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
criminal cases. When approved by senior Justice Department officials, law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.

8 “The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of” one or more predicate offense, 18 U.S.C. 2516.

9 The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement), 1751 (presidential and presidential staff assassination, kidnapping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnapping, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or naturalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations, 18 U.S.C. 2518. The court notifies the parties to any conversations seized under the order after the order expires, 18 U.S.C. 2518(8).

Below Title III, the next tier of privacy protection covers some of those matters which the Supreme Court has described as beyond the reach of the Fourth Amendment protection—telephone records, e-mail held in third party storage, and the like, 18 U.S.C. 2701-2709 (Chapter 121). Here, the law permits law enforcement access, ordinarily pursuant to a warrant or court order or under a subpoena in some cases, but in connection with any criminal investigation and without the extraordinary levels of approval or constraint that mark a Title III interception, 18 U.S.C. 2703.

Least demanding and perhaps least intrusive of all is the procedure that governs court orders approving the government’s use of trap and trace devices and pen registers, a kind of secret “caller id”, which identify the source and destination of calls made to and from a particular telephone, 18 U.S.C. 3121-3127 (Chapter 206). The orders are available based on the government’s certification, rather than a finding of the court, that the use of the device is likely to produce information relevant to the investigation of a crime, any crime, 18 U.S.C. 3123. The devices record no more than the identity of the participants in a telephone conversation, but neither the orders nor the results they produce need ever be revealed to the participants.

The Act modifies the procedures at each of the three levels. It:

offense involving counterfeiting punishable under 18 U.S.C. 471, 472, or 473; (e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States; (f) any offense including extortionate credit transactions under 18 U.S.C. 892, 893, or 894; (g) a violation of 31 U.S.C. 5322 (dealing with the reporting of currency transactions); (h) any felony violation of 18 U.S.C. 2511 and 2512 (interception and disclosure of certain communications and to certain intercepting devices); (i) any felony violation of 18 U.S.C. ch. 71 (obscenity); (j) 49 U.S.C. 60123(b) (destruction of a natural gas pipeline), 46502 (aircraft piracy); (k) 22 U.S.C. 2778 (Arms Export Control Act); (l) the location of any fugitive from justice from an offense described in this section; (m) a violation of 8 U.S.C. 1324, 1327, or 1328; (n) any felony violation of 18 U.S.C. 922, 924 (firearms); (o) any violation of 26 U.S.C. 5861 (firearms); (p) a felony violation of 18 U.S.C. 1028 (production of false identification documents), 1542 (false statements in passport applications), 1546 (fraud and misuse of visas, permits, and other documents) or a violation of 8 U.S.C. 1324, 1327, or 1328 (smuggling of aliens); (p) 229 (chemical weapons), 2332 (terrorist violence against Americans overseas), 2332a (weapons of mass destruction), 2332b (multinational terrorism), 2332d (financial transactions with countries supporting terrorism), 2339A (support of terrorist), 2332B (support of terrorist organizations); (r) any conspiracy to commit any of these, 18 U.S.C. 2516(1)(crimes added by the Act in italics). Other than telephone face to face conversations (i.e., electronic communications), the approval of senior Justice Department officials is not required and an order may be sought in any felony investigation, 18 U.S.C. 2516(3).

10 Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
• permits pen register and trap and trace orders for electronic communications
  (e.g., e-mail)

• authorizes nationwide execution of court orders for pen registers, trap and
  trace devices, and access to stored e-mail or communication records

• treats stored voice mail like stored e-mail (rather than like telephone
  conversations)

• permits authorities to intercept communications to and from a trespasser within
  a computer system (with the permission of the system’s owner)

• adds terrorist and computer crimes to Title III’s predicate offense list

• reinforces protection for those who help execute Title III, ch. 121, and ch. 206
  orders

• encourages cooperation between law enforcement and foreign intelligence
  investigators

• establishes a claim against the U.S. for certain communications privacy
  violations by government personnel

• terminates the authority found in many of the these provisions and several of
  the foreign intelligence amendments with a sunset provision (Dec. 31, 2005).

Pen Registers and Trap and Trace Devices. In section 216, the Act
allows court orders authorizing trap and trace devices and pen registers to be used to
capture source and addressee information for computer conversations (e.g., e-mail)
as well as telephone conversations, 18 U.S.C. 3121, 3123. In answer to objections
that e-mail header information can be more revealing than a telephone number, it
creates a detailed report to the court, 18 U.S.C. 3123(a)(3).11

11 "Where the law enforcement agency implementing an ex parte order under this subsection
seeks to do so by installing and using its own pen register or trap and trace device on a packet-
switched data network of a provider of electronic communication service to the public the
agency shall ensure that a record will be maintained which will identify – (i) any officer or
officers who installed the device and any officer or officers who accessed the device to obtain
information from the network; (ii) the date and time the device was installed, the date and time
the device was uninstalled, and the date, time, and duration of each time the device is accessed
to obtain information; (iii) the configuration of the device at the time of its installation and any
subsequent modification thereof; and (iv) any information which has been collected by the
device. To the extent that the pen register or trap and trace device can be set automatically
to record this information electronically, the record shall be maintained electronically
throughout the installation and use of the such device.

"(B) The record maintained under subparagraph (A) shall be provided ex parte and
under seal to the court which entered the ex parte order authorizing the installation and use
of the device within 30 days after termination of the order (including any extensions thereof)," section 216(b)(1).
The use of pen registers or trap and trace devices was limited at one time to the judicial district in which the order was issued, 18 U.S.C. 3123 (2000 ed.). Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States, 18 U.S.C. 3123(b)(1)(C), 3127(2).12

**Communications Records and Stored E-Mail.** With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber, 18 U.S.C. 2703(a),(b). A warrant will also suffice to seize records describing telephone and other communications transactions without customer notice, 18 U.S.C. 2703(c). In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation, officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records, 18 U.S.C. 2703(b),(c). They can obtain a limited amount of record information (subscribers’ names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena, 18 U.S.C. 2703(c)(1)(C). There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial, 18 U.S.C. 2705.

In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider’s customer records, 18 U.S.C. 2703(c)(1)(C).13

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.

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12 The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” *DoJ* at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

13 Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user’s true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” *DoJ* at §107.
Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

The Act, in section 209, treats voice mail like e-mail, that is, subject to the warrant or court order procedure, rather than to the more demanding coverage of Title III once required, United States v. Smith, 155 F.3d 1050, 1055-56 (9th Cir. 1998).

Finally, the Act resolves a conflict between chapter 121 and the federal law governing cable companies. Government entities may have access to cable company customer records only under a court order following an adversary hearing if they can show that the records will evidence that the customer is or has engaged in criminal activity, 47 U.S.C. 511(h). When cable companies began offering telephone and other communications services the question arose whether the more demanding cable rules applied or whether law enforcement agencies were entitled to ex parte court orders under the no-notice procedures applicable to communications providers. The Act makes it clear that the cable rules apply when cable television viewing services are

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14 Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

15 See e.g., DoJ at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement's access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

Electronic Surveillance. To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202. A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(i). Yet only the interloper's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.

Criminal Investigators' Access to Foreign Intelligence Information. The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism. It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that “the purpose for the surveillance is to obtain foreign intelligence information,” 50 U.S.C. 1804(a)(7)(B)(2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps “the purpose” might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation...
Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment's warrant clause. It is here that the “primary purpose” notion originated. In *United States v. Truong Dinh Hung*, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, “as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.” Subsequent case law, however, is not as clear as it might be: see e.g., *United States v. Duggan*, 743 F.2d 59, 77 (2d Cir. 1984)(“FISA permits federal officials to obtain orders authorizing electronic surveillance ‘for the purpose of obtaining foreign intelligence information.’ The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying officials’s belief that the information sought is the type of foreign intelligence information described”); *United States v. Pelton*, 835 F.2d 1067, 1075-76 (4th Cir. 1987)(“We also reject Pelton’s claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial”); *United States v. Sarkissian*, 841 F.2d 959, 907-8 (9th Cir. 1988)(“Defendants rely on the primary purpose test articulated in United States v. Truong Dinh Hung. . . . One other court has applied the primary purpose test. Another court has rejected it . . . distinguishing Truong. A third court has declined to decide the issue. We also decline to decide the issue”); *United States v. Johnson*, 952 F.2d 565, 572 (1st Cir. 1991)(“Appellants attack the government's surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance”).

20 “Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” DoJ at §153.
demanding standard than the “a purpose” threshold proposed by the Justice
Department, but a clear departure from the original “the purpose” entry point. FISA
once described a singular foreign intelligence focus prerequisite for any FISA
surveillance application. Section 504 of the Act further encourages coordination
between intelligence and law enforcement officials, and states that such coordination
is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k),
1825(k).²¹

Protective Measures. The Act reenforces two kinds of safeguards, one set
designed to prevent abuse and the other to protect those who assist the government.
The sunset clause is perhaps the best known of the Act’s safeguards. Under the
direction of section 224, many of the law enforcement and foreign intelligence
authorities granted by the Act expire as of December 31, 2005.²² The Act also fills
some of the gaps in earlier sanctions available for official, abusive invasions of
privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter

²¹ “(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence
information under this title may consult with Federal law enforcement officers to coordinate
efforts to investigate or protect against – (A) actual or potential attack or other grave hostile
acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism
by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities
by an intelligence service or network of a foreign power or by an agent of a foreign power.
(2) Coordination authorized under paragraph (1) shall not preclude the certification required
by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign
power” and “agent of a foreign power” broadly, see note 33, infra, quoting, 50 U.S.C. 1801.

²² “(a) Except as provided in subsection (b), this title and the amendments made by this title
(other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing
grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail],
210[subpoenas for communications provider customer records], 211[access to cable company
communication service records], 213[sneak and peek], 216[pen register and trap and trace
device amendments], 221[trade sanctions], and 222[assistance to law enforcement], and the
amendments made by those sections) shall cease to have effect on December 31, 2005.
“(b) With respect to any particular foreign intelligence investigation that began before
the date on which the provisions referred to in subsection (a) cease to have effect, or with
respect to any particular offense or potential offense that began or occurred before the date
on which such provisions cease to have effect, such provisions shall continue in effect,”
section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the
predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence
officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register
and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207
(duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice
mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in
emergency cases), 214 (authority for pen registers and trap and trace devices in foreign
intelligence cases), 215 (production of tangible items in foreign intelligence investigations),
217 (intercepting computer trespassers’ communications), 218 (foreign intelligence
surveillance when foreign intelligence gathering is “a significant” reason rather than “the”
reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide
communication records and stored e-mail search warrants), 223 (civil liability and
administrative discipline for violations of Title III, chapter 121, and certain foreign
intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices). Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees, but could not recover against the United States. Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice's Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government's request until a court order authorizing access can be obtained. Another allows providers to disclose customer records to protect the provider's rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others. A third section,

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26 Prior law already granted service providers immunity for disclosure of customer records in compliance with a court access order, 18 U.S.C. 2703(f).
27 “Existing law contains no provision that allows providers of electronic communications service to disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies that threaten death or serious bodily injury. This section amends 18 U.S.C. §2702 to authorize such disclosures if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.

“Current law also contains an odd disconnect: a provider may disclose the contents of the customer's communications in order to protect its rights or property but the current statute does not expressly permit a provider to voluntarily disclose non-content records (such as a subscriber's login records). 18 U.S.C. 2702(b)(5). This problem substantially hinders the ability of providers to protect themselves from cyber-terrorists and criminals. Yet the right to disclose the contents of communications necessarily implies the less intrusive ability to disclose non-content records. In order to promote the protection of our nation's critical infrastructures, this section's amendments allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems,” DoJ at
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

**Foreign Intelligence Investigations**

Although both criminal investigations and foreign intelligence investigations are conducted in the United States, criminal investigations seek information about unlawful activity; foreign intelligence investigations seek information about other countries and their citizens. Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough.

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA), something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President’s authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, *United States v. United States District Court*, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage

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28 Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

29 Thus in the name of assisting in the execution of Title III, chapter 121, or chapter 206 order, the courts may not cite the Act as the basis for an order compelling a service provider to make system modifications or provide any other technical assistance not already required under 18 U.S.C. 2518(4), 2706, or 3124(c), see, H.R.Rep.No. 107-236, at 62-3 (2001) (emphasis added) (“This Act is not intended to affect obligations under Communications Assistance for Law Enforcement Act [which addresses law enforcement-beneficial system modifications and the compensation to be paid for the changes], nor does the act impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance”).

30 *E.g.*, As amended by section 902 of the Act, “‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2)(language added by the Act in italics).

31 50 U.S.C. 1801 *et seq.*
lockers, 50 U.S.C. 1861-1863 (2000 ed.). Intelligence authorities gained narrow passages through other privacy barriers as well.\textsuperscript{32}

In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs.\textsuperscript{33} There were and still are extra


\textsuperscript{33} “As used in this subchapter: (a) ‘Foreign power’ means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

“(b) ‘Agent of a foreign power’ means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of a foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C).

“(c) ‘International terrorism’ means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnapping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

“(d) ‘Sabotage’ means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

“(e) ‘Foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans (“United States persons,” i.e., citizens or permanent resident aliens). The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

- permits “roving” surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)

- increases the number of judges on the FISA court from 7 to 11

- allows application for a FISA surveillance or search order when gathering foreign intelligence is a significant reason for the application rather than the reason

- authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations

- sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses

- carries a sunset provision

- establishes a claim against the U.S. for certain communications privacy violations by government personnel

- expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to – (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States,” 50 U.S.C. 1801.

34 Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).

See also, DoJ at §151, “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order’s minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed (50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

See e.g., S.Rep.No. 106-352, at 3, 6, 7 (2000)(“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application
Intelligence with the responsibility to formulate requirements and priorities for the use of FISA to collect foreign intelligence information. He is also charged with the responsibility of assisting the Attorney General in the efficient and effective dissemination of FISA generated information (50 U.S.C. 403-3(c)).

**Pen Registers and Trap and Trace Devices for Intelligence Gathering.** Section 214 grants the request of the Department of Justice by dropping requirements which limited FISA pen register and trap and trace device orders to facilities used by foreign agents or those engaged in international terrorist or clandestine intelligence activities, 50 U.S.C. 1842(c)(3)(2000 ed.). It is enough that the order is sought as part of an investigation to protect against international terrorism or clandestine intelligence activities and is not motivated solely by an American’s exercise of his or her First Amendment rights. Elsewhere (section 505), the Act drops a similar limitation for intelligence officials’ access to telephone records, 18 U.S.C.

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38 “When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevance, an additional factual showing that the communications device has been used to contact an ‘agent of a foreign power’ engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the ‘agent of a foreign power’ prong from the predication, and thus makes the FISA authority more closely track the criminal authority,” DoJ at §155.
Section 214 adjusts the language of the FISA pen register-trap and trace authority to permit its use to capture source and destination information relating to electronic communications (e.g., e-mail) as well as telephone communications, 50 U.S.C. 1842(d). The section makes it clear that requests for a FISA pen register-trap and trace order, like requests for other FISA orders, directed against Americans (U.S. persons) may not be based solely on activities protected by the First Amendment, 50 U.S.C. 1842, 1843.

**Third Party Cooperation and Tangible Evidence.** As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target's activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.40

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39 Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise to be entitled to confidentiality. Section 505, in response to the Justice Department's suggestion, allows FBI field offices to make the requests, see DoJ at §157 (“At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports”).

40 When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court's order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.’ This would enhance the FBI's ability to monitor international terrorists and intelligence officers who are
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian. The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities, in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B);
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a);
- the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a);
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v;

trained to thwart surveillance by rapidly changing hotel accommodations, cell phones, Internet accounts, etc., just prior to important meetings or communications. Under the current law, the government would have to return to the FISA Court for an order that named the new carrier, landlord, etc., before effecting surveillance. Under the proposed amendment, the FBI could simply present the newly discovered carrier, landlord, custodian or other person with a generic order issued by the Court and could then effect FISA coverage as soon as technically feasible,” DoJ at 152.


41 “The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigative contexts. The time and difficulty involved in getting such pleadings before the Court usually outweighs the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” DoJ at §156.

42 Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.43

**Access to Law Enforcement Information.** Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community's access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, Draft at §103.44

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43 H.R.Rep.No. 107-205, at 60-1 (2001)(“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement. “The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis. “Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual’s credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding--without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information”).

44 See also, DoJ at §103, “This section facilitates the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, Draft at §354.45

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, Draft at §154.46

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion.47 It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions.”

45 See also, DoJ at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.” Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officers.

46 See also, DoJ at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”

47 Blair v. United States, 250 U.S. 273, 281 (1919)(the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
affairs are conducted in private and outside the presence of the court. Only the
attorney for the government, witnesses under examination, and a court reporter may
attend its proceedings, F.R.Crim.P. 6(d). Matters occurring before the grand jury are
secret and may be disclosed by the attending attorney for the government and those
assisting the grand jury only in the performance of their duties; in presentation to a
successor grand jury; or under court order for judicial proceedings, for inquiry into
misconduct before the grand jury, or for state criminal proceedings, F.R.Crim.P. 6(e).

The Act, in section 203(a), allows disclosure of matters occurring before the
grand jury to “any federal law enforcement, intelligence, protective, immigration,
national defense, or national security” officer to assist in the performance of his
official duties, F.R.Crim.P. 6(e)(3)(C)(i)(V). \(^{48}\)

Critics may protest that the change could lead to the use of the grand jury for
intelligence gathering purposes, or less euphemistically, to spy on Americans. \(^ {49}\) The
proposal was never among those scheduled to sunset, but earlier versions of the
section followed the path used for most other disclosures of grand jury material: prior

\(^{48}\) These officers may receive: (1) “foreign intelligence information” that is, information
regardless whether it involves Americans or foreign nationals that “[a] relates to the ability
of the United States to protect against – (aa) actual or potential attack or other grave hostile
acts of a foreign power or an agent of a foreign power; (bb) sabotage or international
terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence
activities by an intelligence service or network of a foreign power;” or [b] “with respect to a
foreign power or foreign territory that relates to – (aa) the national defense or security of the
United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P.
6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that
is, [a] “information relating to the capabilities, intentions, or activities of foreign governments
or elements thereof, foreign organizations, or foreign persons, or international terrorist
activities” or [b] “information gathered and activities conducted, to protect against espionage,
other intelligence activities, sabotage, or assassinations conducted on behalf of foreign
governments or elements thereof, foreign organizations, or foreign persons, or international
terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in
italics).

\(^{49}\) Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on
Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25
Harvard Journal of Law & Public Policy 699, 719-20 (2002) ("There is a significant
danger that the rule permitting disclosure will be treated as the de facto authorization of an
expansion of the grand jury’s investigative role to encompass seeking material relevant only
to matters of national security, national defense, immigration, and so forth. The grand jury’s
awesome powers should not be unwittingly extended to a much wider range of issues. . .
Since the grand jury operates in secret, there are no public checks on the scope of its
investigations, and witnesses are not permitted to challenge its jurisdiction. Only the
supervising court is in a position to keep the grand jury’s investigation within proper bounds.
Requiring judicial approval of foreign intelligence and counterintelligence information
disclosures would provide a natural check against the temptation to manipulate the grand jury
to develop information for unauthorized purposes"); but see, Scheidegger et al., Federalist
Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6
(Nov. 2001) ("The grand jury secrecy rule is a rule of policy which has always had exceptions,
and it has been frequently modified. The secrecy rule has no credible claim to constitutional
stature").
Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

Law enforcement officials may share Title III information with the intelligence community under the same conditions, section 203(b), although the grand jury and Title III sharing provisions differ in at least three important respects. The court need not be notified of Title III disclosures. On the other hand, the authority for sharing Title III information expires on December 31, 2005, section 224, and agencies and their personnel guilty of intentional improper disclosures may be subject to a claim for damages and disciplinary action, 18 U.S.C. 2520.

The third subsection of section 203 remains something of an enigma. It speaks in much the same language as its counterparts. It allows law enforcement officials to share information with the intelligence community, “notwithstanding any other provisions of law,” section 203(d). It either swallows the other subsections, or supplements them. Several factors argue for its classification as a supplement. Congress is unlikely to have crafted subsections (a), (b) and (c) only to completely

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50 Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

51 “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person’s official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification.\footnote{Duncan v. Walker, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted) (“It is our duty to give effect, if possible, to every clause and word of a statute. United States v. Menasche, 348 U.S. 528, 538-539 (1955) (quoting Montclair v. Ramsdell, 107 U.S. 147, 152 (1883)); see also Williams v. Taylor, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); Market Co. v. Hoffman, 101 U.S. 112, 115 (1879)(As early as in Bacon’s Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage in any setting. Babbitt v. Sweet Home Chapter, Communities for Great Ore., 515 U.S. 687, 698 (1995); see also Ratzlaf v. United States, 510 U.S. 135, 140 (1994)).”}

By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.\footnote{Draft at §154, “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”}

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

**Increasing Institutional Capacity.** As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a
computerized translation capability to be used in foreign intelligence gathering.\(^{54}\) Section 907 instructs the Director of the Central Intelligence, in consultation with the Director of the FBI, to report on the creation of a National Virtual Translation Center. The report is to include information concerning staffing, allocation of resources, compatibility with comparable systems to be used for law enforcement purposes, and features which permit its efficient and secure use by all of the intelligence agencies.

**Money Laundering**

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture.\(^{55}\) The Act bolsters federal efforts in each area.

**Regulation.** Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.\(^{56}\)

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\(^{54}\) “The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

“...The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so,” S.Rep.No. 107-63, at 11 (2001).


\(^{56}\) See *e.g.*, 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
**Records and Reports.** For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler’s checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to file SARs as well,⁵⁷ reflecting Congress’ view that the information provided the IRS may be valuable for other law enforcement purposes.⁵⁸ This concern is likewise

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⁵⁸ H.R.Rep.No. 107-250, at 38-9 (2001) (“Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

“Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a ‘Safeguard Procedures Report’ which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

“While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement
reflected in section 357 which asks the Secretary of the Treasury to report on the Internal Revenue Service’s role in the administration of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311 et seq.), and what transfers of authority, if any, are appropriate.

Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action. Section 355 expands the immunity to cover disclosures in authorities as the various reports mandated by the Bank Secrecy Act, which can typically be retrieved electronically from a database maintained by the Treasury Department. The differential access to the two kinds of reports is made anomalous by the fact that Form 8300 elicits much the same information that is required to be disclosed by the Bank Secrecy Act. For example, just as Form 8300 seeks the name, address, and social security number of a customer who engages in a cash transaction exceeding $10,000 with a trade or business, Currency Transaction Reports (CTRs) mandated by the Bank Secrecy Act require the same information to be reported on a cash transaction exceeding $10,000 between a financial institution and its customer”).

59 “Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

“First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor from civil liability applies in arbitration, as well as judicial, proceedings. Second, it amends section 5318(g)(3) to clarify the safe harbor’s coverage of voluntary disclosures (that is, those not covered by the SAR regulatory reporting requirement). The language in section 5318(g)(3)(A) providing that ‘any financial institution that *** makes a disclosure pursuant to *** any other authority *** shall not be liable to any person’ is not intended to avoid the application of the reporting and disclosure provisions of the Federal securities laws to any person, or to insulate any issuers from private rights of actions for disclosures made under the Federal securities laws.

“Subsection [351](b) amends section 5318(g)(2) of title 31--which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed--to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee’s official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
potential wrongdoing was also reported in a SAR,” H.R.Rep.No. 107-250, at 66 (2001).

The Financial Crimes Enforcement Network (FinCEN), a component within the Treasury Department long responsible for these anti-money laundering reporting and record-keeping requirements, 31 C.F.R. pt. 103, was administratively created in 1990 to provide other government agencies with an “intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes,” 55 Fed.Reg. 18433 (May 2, 1990).

The Act, in section 361, makes FinCEN a creature of statute, a bureau within the Treasury Department, 31 U.S.C. 310. Section 362 charges it with the responsibility of establishing a highly secure network to allow financial institutions to file required reports electronically and to permit FinCEN to provide those institutions with alerts and other information concerning money laundering protective measures, 31 U.S.C. 310 note.

**Special Measures.** In extraordinary circumstances involving international financial matters, the Act grants the Secretary of the Treasury, in consultation with other appropriate regulatory authorities, the power to issue regulations and orders involving additional required “special measures” and additional “due diligence” requirements to combat money laundering. The special measure authority, available under section 311, comes to life with the determination that particular institutions, jurisdictions, types of accounts, or types of transactions pose a primary money

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60 31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 67 (2001).
These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

61 31 U.S.C. 5318A. The circumstances considered in the case of a suspect jurisdiction are: evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction’s banking regulation; the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

62 The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’ including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

“Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate
business transactions.

"Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

"Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

"The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

"The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

"The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

"The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent’ account for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information that it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

"The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

"The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed
Due Diligence.** Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.63

63 See generally, H.R.Rep. No. 107-250, at 71-2 ("Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
**General Regulatory Matters.** The Act establishes several other regulatory mechanisms directed at the activities involving U.S. financial institutions and foreign individuals or institutions. Section 313, for instance, in another restriction on correspondent accounts for foreign financial institutions, prohibits U.S. financial institutions from maintaining correspondent accounts either directly or indirectly for foreign shell banks (banks with no physical place of business) which have no affiliation with any financial institution through which their banking activities are subject to regulatory supervision.

The Act, in section 325, empowers the Secretary of the Treasury to promulgate regulations to prevent financial institutions from allowing their customers to conceal their financial activities by taking advantage of the institutions’ concentration account practices.

The Secretary of the Treasury is instructed in section 326 to issue regulations for financial institutions’ minimum new customer identification standards and record-
 Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a ‘street name’ or omnibus account in the broker-dealer's name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to ‘look through’ the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund's customers. Thus, the fund would not be required to ‘look through’ the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature.68

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

**Reports to Congress.** Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

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exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.⁶⁹

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

**International Cooperation.** Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.⁷⁰

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (i.e., the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.


⁷⁰ H.R.Rep.No. 107-250, at 67 (2001)(“This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury's progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

“The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime”).
**Crimes.** Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, smuggling, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
Section 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

“The definition of ‘financial institution’ in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of ‘commercial bank’ or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad—say to a Mexican bank—and launders them through a series of financial transactions, the government conceivably could not rely on the definition of a ‘financial institution’ in 1956(c)(6) to establish that the transaction was a ‘financial transaction’ within the meaning of 1956(c)(4)(B) (defining a ‘financial transaction’ as a transaction involving the use of a ‘financial institution’), or that it was a ‘monetary transaction’ within the meaning of 1957(f) (defining ‘monetary transaction’ as, inter alia, a transaction that would be a ‘financial transaction’ under 1956(c)(4)(B)).

“Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launders the proceeds of one of the crimes set forth on a list of ‘specified unlawful activities.’ 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),” H.R.Rep.No. 107-250, at 38 (2000).

Section 329 makes it a federal crime to corruptly administer the money laundering regulatory scheme. Offenders are punishable by imprisonment for not more than 15 years and a fine of not more than three times the amount of the bribe.

Section 5326 of title 31 authorizes the Secretary of the Treasury to impose temporary, enhanced reporting requirements upon financial institutions in areas victimized by substantial money laundering activity (geographic targeting regulations and orders). Section 353 makes it clear that the civil sanctions, criminal penalties, and prohibitions on smurfing (structuring transactions to evade reporting requirements) apply to violations of the regulations and orders issued under 31 U.S.C. 5326. It also extends the permissible length of the temporary geographical orders from 60 to 180 days.

Violations of the special measures and special due diligence requirements of sections 311 and 312 are subject to both civil and criminal penalties by virtue of section 363's amendments to 31 U.S.C. 5321(a) and 5322. The amendments authorize civil penalties and criminal fines of twice the amount of the transaction but not more than $1 million. Criminal offenders would be subject to a fine in the same amount.

[71] “[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

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Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.\(^{73}\)

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents.\(^{74}\) They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

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73 “The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business.

Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.

Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive,” H.R.Rep.No. 107-250, at 54 (2001).

74 “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual, 31 U.S.C. 5332(a)(2).

- 18 U.S.C. 476 (taking impressions of tools used for obligations and securities) from 10 to 25 years;
- 18 U.S.C. 477 (possessing or selling impressions of tools used for obligations or securities) from 10 to 25 years;
- 18 U.S.C. 484 (connecting parts of different notes) from 5 to 10 years;
- 18 U.S.C. 493 (bonds and obligations of certain lending agencies) from 5 to 10 years;
- 18 U.S.C. 478 (foreign obligations or securities) from 5 to 20 years;
- 18 U.S.C. 479 (uttering counterfeit foreign obligations or securities) from 3 to 20 years;
- 18 U.S.C. 480 (possessing counterfeit foreign obligations or securities) from 1 to 20 years;
- 18 U.S.C. 481 (plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities) from 5 to 25 years;
- 18 U.S.C. 482 (foreign bank notes) from 2 to 20 years; and
- 18 U.S.C. 483 (uttering counterfeit foreign bank notes) from 1 to 20 years.

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

**Bulk Cash.** Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act’s bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting.⁷⁵

The section appears to be the product of reactions to the Supreme Court’s decision in *United States v. Bajakian*, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court’s

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⁷⁵ “For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).
As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency – representing the proceeds of drug trafficking and other criminal offenses – is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad.

Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United States without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

Extraterritorial Jurisdiction. The Act makes 18 U.S.C. 1029, the federal statute condemning various crimes involving credit cards, PIN numbers and other access devices, applicable overseas if the card or device is issued by or controlled by an American bank or other entity and some article is held in or transported to or through the United States during the course of the offense, section 377. The change was part of the original Justice Department proposals. Justice explained that, “[financial crime] admits of no border, utilizing the integrated global financial network for ill purposes. This provision would apply the financial crimes prohibitions to conduct committed abroad, so long as the tools or proceeds of the crimes pass through or are in the United States,” DoJ at §408. The section, however, appears to limit the otherwise applicable extraterritorial jurisdiction implicit in section 1029, since federal courts would likely recognize extraterritorial jurisdiction over a violation

Section 5317 of title 31 once called for civil forfeiture of property traceable to a violation of 31 U.S.C. 5316 (reports on exporting or importing money instruments worth $10,000 or more). Section 372 of the Act recasts section 5317 to provide for civil and criminal forfeitures for violations of 31 U.S.C. 5316, of 31 U.S.C. 5313 (reports on domestic coins and currency transactions involving $10,000 or more) and of 31 U.S.C. 5324 (structuring transactions to evade reporting requirements (smurfing)).

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“Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute,” H.R.Rep.No. 107-250 at 36-7 (2001).
under either circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.\footnote{United States v. Bowman, 260 U.S. 94, 97-8 (1922); Ford v. United States, 273 U.S. 593, 623 (1927). For a general discussion of the extraterritorial application of federal criminal law, see, Doyle, Extraterritorial Application of American Criminal Law, CRS REP.NO. 94-166A (Mar. 13, 1999).}

**Venue.** Section 1004 relies on dicta in United States v. Cabrales, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering,\footnote{“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed,” U.S.Const. Art.III, §2, cl.3.} in the state and district in which the monetary transaction takes place. The Supreme Court in Cabrales held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in dicta, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.\footnote{“[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,” U.S.Const. Amend. VI.}

**Forfeiture.** Forfeiture is the government confiscation of property as a consequence of crime.\footnote{See also, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnaping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.}

The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 et seq. (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

**Constitutional Considerations.** The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 et seq., which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the
jurisdiction of the United States, belonging to any foreign individual, foreign entity, or foreign country whom they determine to have planned, authorized, aided or engaged in an attack on the United States by a foreign country or foreign nationals.

The section also permits the government to present secretly (ex parte and in camera) any classified information upon which the forfeiture was based should the decision be subject to judicial review. The Justice Department requested the section as a revival of the President's powers in times of unconventional wars. By virtue of section 316, property owners may initiate a challenge to a confiscation by filing a claim under the rules applicable in maritime confiscations. The section permits two defenses to forfeiture — that the property is not subject to confiscation under section 106 or that the claimant is entitled to the innocent owner defense of 18 U.S.C. 983(d). The characterization of the defenses as “affirmative defense” indicates that the claimant bears the burden of proof. The innocent owner defenses of 18 U.S.C. 983(d) are probably not available in cases under section 106, since that section is explicitly

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81 "This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App.U.S.C. §5(b).

“This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress's war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

“The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2)," DoJ at §159.

82 “An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
excepted from the coverage of 18 U.S.C. 983. The challenge proceedings permit the court to admit evidence, such as hearsay evidence, that would not otherwise be admissible under the Federal Rules of Evidence if the evidence is reliable and if national security might be imperiled should dictates of the Federal Rules be followed, §316(b). The section recognizes the rights of claimants to proceed alternatively under the Constitution or the Administrative Procedure Act.

The Justice Department also recommended enactment of an overlapping provision which ultimately passed as section 806 of the Act without any real discussion of the relationship of the two sections. Section 806 authorizes confiscation of all property, regardless of where it is found, of any individual, entity, or organization engaged in domestic or international terrorism (as defined in 18 U.S.C. 2331), against the United States, Americans or their property, 18 U.S.C.

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83 18 U.S.C. 983(i)(2)(D).

84 “The exclusion of certain provisions of Federal law from the definition of the term ‘civil forfeiture statute’ in section 983(i) of title 18, United States Code, shall not be construed to deny an owner of property the right to contest the confiscation of assets of suspected international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C) subchapter II of chapter 5 of title 5, United States Code (commonly known as the ‘Administrative Procedure Act’).” Sec. 316(c)(1).

85 “Current law does not contain any authority tailored specifically to the confiscation of terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available current forfeiture laws require detailed tracing that is quite difficult for accounts coming through the banks of countries used by many terrorists.

“This section increases the government’s ability to strike at terrorist organizations’ economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001,” DoJ, at §403. The House Report on H.R. 2975 which contained versions of both sections is no more explicit on the relation of the two sections.

86 “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
Section 806 as discussed below also calls for the more common confiscation of property derived from and or facilitating acts of domestic or international terrorism against the United States or its citizens. Confiscations under 806 may be challenged under the procedures of 18 U.S.C. 983, since they are not exempted there. To the extent that forfeiture under section 806 is based on international rather than domestic terrorism, claimants may also use the procedures of section 316.

Confiscation based solely on the fact that the property is owned by a criminal offender, rather than that it is derived from or facilitates some crime is fairly uncommon. It is the mark of common law forfeiture of estate. At common law, a felon forfeited all of his property. Most contemporary forfeiture statutes employ statutory forfeiture, a more familiar presence in American law, which consists of the confiscation of things whose possession is criminal, of the fruits of crime, and of the means of crime – untaxed whiskey, the drug dealer’s profits, and the rum runner’s ship.

Three characteristics set forfeiture of estate apart. The property is lost solely by reason of its ownership by a felon. All of a felon’s property is confiscated, not merely that which is related to the crime for which he is convicted. Finally, it occasions attainder which negates the felon’s right to hold property or for title to property to pass through him to his heirs. It was with this in mind, that the Framers declared that “no attainder of treason shall work corruption of blood or forfeiture exception during the life of the person attainted.” And for this reason, President Lincoln insisted that the confiscated real estate of Confederate supporters should revert their heirs at death.

of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5) (as amended by section 802 of the Act).

87 Austin v. United States, 509 U.S. 602, 611-12 (1993) (“Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture . . . . Of England’s three kinds of forfeiture, only the third took hold in the United States”).


89 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal in personam proceedings following criminal conviction as a means of accomplishing confiscation.
Neither section 106 nor 806 require conviction of the terrorist property owner.\textsuperscript{90} Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers.\textsuperscript{91} The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners.\textsuperscript{92} Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them.\textsuperscript{93} The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate

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\textsuperscript{90} Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c)(“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act”).

\textsuperscript{91} 
\textit{Silesian American Corp. v. Clark}, 332 U.S. 469 (1947); \textit{cf., Societe Internationale v. Rogers}, 357 U.S. 197, 211 (1958)(“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).

\textsuperscript{92} 
\textit{Zittman v. McGrath}, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’”).

any presumption of remedial purposes.\textsuperscript{94} The same has been said of the applicability of the ex post facto clause.\textsuperscript{95}

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO.\textsuperscript{96} If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

\textbf{Other Forfeiture Amendments.} In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.\textsuperscript{97}

\textsuperscript{94} United States v. Ursery, 518 U.S. 267, 278 (1996).
\textsuperscript{95} See e.g., United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.), 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994).
\textsuperscript{96} DoJ, at §403.
\textsuperscript{97} 18 U.S.C. 1956(b). Cf., H.R.Rep.No. 107-250, at 54-5 (2001) (“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas. Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted

American Bank, 191 F.3d 30 (1st Cir. 1999).

“The second provision, modeled on 18 U.S.C. 1345(b), gives the district court the power to restrain property, issue seizure warrants, or take other action necessary to ensure that a defendant in an action covered by the statute does not dissipate the assets that would be needed to satisfy a judgment.

“This section also authorizes a court, on the motion of the Government or a State or Federal regulator, to appoint a receiver to gather and protect assets needed to satisfy a judgment under sections 1956 and 957, and the forfeiture provisions in sections 981 and 982. This authority is intended to apply in three circumstances: (1) when there is a judgment in a criminal case, including an order of restitution, following a conviction for a violation of section 1956 or 1957; (2) when there is a judgment in a civil case under section 1956(b) assessing a penalty for a violation of either section 1956 or 1957; and (3) when there is a civil forfeiture judgment under section 981 or a criminal forfeiture judgment, including a personal money judgment, under section 982.

“The amendment also makes section 1956(b) applicable to violations of section 1957. It applies to conduct occurring before the effective date of the Act”).

18 U.S.C. 981(k). H.R.Rep.No. 107-250, at 57-8 (2001)(“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank's customers.

“Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank's correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

“The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”).
defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation.\textsuperscript{99}

Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here.\textsuperscript{100} Section 320 enlarges this provisions to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements.\textsuperscript{101} This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.\textsuperscript{102}

\textsuperscript{99} Cf., H.R.Rep.No. 107-250, at 58-9 (2001) (“Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of ‘substitute assets’ when the defendant has placed the property otherwise subject to forfeiture ‘beyond the jurisdiction of the court.’ Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

“This section amends 21 U.S.C. 853 to make clear that a court in a criminal case may issue a repatriation order--either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. 853(e) to restrain property--so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both”).

\textsuperscript{100} 18 U.S.C. 981(a)(1)(B).

\textsuperscript{101} H.R.Rep.No. 107-250, at 56 (2001)(“This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act”).

\textsuperscript{102} H.R.Rep.No. 107-250, at 59-60 (2001)(“Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country.

“This specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
A fugitive may not challenge a federal forfeiture.\textsuperscript{103} Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in “order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.”

to contest the restraining order could do so on the ground that 28 U.S.C. 2467 was not properly applied to the particular case, but could not oppose the restraining order on any ground that could also be raised in the proceedings pending in a foreign court. This provision prevents a litigant from taking ‘two bites at the apple’ by raising objections to the basis for the forfeiture in the Federal court that he also raised, or is entitled to raise, in the foreign court where the forfeiture action is pending. It complements the existing provision in section 2467(e) providing that the Federal court is bound by the findings of fact of the foreign court, and may not look behind such findings in determining whether to enter an order enforcing a foreign forfeiture judgment.

“This section also amends 28 U.S.C. 2467 to make clear that it is not necessary to prove that the person asserting an interest in the property received actual notice of the forfeiture proceedings. As is the case with respect to forfeitures under U.S. law, it is sufficient if the foreign nation takes steps to provide notice, in accordance with the principles of due process. See Gonzalez v. United States, 1997 WL 278123 (S.D.N.Y. 1997) (‘the [G]overnment is not required to ensure actual receipt of notice that is properly mailed’); Albajon v. Gugliotta, 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant’s identifications, and mailed after claimant released from jail, is sufficient to satisfy due process, even if claimant never received notice); United States v. Schiavo, 897 F. Supp. 644, 648 49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; due process satisfied even if he did not receive the notice).

“Finally, 28 U.S.C. 2467 is amended to authorize the enforcement of a forfeiture judgment based on any foreign offense that would constitute an offense giving rise to a civil or criminal forfeiture of the same property if the offense had been committed in the United States. This is one of two safeguards that the statute contains against the enforcement of judgments that the United States does not consider appropriate for enforcement: if the judgment is based on an act that would not constitute a crime in the United States, such as removing assets from the reach of a repressive regime, it could not be enforced. In addition, section 2467 already provides that a foreign judgment may only be enforced by a Federal court at the request of the United States, and only after the Attorney General has certified that the judgment was obtained in accordance with the principles of due process. Thus, neither a foreign Government nor a foreign private party could enforce a foreign judgment on its own under this provision.”). Note that the safeguard to which the report refers is the range of foreign offenses that will support an enforceable confiscation order, \textit{i.e.,} drug offenses and crimes on the money laundering predicate offense list, and that the amendment narrows that safeguard by adding additional foreign offenses, \textit{i.e.,} any foreign equivalent of a federal crime which would support a confiscation order.

\textsuperscript{103} 28 U.S.C. 2466.
Alien Terrorists and Victims

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

Border Protection. The border protection provisions:

- authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401

- authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402

- remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404

- authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405

- authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.

- instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007

- direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418

- express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414

- add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415

- call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416

- limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
• instruct the Attorney General to report on the feasibility of using biometric scanners to help prevent terrorists and other foreign criminals from entering the country, section 1008\textsuperscript{104}

• authorize appropriations of $250,000 for the FBI to determine the feasibility of providing airlines with computer access to the names of suspected terrorists, section 1009

• authorize reciprocal sharing of the State Department’s visa lookout data and related information with other nations in order to prevent terrorism, drug trafficking, slave marketing, and gun running, section 413

**Detention and Removal.** Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity, 8 U.S.C. 1227 (a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(i)(ii). Aliens may be inadmissible for any number of terrorism-related reasons, 8 U.S.C. 1182 (a)(3)(B). Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported.


Section 411 defines “terrorist organization” to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the *Federal Register* as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C.

\textsuperscript{104} As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).
Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).


An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in “premeditated, politically motivated violence perpetrated against noncombatant targets,” or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security or endanger some individual or the general public. The Attorney General's determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

Victims. The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

- permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421\(^{105}\)
- extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422\(^{106}\)

\(^{105}\) “The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

\(^{106}\) “The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks.

“The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application.

“Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
• preservation of certain immigration benefits available to alien family members that would otherwise be lost as a consequence of the death of a victim of September 11, section 423

• limited easing of age restrictions on visas available to aliens under 21 years of age for those whose 21st birthday occurred immediately before or soon after September 11, section 424

• temporary administrative relief for alien family members of a victim of September 11 who are not otherwise entitled to relief under the Act, section 425

the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

“Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 31.

“Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.


107 “Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

“The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

“The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death),” H.R.Rep.No. 107-236, at 68 (2001).

108 “Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien’s 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien’s 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
• a denial of benefits of the Act to terrorists and their families, section 427
• authority for the Attorney General to establish evidentiary standards to implement the alien victim provisions of the Act, section 426.

Other Crimes, Penalties, & Procedures

New Crimes. The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department, the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offenses for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents, 18 U.S.C. 175b. Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.

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109 “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . . .” DoJ at §305.

110 The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

111 “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2)(“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.\(^\text{112}\)

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D). The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

\(^{112}\) \textit{U.S. Const.} Art.III, §2, cl.3 (“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . .”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . .”); \textit{United States v. Cabrales}, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from \textit{Cabrales} when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnapping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, \textit{United States v. Rodriguez-Moreno}, 526 U.S. 275, 280-81 n.4 (1999)(“By way of comparison, last Term in \textit{Cabrales} we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).
The Justice Department sought the expansion along with the enlargement of the predicate offense list, "18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of 'material support or resources' is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill ('Federal terrorism offenses')."

Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.


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115 “The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill (‘Federal terrorism offenses’) is used in identifying the relevant crimes,” DoJ, at §304.

New Penalties. The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. 3571(b),(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense.117

The proposal, however, failed to identify the critical elements that would trigger the alternative.118 Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

- for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

- for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

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117 “Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersede lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,” DoJ, at §302.

118 “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense,” Draft at §302.
The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object of offense – see e.g., 21 U.S.C. §846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.

- for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;
- for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;
- for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;
- for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and
- for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism.\(^\text{119}\) Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:

- arson committed within a federal enclave, 18 U.S.C. 81;
- killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);
- destruction of communications facilities, 18 U.S.C. 1362;
- destruction of property within a federal enclave, 18 U.S.C. 1363;
- causing a train wreck, 18 U.S.C. 1922;
- providing material support to a terrorist, 18 U.S.C. 2339A;
- torture committed overseas under color of law, 18 U.S.C. 2340A;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

\(^{119}\) “The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

“This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.
- interfering with a flight crew within U.S. special aircraft jurisdiction, 49 U.S.C. 46504;
- carrying a weapon or explosive abroad an aircraft within U.S. special aircraft jurisdiction, 49 U.S.C. 46505; and

When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years). The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission), a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

120 Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

121 “Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.

“This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders). 122

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

Other Procedural Adjustments. In other procedural adjustments designed to facilitate criminal investigations, the Act:

- increases the rewards for information in terrorism cases
- expands the Posse Comitatus Act exceptions
- authorizes “sneak and peek” search warrants
- permits nationwide and perhaps worldwide execution of warrants in terrorism cases
- eases government access to confidential information
- allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
- lengthens the statute of limitations applicable to crimes of terrorism
- clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
- adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B. 123

122 It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, e.g., damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

123 When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001)(remarks of Rep. Sensenbrenner); for general background, see, Doyle, McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys, CRS REP.NO. RL30060 (Dec. 14, 2001).
Rewards. The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L.105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism.124

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

Posse Comitatus. The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.125

Delayed notification of a search (sneak and peek). Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take

124 The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct threat assessments for federal agencies, and to reimburse federal agencies for the costs of detaining terrorist suspects overseas.

125 For a general discussion of the Posse Comitatus Act, see, Doyle, The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law, CRS REP.NO. 95-964 (June 1, 2000).
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, Richards v. Wisconsin, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, Wilson v. Arkansas, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, Dalia v. United States, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, cf., United States v. Miller, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, United States v. Freitas, 800 F.2d 1451, 1453 (9th Cir. 1986).126

126 The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in United States v. New York Telephone Co., 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth
The Second Circuit was less convinced and preferred to hold sneak and peek searches to the demands of Rule 41, *United States v. Pangburn*, 983 F.2d 449 (2d Cir. 1993). The Fourth Circuit was, if anything, less convinced. Moreover, the facts in the case demonstrate the potential impact of the issue on computer privacy, *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000).

Amendment, demands that surreptitious entries be closely circumscribed,” *United States v. Freitas (Freitas I)*, 800 F.2d 1451, 1455-456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, *United States v. Freitas (Freitas II)*, 856 F.2d 1425 (9th Cir. 1988).

127 “No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in *Dalia v. United States*, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in *Dalia*, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property. . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. See *United States v. New York Telephone Co.* , 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . . Although the *Freitas I* court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in *United States v. Villegas*, 899 F.2d 1324 (1999). Although the *Freitas I* court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in *Villegas*. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the *Freitas I* court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” *United States v. Pangburn*, 983 F.2d 449, 453-55 (2d Cir. 1993).

128 In *Simons*, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
The Justice Department urged that the conflict be resolved with a uniform rule which permitted sneak and peek warrants under the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage.\footnote{129}

The Act, in section 213, stops short of the Justice Department proposal. Characterized as a codification of the Second Circuit decision, 147 \textit{Cong.Rec.} H7197 (daily ed. Oct. 23, 2001), the Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C. 3103a. Its sneak and peek authorization reaches all federal search and seizure warrants where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (\textit{e.g.}, risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (\textit{e.g.}, jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, \textit{i.e.}, in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation.\footnote{130} The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

\footnote{129} “The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. \textsection{}2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities,” \textit{DoJ} at \textsection{}353.

\footnote{130} Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department’s initial proposal, the Department’s justification does not address the question.
constitutionally “reasonable,” that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

**Nationwide terrorism search warrants.** The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either “within or outside the district,” (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases. The provision may anticipate execution both in this country and overseas. The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage. Neither Rule 41 nor any other provision of federal

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131 The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

132 The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

133 *United States v. Barona*, 56 F.3d 1087, 1092 (9th Cir. 1995)(“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994)(“if American law enforcement officials substantially participated in the search or if the

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” F.R.Crim.P. 41, *Advisory Committee Notes: 1990 Amendment*. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

**Terrorists’ DNA.** The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards *per se*.  

Existing federal law allowed the Attorney General to collect samples from foreign officials conducting the search were actually acting as agents for their American counterparts’); *United States v. Maturo*, 982 F.2d 57, 61 (2d Cir. 1992)(“where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials” or “where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials”); *United States v. Mitro*, 880 F.2d 1480, 1482 (1st Cir. 1989)(“where American agents participated in the foreign search or the foreign officers acted as agents for their American counterparts’); *United States v. Mount*, 757 F.2d 1315, 1318 (D.C.Cir. 1985)(“if American officials or officers participated in some significant way”); *United States v. Marzano*, 537 F.2d 257, 270 (7th Cir. 1976)(declining to adopt the “joint venture” standards, but finding level of American participation in the case before it insignificant); *United States v. Morrow*, 537 F.2d 120, 139 (5th Cir. 1976)(“if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts’); each of the decisions also suggests that evidence secured in a manner which shocked the conscience of the court would be excluded.

134 The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, see, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), reprinted, 78 Cong.Rec. 4982-983 (1934)(“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.) (conferring judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples form convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes,” DoJ at §353.

For a general discussion, see, Fischer, DNA Identification: Applications and Issues, CRS REP.NO. RL30717 (Jan. 12, 2001).

Access to Educational Records. Finally, the Act calls for an ex parte court order procedure under which senior Justice Department officials may seek authorization to collect educational records relevant to an investigation or prosecution of a crime of terrorism, section 507 (as an exception to the confidentiality requirements of the General Education Provisions Act, 20 U.S.C. 1232g), section 508 (as an exception to the confidentiality requirements of the National Education Statistics Act, 20 U.S.C. 9007).

Statute of Limitations. Prosecution for murder in violation of federal law may be initiated at any time, 18 U.S.C. 3281. A five year statute of limitations applied for most other federal crimes before passage of the Act, with a few exceptions. Among the relevant exceptions were an eight year statute of limitations for several terrorist offenses, 18 U.S.C. 3286, and a ten year statute of limitations for a few arson and explosives offenses, 18 U.S.C. 3295. The Justice Department recommended the elimination of a statute of limitations in terrorism cases.138

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137 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

138 “This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

“This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in
The Act takes less dramatic action in section 809. It eliminates the statute of limitations for any crime of terrorism\textsuperscript{139} that risks or results in a death or serious bodily injury, 18 U.S.C. 3286. In the absence of such a risk or result, all other terrorism offenses become subject to the eight year statute of limitations unless already covered by the ten year statute for explosives and arson offenses, 18 U.S.C. 3286.

Application of the statute of limitations rarely provokes a constitutional inquiry. Nevertheless, due process precludes prosecution when it can be shown that pre-indictment delay “caused substantial prejudice to [a defendant’s] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.”\textsuperscript{140} Moreover, a judicial difference of opinion has appeared in those cases

\textsuperscript{139} As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 (sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period.\textsuperscript{141} Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.\textsuperscript{142}

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (\textit{Grimes}, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (\textit{Frazer}, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

\textbf{Extraterritoriality.} Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States or elsewhere. . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.\textsuperscript{143}

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnapping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.

\textsuperscript{141} \textit{United States v. De La Matta}, 266 F.3d 1275, 1286 (11th Cir. 2001); \textit{United States v. Grimes}, 142 F.3d 1342, 1351 (11th Cir. 1998); \textit{United States v. Morrow}, 177 F.3d 272, 294 (5th Cir. 1999); \textit{Falter v. United States}, 23 F.2d 420, 425-26 (2d Cir. 1928).

\textsuperscript{142} \textit{People v. Frazer}, 24 Cal.4th 737, 759, 982 P.2d 180, 1294, 88 Cal.Rptr.2d 312, 327 (1999).

\textsuperscript{143} \textit{United States v. Layton}, 855 F.2d 1388 (9th Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); \textit{United States v. Benítez}, 741 F.2d 1312 (11th Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.\(^{144}\)

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

**Victims.** Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11\(^{th}\) Victim Compensation Fund legislation before it passed the Act. Consequently, the Act’s victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 *et seq.*, and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 *et seq*.

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:

• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year) (42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d)(5)), section 621(d)

• waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

• eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

**Increasing Institutional Capacity.** A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

- $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)

- necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)

- $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)

- $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816

- $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701

- $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)

- $5 million for DEA police training in South and Central Asia, section 1007.

Miscellaneous. Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might to used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act, or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b). 807.

\[145\]  \textit{i.e.}, Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).

\[146\] For a general discussion of trade sanctions legislation, see, Jurenas, Exempting Food and Agriculture Products from U.S. Economic Sanctions: Status and Implementation, CRS ISSUE BRIEF IB100061.
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.\(^{112}\)

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D). The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

\(^{112}\) *U.S. Const.* Art.III, §2, cl.3 (“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . .”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . .”); *United States v. Cabrales*, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from *Cabrales* when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnaping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280-81 n.4 (1999)(“By way of comparison, last Term in *Cabrales* we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).
The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of `material support or resources' is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’),” DoJ at 306.

And it adds expert advice or assistance to the types of assistance that may not be provided under section 2339A. This last addition may encounter the same First Amendment vagueness problems some courts have found in assistance which takes the form of “training” and “personnel,” Humanitarian Law Project v. Reno, 205 F.3d 1130, 1137-136 (9th Cir. 2000). Finally, the section announces that a prosecution for violation of section 2339A (support of terrorists) may be brought where the support is provided or where the predicate act of terrorism occurs. There may be some question whether the Constitution permits prosecution where the predicate act occurs.

Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.


113 The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of ‘material support or resources’ is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’),” DoJ at 306.


115 “The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill (‘Federal terrorism offenses’) is used in identifying the relevant crimes,” DoJ, at §304.

New Penalties. The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. 3571(b),(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense.¹¹⁷

The proposal, however, failed to identify the critical elements that would trigger the alternative.¹¹⁸ Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

- for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

- for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

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¹¹⁷ “Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersede lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,” DoJ, at §302.

¹¹⁸ “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense,” Draft at §302.
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- for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;

- for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;

- for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;

- for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and

- for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism. Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:

- arson committed within a federal enclave, 18 U.S.C. 81;
- killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);
- destruction of communications facilities, 18 U.S.C. 1362;
- destruction of property within a federal enclave, 18 U.S.C. 1363;
- causing a train wreck, 18 U.S.C. 1922;
- providing material support to a terrorist, 18 U.S.C. 2339A;
- torture committed overseas under color of law, 18 U.S.C. 2340A;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

119 “The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists. This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.
• interfering with a flight crew within U.S. special aircraft jurisdiction, 49 U.S.C. 46504;
• carrying a weapon or explosive abroad an aircraft within U.S. special aircraft jurisdiction, 49 U.S.C. 46505; and
• sabotage of interstate gas pipeline facilities, 49 U.S.C. 60123.

When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years). The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission), a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

120 Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

121 “Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.

“This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders).122

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

**Other Procedural Adjustments.** In other procedural adjustments designed to facilitate criminal investigations, the Act:

- increases the rewards for information in terrorism cases
- expands the Posse Comitatus Act exceptions
- authorizes “sneak and peek” search warrants
- permits nationwide and perhaps worldwide execution of warrants in terrorism cases
- eases government access to confidential information
- allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
- lengthens the statute of limitations applicable to crimes of terrorism
- clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
- adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B.123

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122 It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, e.g., damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

123 When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001)(remarks of Rep. Sensenbrenner); for general background, see, Doyle, McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys, CRS REP.NO. RL30060 (Dec. 14, 2001).
Rewards. The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L.105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism.\textsuperscript{124}

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

Posse Comitatus. The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.\textsuperscript{125}

Delayed notification of a search (sneak and peek). Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take

\textsuperscript{124} The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct threat assessments for federal agencies, and to reimburse federal agencies for the costs of detaining terrorist suspects overseas.

\textsuperscript{125} For a general discussion of the Posse Comitatus Act, see, Doyle, \textit{The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law}, CRS REP.NO. 95-964 (June 1, 2000).
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, Richards v. Wisconsin, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, Wilson v. Arkansas, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, Dalia v. United States, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, cf., United States v. Miller, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, United States v. Freitas, 800 F.2d 1451, 1453 (9th Cir. 1986).126

126 The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in United States v. New York Telephone Co., 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth
Amendment, demands that surreptitious entries be closely circumscribed,” United States v. Freitas (Freitas I), 800 F.2d 1451, 1455-1456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, United States v. Freitas (Freitas II), 856 F.2d 1425 (9th Cir. 1988).

“‘No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in Dalia v. United States, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in Dalia, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property. . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. See United States v. New York Telephone Co., 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . . Although the Freitas I court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in United States v. Villegas, 899 F.2d 1324 (1999). Although the Freitas I court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in Villegas. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the Freitas I court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” United States v. Pangburn, 983 F.2d 449, 453-455 (2d Cir. 1993).

127 In Simons, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
The Justice Department urged that the conflict be resolved with a uniform rule which permitted sneak and peek warrants under the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage.\textsuperscript{129}

The Act, in section 213, stops short of the Justice Department proposal. Characterized as a codification of the Second Circuit decision, 147 \textit{Cong.Rec.} H7197 (daily ed. Oct. 23, 2001), the Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C. 3103a. Its sneak and peek authorization reaches all federal search and seizure warrants where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (\textit{e.g.,} risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (\textit{e.g.,} jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, \textit{i.e.,} in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation.\textsuperscript{130} The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

\textsuperscript{129} “The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. \textsection{2705}, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities,” \textit{DoJ} at \textsection{353}.

\textsuperscript{130} Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department's initial proposal, the Department's justification does not address the question.
constitutionally “reasonable,” that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

**Nationwide terrorism search warrants.** The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either “within or outside the district,” (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases. The provision may anticipate execution both in this country and overseas. The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage. Neither Rule 41 nor any other provision of federal

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131 The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

132 The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

133 *United States v. Barona*, 56 F.3d 1087, 1092 (9th Cir. 1995)(“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994)(“if American law enforcement officials substantially participated in the search or if the

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” F.R.Crim.P. 41, *Advisory Committee Notes: 1990 Amendment*. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

**Terrorists’ DNA.** The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards *per se.* Existing federal law allowed the Attorney General to collect samples from foreign officials conducting the search were actually acting as agents for their American counterparts’); *United States v. Maturo*, 982 F.2d 57, 61 (2d Cir. 1992)(“where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials” or “where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials”); *United States v. Mitro*, 880 F.2d 1480, 1482 (1st Cir. 1989)(“where American agents participated in the foreign search or the foreign officers acted as agents for their American counterparts”); *United States v. Mount*, 757 F.2d 1315, 1318 (D.C.Cir. 1985)(“if American officials or officers participated in some significant way”); *United States v. Marzano*, 537 F.2d 257, 270 (7th Cir. 1976)(declining to adopt the “joint venture” standards, but finding level of American participation in the case before it insignificant); *United States v. Morrow*, 537 F.2d 120, 139 (5th Cir. 1976)(“if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts”); each of the decisions also suggests that evidence secured in a manner which shocked the conscience of the court would be excluded.

134 The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, see, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), reprinted, 78 *Cong.Rec.* 4982-983 (1934)(“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.)(conferring judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples from convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes,” DoJ at §353.

Access to Educational Records. Finally, the Act calls for an ex parte court order procedure under which senior Justice Department officials may seek authorization to collect educational records relevant to an investigation or prosecution of a crime of terrorism, section 507 (as an exception to the confidentiality requirements of the General Education Provisions Act, 20 U.S.C. 1232g), section 508 (as an exception to the confidentiality requirements of the National Education Statistics Act, 20 U.S.C. 9007).

Statute of Limitations. Prosecution for murder in violation of federal law may be initiated at any time, 18 U.S.C. 3281. A five year statute of limitations applied for most other federal crimes before passage of the Act, with a few exceptions. Among the relevant exceptions were an eight year statute of limitations for several terrorist offenses, 18 U.S.C. 3286, and a ten year statute of limitations for a few arson and explosives offenses, 18 U.S.C. 3295. The Justice Department recommended the elimination of a statute of limitations in terrorism cases.138

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For a general discussion, see, Fischer, DNA Identification: Applications and Issues, CRS REP.NO. RL30717 (Jan. 12, 2001).

137 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

138 “This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

“This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in
connection with the September 11, 2001 terrorist attacks. The constitutionality of such retroactive applications of changes in statutes of limitations is well-settled, See, e.g., United States v. Grimes, 142 F.3d 1342, 1350-51 (11th Cir. 1998); People v. Frazer, 982 P.2d 180 (Cal. 1999).

"Existing federal law (18 U.S.C. §3282) bars prosecuting most offenses after five years. 18 U.S.C. §3286, as currently formulated, extends the limitation period for prosecution for certain offenses that may be committed by terrorists – but only to eight years. While this is a limited improvement over the five-year limitation period for most federal offenses, it is patently inadequate in relation to the catastrophic human and social costs that frequently follow from such crimes as destruction of aircraft (18 U.S.C. §32), aircraft hijackings ([49] U.S.C. §§46502, 46504-06, attempted political assassinations (18 U.S.C. §§351, 1116, 1751), or hostage taking (18 U.S.C. §1203). These are not minor acts of misconduct which can properly be forgiven or forgotten merely because the perpetrator has avoided apprehension for some period of time. Anomalously, existing law provides longer limitation periods for such offenses as bank frauds and certain artwork thefts (18 U.S.C.§§3293-94) than it does for crimes characteristically committed by terrorists.

"In many American jurisdictions, the limitation periods for prosecution for serious offenses are more permissible than those found in federal law, including a number of states which have no limitation period for the prosecution of felonies generally. While this section does not go so far, it does eliminate the limitation period for prosecution of the major crimes that are most likely to be committed by terrorists (‘Federal terrorism offenses’), as specified in section 309 of this bill,” DoJ at 301.

As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 (sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period.\(^{141}\) Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.\(^{142}\)

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (Grimes, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (Frazer, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

**Extraterritoriality.** Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States or elsewhere. . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.\(^{143}\)

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnaping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.

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\(^{141}\) *United States v. De La Matta*, 266 F.3d 1275, 1286 (11th Cir. 2001); *United States v. Grimes*, 142 F.3d 1342, 1351 (11th Cir. 1998); *United States v. Morrow*, 177 F.3d 272, 294 (5th Cir. 1999); *Falterm v. United States*, 23 F.2d 420, 425-26 (2d Cir. 1928).

\(^{142}\) *People v. Frazer*, 24 Cal.4th 737, 759, 982 P.2d 180, 1294, 88 Cal.Rptr.2d 312, 327 (1999).

\(^{143}\) *United States v. Layton*, 855 F.2d 1388 (9th Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); *United States v. Benitez*, 741 F.2d 1312 (11th Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.\footnote{Compare, United States v. Gatlin, 216 F.3d 207 (2d Cir. 2000); United States v. Laden, 92 F.Supp.2d 189 (S.D.N.Y. 2000); with, United States v. Corey, 232 F.3d 1166 (9th Cir. 2000); United States v. Erdos, 474 F.2d 157 (4th Cir. 1973).}

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

Victims. Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11\textsuperscript{th} Victim Compensation Fund legislation before it passed the Act. Consequently, the Act’s victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 \textit{et seq.}, and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 \textit{et seq.}

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:
• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year)(42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d) (5)), section 621(d)

• waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

• eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
• makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

• prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

• allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

• reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

• makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

• allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

• establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

Increasing Institutional Capacity. A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

- $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)

- necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)

- $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)

- $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816

- $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701

- $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)

- $5 million for DEA police training in South and Central Asia, section 1007.

**Miscellaneous.** Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might to used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act, or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b), 807.

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145 I.e., Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).

146 For a general discussion of trade sanctions legislation, see, Jurenas, Exempting Food and Agriculture Products from U.S. Economic Sanctions: Status and Implementation, CRS ISSUE BRIEF IB100061.
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The USA PATRIOT Act: A Legal Analysis

April 15, 2002

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Summary

The USA PATRIOT Act passed in the wake of the September 11 terrorist attacks. It flows from a consultation draft circulated by the Department of Justice, to which Congress made substantial modifications and additions. The stated purpose of the Act is to enable law enforcement officials to track down and punish those responsible for the attacks and to protect against any similar attacks.

The Act grants federal officials greater powers to trace and intercept terrorists’ communications both for law enforcement and foreign intelligence purposes. It reinforces federal anti-money laundering laws and regulations in an effort to deny terrorists the resources necessary for future attacks. It tightens our immigration laws to close our borders to foreign terrorists and to expel those among us. Finally, it creates a few new federal crimes, such as the one outlawing terrorists’ attacks on mass transit; increases the penalties for many others; and institutes several procedural changes, such as a longer statute of limitations for crimes of terrorism.

Critics have suggested that it may go too far. The authority to monitor e-mail traffic, to share grand jury information with intelligence and immigration officers, to confiscate property, and to impose new book-keeping requirements on financial institutions, are among the features troubling to some.

The Act itself responds to some of these reservations. Many of the wiretapping and foreign intelligence amendments sunset on December 31, 2005. The Act creates judicial safeguards for e-mail monitoring and grand jury disclosures; recognizes innocent owner defenses to forfeiture; and entrusts enhanced anti-money laundering powers to those regulatory authorities whose concerns include the well being of our financial institutions.

This report, stripped of its citations and footnotes, is available in an abbreviated form as The USA PATRIOT Act: A Sketch, CRS REP.NO. RS21203. In addition, much of the information contained here may also be found under a different arrangement in a report entitled, Terrorism: Section by Section Analysis of the USA PATRIOT Act, CRS REP.NO. RL31200 (Dec. 10, 2001). A wider array of terrorism-related analysis appears on the CRS terrorism electronic briefing book page.
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The USA PATRIOT Act: A Legal Analysis

Introduction

Congress passed the USA PATRIOT Act (the Act) in response to the terrorists’ attacks of September 11, 2001. The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to further close our borders to foreign terrorists and to detain and remove those within our borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it is not without safeguards, critics contend some of its provisions go too far. Although it grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough.


1 P.L. 107-56, 115 Stat. 272 (2001); its full title is the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT).”

2 H.R. 2975 was introduced by Representative Sensenbrenner for himself and Representatives Conyers, Hyde, Coble, Goodlatte, Jenkins, Jackson-Lee, Cannon, Meehan, Graham, Bachus, Wexler, Hostettler, Keller, Issa, Hart, Flake, Schiff, Thomas, Goss, Rangel, Berman and Lofgren; S.1510 by Senator Daschle for himself and Senators Lott, Leahy, Hatch, Graham, Shelby and Sarbanes.

3 H.R. 3004 was introduced by Representative Oxley for himself and Represenatives LaFalce, Leach, Maloney, Roukema, Bentsen, Hooley, Bereuter, Baker, Bachus, King, Kelly, Gillmore, Cantor, Riley, Latourette, Green (of Wisconsin), and Grucci; and reported out of the House Financial Services Committee with amendments on October 15, 2001, H.R.Rep.No. 107-250. H.R. 3004, as reported out, included Internet gambling amendments that were not included in H.R. 2975/H.R.3108.
ed. Oct. 24, 2001), and H.R. 3162 was sent to the President who signed it on October 26, 2001.

**Criminal Investigations: Tracking and Gathering Communications**

A portion of the Act addresses issues suggested originally in a Department of Justice proposal circulated in mid-September. The first of its suggestions called for amendments to federal surveillance laws, laws which govern the capture and tracking of suspected terrorists’ communications within the United States. Federal law features a three tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications.

The tiers reflected the Supreme Court’s interpretation of the Fourth Amendment’s ban on unreasonable searches and seizures. The Amendment protects private conversations, *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967). It does not cloak information, even highly personal information, for which there is no individual justifiable expectation of privacy, such as telephone company records of calls made to and from an individual’s home, *Smith v. Maryland*, 442 U.S. 735 (1979), or bank records of an individual’s financial dealings, *United States v. Miller*, 425 U.S. 435 (1976).

Congress responded to *Berger* and *Katz*, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications, 18 U.S.C. 2511. At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious

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4 The Department’s proposal, dated September 20, 2001, came with a brief section by section analysis. Both the proposal (Draft) and analysis (DoJ) were printed as an appendix in *Administration's Draft Anti-Terrorism Act of 2001, Hearing Before the House Comm. on the Judiciary, 107th Cong., 1st Sess. 54 (2001).*


6 “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,” U.S. Const. Amend. IV.

7 Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
criminal cases. When approved by senior Justice Department officials, law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.

8 “The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of” one or more predicate offense, 18 U.S.C. 2516.

9 The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(e) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement), 1751 (presidential and presidential staff assassination, kidnapping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnaping, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or naturalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations, 18 U.S.C. 2518. The court notifies the parties to any conversations seized under the order after the order expires, 18 U.S.C. 2518(8).

Below Title III, the next tier of privacy protection covers some of those matters which the Supreme Court has described as beyond the reach of the Fourth Amendment protection – telephone records, e-mail held in third party storage, and the like, 18 U.S.C. 2701-2709 (Chapter 121). Here, the law permits law enforcement access, ordinarily pursuant to a warrant or court order or under a subpoena in some cases, but in connection with any criminal investigation and without the extraordinary levels of approval or constraint that mark a Title III interception, 18 U.S.C. 2703.

Least demanding and perhaps least intrusive of all is the procedure that governs court orders approving the government’s use of trap and trace devices and pen registers, a kind of secret “caller id”, which identify the source and destination of calls made to and from a particular telephone, 18 U.S.C. 3121-3127 (Chapter 206). The orders are available based on the government's certification, rather than a finding of the court, that the use of the device is likely to produce information relevant to the investigation of a crime, any crime, 18 U.S.C. 3123. The devices record no more than the identity of the participants in a telephone conversation, but neither the orders nor the results they produce need ever be revealed to the participants.

The Act modifies the procedures at each of the three levels. It:

offense involving counterfeiting punishable under 18 U.S.C. 471, 472, or 473; (e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States; (f) any offense including extortionate credit transactions under 18 U.S.C. 892, 893, or 894; (g) a violation of 31 U.S.C. 5322 (dealing with the reporting of currency transactions); (h) any felony violation of 18 U.S.C. 2511 and 2512 (interception and disclosure of certain communications and to certain intercepting devices); (i) any felony violation of 18 U.S.C. ch. 71 (obscenity); (j) 49 U.S.C. 60123(b) (destruction of a natural gas pipeline), 46502 (aircraft piracy); (k) 22 U.S.C. 2778 (Arms Export Control Act); (l) the location of any fugitive from justice from an offense described in this section; (m) a violation of 8 U.S.C. 1324, 1327, or 1328; (n) any felony violation of 18 U.S.C. 922, 924 (firearms); (o) any violation of 26 U.S.C. 5861 (firearms); (p) a felony violation of 18 U.S.C. 1028 (production of false identification documents), 1542 (false statements in passport applications), 1546 (fraud and misuse of visas, permits, and other documents) or a violation of 8 U.S.C. 1324, 1327, or 1328 (smuggling of aliens); (p) 229 (chemical weapons), 2332 (terrorist violence against Americans overseas), 2332a (weapons of mass destruction), 2332b (multinational terrorism), 2332d (financial transactions with countries supporting terrorism), 2339A (support of terrorist), 2332B (support of terrorist organizations); (r) any conspiracy to commit any of these, 18 U.S.C. 2516(1)(crimes added by the Act in italics). Other than telephone face to face conversations (i.e., electronic communications), the approval of senior Justice Department officials is not required and an order may be sought in any felony investigation, 18 U.S.C. 2516(3).

10 Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
• permits pen register and trap and trace orders for electronic communications (e.g., e-mail)

• authorizes nationwide execution of court orders for pen registers, trap and trace devices, and access to stored e-mail or communication records

• treats stored voice mail like stored e-mail (rather than like telephone conversations)

• permits authorities to intercept communications to and from a trespasser within a computer system (with the permission of the system’s owner)

• adds terrorist and computer crimes to Title III’s predicate offense list

• reenforces protection for those who help execute Title III, ch. 121, and ch. 206 orders

• encourages cooperation between law enforcement and foreign intelligence investigators

• establishes a claim against the U.S. for certain communications privacy violations by government personnel

• terminates the authority found in many of these provisions and several of the foreign intelligence amendments with a sunset provision (Dec. 31, 2005).

**Pen Registers and Trap and Trace Devices.** In section 216, the Act allows court orders authorizing trap and trace devices and pen registers to be used to capture source and addressee information for computer conversations (e.g., e-mail) as well as telephone conversations, 18 U.S.C. 3121, 3123. In answer to objections that e-mail header information can be more revealing than a telephone number, it creates a detailed report to the court, 18 U.S.C. 3123(a)(3).11

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11 "Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public the agency shall ensure that a record will be maintained which will identify – (i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of the device.

"(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof),” section 216(b)(1).
The use of pen registers or trap and trace devices was limited at one time to the judicial district in which the order was issued, 18 U.S.C. 3123 (2000 ed.). Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States, 18 U.S.C. 3123(b)(1)(C), 3127(2).12

**Communications Records and Stored E-Mail.** With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber, 18 U.S.C. 2703(a),(b). A warrant will also suffice to seize records describing telephone and other communications transactions without customer notice, 18 U.S.C. 2703(c). In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation, officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records, 18 U.S.C. 2703(b),(c). They can obtain a limited amount of record information (subscribers’ names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena, 18 U.S.C. 2703(c)(1)(C). There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial, 18 U.S.C. 2705.

In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider’s customer records, 18 U.S.C. 2703(c)(1)(C).13

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.

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12 The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” DoJ at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

13 Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user's true identity... this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” DoJ at §107.
Previously, only a federal court in the district in which the e-mail was stored could issue the order. Under section 220, federal courts in the district where an offense under investigation occurred may issue orders applicable “without geographic limitation,” 18 U.S.C. 2703.\(^\text{14}\)

The Act, in section 209, treats voice mail like e-mail, that is, subject to the warrant or court order procedure, rather than to the more demanding coverage of Title III once required, \textit{United States v. Smith}, 155 F.3d 1050, 1055-56 (9th Cir. 1998).

Finally, the Act resolves a conflict between chapter 121 and the federal law governing cable companies. Government entities may have access to cable company customer records only under a court order following an adversary hearing if they can show that the records will evidence that the customer is or has engaged in criminal activity, 47 U.S.C. 511(h). When cable companies began offering telephone and other communications services the question arose whether the more demanding cable rules applied or whether law enforcement agencies were entitled to ex parte court orders under the no-notice procedures applicable to communications providers.\(^\text{15}\) The Act makes it clear that the cable rules apply when cable television viewing services are

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\(^\text{14}\) Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” \textit{DoJ} at §108.

\(^\text{15}\) See e.g., \textit{DoJ} at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement’s access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

**Electronic Surveillance.** To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202. A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(i). Yet only the interloper's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.

**Criminal Investigators' Access to Foreign Intelligence Information.** The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism. It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that “the purpose for the surveillance is to obtain foreign intelligence information,” 50 U.S.C. 1804(a)(7)(B)(2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps “the purpose” might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation

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16 18 U.S.C. 229 (chemical weapons), 2332(terrorist acts of violence committed against Americans overseas), 2332a(use of weapons of mass destruction), 2332b(acts of terrorism transcending national boundaries), 2332d(financial transactions with countries which support terrorists), 2339A(providing material support to terrorists), and 2339B(providing material support to terrorist organizations).

17 “Because service providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves as permitted under current law, they often have no way to exercise their rights to protect themselves from unauthorized attackers. Moreover, such attackers can target critical infrastructures and engage in cyberterrorism,” DoJ at §106. Elsewhere the Act defines “electronic surveillance” for purposes of the Foreign Intelligence Surveillance Act (FISA) to emphasize that the law enforcement authority for this intruder surveillance does not confer similar authority for purposes of foreign intelligence gathering, section 1003 (50 U.S.C. 1801(f)(2)).

Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment's warrant clause. It is here that the “primary purpose” notion originated. In *United States v. Truong Dinh Hung*, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, “as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.”

Subsequent case law, however, is not as clear as it might be: see e.g., *United States v. Duggan*, 743 F.2d 59, 77 (2d Cir. 1984) (“FISA permits federal officials to obtain orders authorizing electronic surveillance ‘for the purpose of obtaining foreign intelligence information.’ The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying officials’ belief that the information sought is the type of foreign intelligence information described”); *United States v. Pelton*, 835 F.2d 1067, 1075-76 (4th Cir. 1987) (“We also reject Pelton’s claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial”); *United States v. Sarkissian*, 841 F.2d 959, 907-8 (9th Cir. 1988) (“Defendants rely on the primary purpose test articulated in *United States v. Truong Dinh Hung.* . . . One other court has applied the primary purpose test. Another court has rejected it . . . distinguishing *Truong*. A third court has declined to decide the issue. We also decline to decide the issue”); *United States v. Johnson*, 952 F.2d 565, 572 (1st Cir. 1991) (“Appellants attack the government’s surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance”).

Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” DoJ at §153.
demanding standard than the “a purpose” threshold proposed by the Justice Department, but a clear departure from the original “the purpose” entry point. FISA once described a singular foreign intelligence focus prerequisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k), 1825(k).21

Protective Measures. The Act reenforces two kinds of safeguards, one set designed to prevent abuse and the other to protect those who assist the government. The sunset clause is perhaps the best known of the Act’s safeguards. Under the direction of section 224, many of the law enforcement and foreign intelligence authorities granted by the Act expire as of December 31, 2005.22 The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter

21 “(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. (2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, infra, quoting, 50 U.S.C. 1801.

22 “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210[ subpoenas for communications provider customer records], 211[access to cable company communication service records], 213[sneak and peek], 216[pen register and trap and trace device amendments], 221[trade sanctions], and 222[assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005. “(b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers' communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices).23 Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees,24 but could not recover against the United States.25 Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice's Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government's request until a court order authorizing access can be obtained.26 Another allows providers to disclose customer records to protect the provider's rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others.27 A third section,

26 Prior law already granted service providers immunity for disclosure of customer records in compliance with a court access order, 18 U.S.C. 2703(f).
27 “Existing law contains no provision that allows providers of electronic communications service to disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies that threaten death or serious bodily injury. This section amends 18 U.S.C. §2702 to authorize such disclosures if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.

“Current law also contains an odd disconnect: a provider may disclose the contents of the customer's communications in order to protect its rights or property but the current statute does not expressly permit a provider to voluntarily disclose non-content records (such as a subscriber's login records). 18 U.S.C. 2702(b)(5). This problem substantially hinders the ability of providers to protect themselves from cyber-terrorists and criminals. Yet the right to disclose the contents of communications necessarily implies the less intrusive ability to disclose non-content records. In order to promote the protection of our nation's critical infrastructures, this section's amendments allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems,” DoJ at
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

### Foreign Intelligence Investigations

Although both criminal investigations and foreign intelligence investigations are conducted in the United States, criminal investigations seek information about unlawful activity; foreign intelligence investigations seek information about other countries and their citizens. Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough.

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA), something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President's authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, United States v. United States District Court, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage.
lockers, 50 U.S.C. 1861-1863 (2000 ed.). Intelligence authorities gained narrow passages through other privacy barriers as well.\textsuperscript{32}

In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs.\textsuperscript{33} There were and still are extra


\textsuperscript{33} “As used in this subchapter: (a) ‘Foreign power’ means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

“(b) ‘Agent of a foreign power’ means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person’s presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of a foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C).

“(c) ‘International terrorism’ means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnaping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

“(d) ‘Sabotage’ means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

“(e) ‘Foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans ("United States persons," *i.e.*, citizens or permanent resident aliens). The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

- permits "roving" surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)
- increases the number of judges on the FISA court from 7 to 11
- allows application for a FISA surveillance or search order when gathering foreign intelligence is a significant reason for the application rather than the reason
- authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations
- sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses
- carries a sunset provision
- establishes a claim against the U.S. for certain communications privacy violations by government personnel
- expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to – (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States,” 50 U.S.C. 1801.

34 Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
FISA. FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases. It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

Search and Surveillance for Intelligence Purposes. Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, Draft at §151.36

Section 901 of the Act address a concern raised during the 106th Congress relating to the availability of the FISA orders and the effective use of information gleaned from the execution of a FISA order.37 It vests the Director of Central

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36 See also, DoJ at §151, “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order’s minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed (50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

37 See e.g., S.Rep.No. 106-352, at 3, 6, 7 (2000)(“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application
process, as interpreted by the OIPR is administratively burdensome and, at times, extremely slow. Many applications undergo months of scrutiny before submission to the court because the OIPR prescribes standards and restrictions not imposed by the statute. . . . In particular, the OIPR has been criticized for an overly restrictive interpretation of the FISA ‘currency’ requirement. This is the issue of how recent a subject’s activities must be to support a finding of probable cause that the subject is engaged in clandestine intelligence gathering activities. . . . While existing law does not specifically address “past activities,” it does not preclude, and legislative history supports, the conclusion that past activities may be part of the totality of circumstances considered by the FISC in making a probable cause determination. . . . By definition, information collected pursuant to a court order issued under the Foreign Intelligence Surveillance Act is foreign intelligence not law enforcement information. Accordingly, the Committee wants to clarify that the FISA ‘take’ can and must be shared by the Federal Bureau of Investigation with appropriate intelligence agencies. For the intelligence mission of the United States to be successful, there must be a cooperative and concerted effort among intelligence agencies. Any information collected by one agency under foreign intelligence authorities that could assist another agency in executing its lawful mission should be shared fully and promptly. Only then can the United States Government pursue aggressively important national security targets including, for example, counterterrorist and counternarcotics targets”); see also, 147 Cong.Rec. S799-803 (daily ed. Feb. 24, 2000)(remarks of Sens. Specter, Torricelli and Biden).

Pen Registers and Trap and Trace Devices for Intelligence Gathering. Section 214 grants the request of the Department of Justice by dropping requirements which limited FISA pen register and trap and trace device orders to facilities used by foreign agents or those engaged in international terrorist or clandestine intelligence activities, 50 U.S.C. 1842(c)(3)(2000 ed.). It is enough that the order is sought as part of an investigation to protect against international terrorism or clandestine intelligence activities and is not motivated solely by an American’s exercise of his or her First Amendment rights. Elsewhere (section 505), the Act drops a similar limitation for intelligence officials’ access to telephone records, 18 U.S.C.

38 “When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevance, an additional factual showing that the communications device has been used to contact an ‘agent of a foreign power’ engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the ‘agent of a foreign power’ prong from the predication, and thus makes the FISA authority more closely track the criminal authority,” DoJ at §155.
Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise be entitled to confidentiality. Section 505, in response to the Justice Department’s suggestion, allows FBI field offices to make the requests, see DoJ at §157 (“At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports”).

Third Party Cooperation and Tangible Evidence. As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target’s activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.

39 Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise be entitled to confidentiality. Section 505, in response to the Justice Department’s suggestion, allows FBI field offices to make the requests, see DoJ at §157 (“At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports”).

40 When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court’s order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.’ This would enhance the FBI’s ability to monitor international terrorists and intelligence officers who are
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian. The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities, in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B));
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a);
- the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a);
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v;

trained to thwart surveillance by rapidly changing hotel accommodations, cell phones, Internet accounts, etc., just prior to important meetings or communications. Under the current law, the government would have to return to the FISA Court for an order that named the new carrier, landlord, etc., before effecting surveillance. Under the proposed amendment, the FBI could simply present the newly discovered carrier, landlord, custodian or other person with a generic order issued by the Court and could then effect FISA coverage as soon as technically feasible,” DoJ at 152.


41 “The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigative contexts. The time and difficulty involved in getting such pleadings before the Court usually outweighs the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” DoJ at §156.

42 Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.43

**Access to Law Enforcement Information.** Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community’s access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, Draft at §103.44

43 H.R.Rep.No. 107-205, at 60-1 (2001)(“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

“The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

“Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual’s credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding--without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information”).

44 See also, DoJ at §103, “This section facilities the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, Draft at §354.\textsuperscript{45}

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, Draft at §154.\textsuperscript{46}

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion.\textsuperscript{47} It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions.”

\textsuperscript{45} See also, DoJ at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.” Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officers

\textsuperscript{46} See also, DoJ at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”

\textsuperscript{47} Blair \textit{v. United States}, 250 U.S. 273, 281 (1919)(the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
affairs are conducted in private and outside the presence of the court. Only the
attorney for the government, witnesses under examination, and a court reporter may
attend its proceedings, F.R.Crim.P. 6(d). Matters occurring before the grand jury are
secret and may be disclosed by the attending attorney for the government and those
assisting the grand jury only in the performance of their duties; in presentation to a
successor grand jury; or under court order for judicial proceedings, for inquiry into
misconduct before the grand jury, or for state criminal proceedings, F.R.Crim.P. 6(e).

The Act, in section 203(a), allows disclosure of matters occurring before the
grand jury to “any federal law enforcement, intelligence, protective, immigration,
national defense, or national security” officer to assist in the performance of his

Critics may protest that the change could lead to the use of the grand jury for
intelligence gathering purposes, or less euphemistically, to spy on Americans. 49 The
proposal was never among those scheduled to sunset, but earlier versions of the
section followed the path used for most other disclosures of grand jury material: prior

48 These officers may receive: (1) “foreign intelligence information” that is, information
regardless whether it involves Americans or foreign nationals that “[a] relates to the ability
of the United States to protect against – (aa) actual or potential attack or other grave hostile
acts of a foreign power or an agent of a foreign power; (bb) sabotage or international
terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence
activities by an intelligence service or network of a foreign power;” or [b] “with respect to a
foreign power or foreign territory that relates to – (aa) the national defense or security of the
United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P.
6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that
is, [a] “information relating to the capabilities, intentions, or activities of foreign governments
or elements thereof, foreign organizations, or foreign persons, or international terrorist
activities” or [b] “information gathered and activities conducted, to protect against espionage,
other intelligence activities, sabotage, or assassinations conducted on behalf of foreign
governments or elements thereof, foreign organizations, or foreign persons, or international
terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in
italics).

49 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on
Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25
HARVARD JOURNAL OF LAW & PUBLIC POLICY 699, 719-20 (2002)(“There is a significant
danger that the rule permitting disclosure will be treated as the de facto authorization of an
expansion of the grand jury’s investigative role to encompass seeking material relevant only
to matters of national security, national defense, immigration, and so forth. The grand jury’s
awesome powers should not be unwittingly extended to a much wider range of issues. . . Since the grand jury operates in secret, there are no public checks on the scope of its
investigations, and witnesses are not permitted to challenge its jurisdiction. Only the
supervising court is in a position to keep the grand jury’s investigation within proper bounds.
Requiring judicial approval of foreign intelligence and counterintelligence information
disclosures would provide a natural check against the temptation to manipulate the grand jury
to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist
Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6
(Nov. 2001)(“The grand jury secrecy rule is a rule of policy which has always had exceptions,
and it has been frequently modified. The secrecy rule has no credible claim to constitutional
stature”).
Law enforcement officials may share Title III information with the intelligence community under the same conditions, section 203(b), although the grand jury and Title III sharing provisions differ in at least three important respects. The court need not be notified of Title III disclosures. On the other hand, the authority for sharing Title III information expires on December 31, 2005, section 224, and agencies and their personnel guilty of intentional improper disclosures may be subject to a claim for damages and disciplinary action, 18 U.S.C. 2520.

The third subsection of section 203 remains something of an enigma. It speaks in much the same language as its counterparts. It allows law enforcement officials to share information with the intelligence community, “notwithstanding any other provisions of law,” section 203(d). It either swallows the other subsections, or supplements them. Several factors argue for its classification as a supplement. Congress is unlikely to have crafted subsections (a), (b) and (c) only to completely

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50 Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

51 “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person’s official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification. By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

**Increasing Institutional Capacity.** As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a

52 *Duncan v. Walker*, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted)(“It is our duty to give effect, if possible, to every clause and word of a statute. *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)); see also *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879)(As early as in Bacon's Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

53 Draft at §154, “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”
computerized translation capability to be used in foreign intelligence gathering.\textsuperscript{54} Section 907 instructs the Director of the Central Intelligence, in consultation with the Director of the FBI, to report on the creation of a National Virtual Translation Center. The report is to include information concerning staffing, allocation of resources, compatibility with comparable systems to be used for law enforcement purposes, and features which permit its efficient and secure use by all of the intelligence agencies.

**Money Laundering**

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture.\textsuperscript{55} The Act bolsters federal efforts in each area.

**Regulation.** Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.\textsuperscript{56}

\textsuperscript{54} “The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

“The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so,” S.Rep.No. 107-63, at 11 (2001).


\textsuperscript{56} See *e.g.*, 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
Records and Reports. For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler’s checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to files SARs as well, reflecting Congress’ view that the information provided the IRS may be valuable for other law enforcement purposes. This concern is likewise

58 H.R.Rep.No. 107-250, at 38-9 (2001) (“Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

“Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a ‘Safeguard Procedures Report’ which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

“While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement
reflected in section 357 which asks the Secretary of the Treasury to report on the Internal Revenue Service’s role in the administration of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311 et seq.), and what transfers of authority, if any, are appropriate.

Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action. Section 355 expands the immunity to cover disclosures in

authorities as the various reports mandated by the Bank Secrecy Act, which can typically be retrieved electronically from a database maintained by the Treasury Department. The differential access to the two kinds of reports is made anomalous by the fact that Form 8300 elicits much the same information that is required to be disclosed by the Bank Secrecy Act. For example, just as Form 8300 seeks the name, address, and social security number of a customer who engages in a cash transaction exceeding $10,000 with a trade or business, Currency Transaction Reports (CTRs) mandated by the Bank Secrecy Act require the same information to be reported on a cash transaction exceeding $10,000 between a financial institution and its customer”.

59 “Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

“First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor from civil liability applies in arbitration, as well as judicial, proceedings. Second, it amends section 5318(g)(3) to clarify the safe harbor's coverage of voluntary disclosures (that is, those not covered by the SAR regulatory reporting requirement). The language in section 5318(g)(3)(A) providing that ‘any financial institution that *** makes a disclosure pursuant to *** any other authority *** shall not be liable to any person’ is not intended to avoid the application of the reporting and disclosure provisions of the Federal securities laws to any person, or to insulate any issuers from private rights of actions for disclosures made under the Federal securities laws.

“Subsection [351](b) amends section 5318(g)(2) of title 31—which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed—to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee's official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
potential wrongdoing was also reported in a SAR,” H.R.Rep.No. 107-250, at 66 (2001).

60 31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 67 (2001).
The circumstances considered in the case of a suspect jurisdiction are:

- evidence of organized crime or terrorist transactions there;
- the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use;
- the extent and effectiveness of the jurisdiction’s banking regulation;
- the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven;
- the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and
- the extent of official corruption within the jurisdiction.

The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved;
- secure beneficial ownership information with respect to accounts maintained for foreign customers;
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions;
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution;
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’ including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

“Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate financial institutions.

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61 31 U.S.C. 5318A. The circumstances considered in the case of a suspect jurisdiction are: evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction’s banking regulation; the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

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“Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate financial institutions.
business transactions.

“Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

“Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

“The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

“The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

“The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

“The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent’ account for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information that it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

“The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

“The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed
Due Diligence. Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.

by regulation, order, or otherwise as permitted by law. However, if the Secretary proceeds by issuing an order, the order must be accompanied by a notice of proposed rulemaking relating to the imposition of the special measure, and may not remain in effect for more than 120 days, except pursuant to a regulation prescribed on or before the end of the 120-day period. The fifth special measure may be imposed only by regulation,” H.R.Rep.No. 107-250, at 68-9.

63 See generally, H.R.Rep.No. 107-250, at 71-2 (“Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

“The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

“The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

“For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
General Regulatory Matters. The Act establishes several other regulatory mechanisms directed at the activities involving U.S. financial institutions and foreign individuals or institutions. Section 313, for instance, in another restriction on correspondent accounts for foreign financial institutions, prohibits U.S. financial institutions from maintaining correspondent accounts either directly or indirectly for foreign shell banks (banks with no physical place of business\(^ {64} \)) which have no affiliation with any financial institution through which their banking activities are subject to regulatory supervision.\(^ {65} \)

The Act, in section 325, empowers the Secretary of the Treasury to promulgate regulations to prevent financial institutions from allowing their customers to conceal their financial activities by taking advantage of the institutions’ concentration account practices.\(^ {66} \)

The Secretary of the Treasury is instructed in section 326 to issue regulations for financial institutions’ minimum new customer identification standards and record-

detect and report transactions that may involve the proceeds of foreign corruption. A private bank account is defined as an account (or any combination of accounts) that requires a minimum aggregate deposit of funds or other assets of not less than $1 million; is established on behalf of one or more individuals who have a direct or beneficial ownership in the account; and is assigned to, or administered or managed by, an officer, employee or agent of a financial institution acting as a liaison between the institution and the direct or beneficial owner of the account.

“This section directs the Secretary of the Treasury, within 6 months of enactment of this bill and in consultation with appropriate Federal functional regulators, to further define and clarify, by regulation, the requirements imposed by this section”).

\(^ {64} \) Or more exactly, a bank which has no physical presence in any country; a “physical presence” for a foreign bank is defined as “a place of business that – (i) is maintained by a foreign bank; (ii) is located at a fixed address (other than solely an electronic address) in a country in which the foreign bank is authorized to conduct banking activities, at which location the foreign bank – (I) employs 1 or more individuals on a full-time basis; and (II) maintains operating records relating to its banking activities; and (iii) is subject to inspection by the banking authority which licensed the foreign bank to conduct banking activities,” 31 U.S.C. 5318(j)(4).


\(^ {66} \) The Act does not define “concentration accounts,” although the House Financial Services Committee report provides some incite into the section’s intent, H.R.Rep.No. 107-250, at 72-3 (2001)(“This section gives the Secretary of the Treasury discretionary authority to prescribe regulations governing the maintenance of concentration accounts by financial institutions, to ensure that these accounts are not used to prevent association of the identity of an individual customer with the movement of funds of which the customer is the direct or beneficial owner. If promulgated, the regulations are required to prohibit financial institutions from allowing clients to direct transactions into, out of, or through the concentration accounts of the institution; prohibit financial institutions and their employees from informing customers of the existence of, or means of identifying, the concentration accounts of the institution; and to establish written procedures governing the documentation of all transactions involving a concentration account.”)
Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a ‘street name’ or omnibus account in the broker-dealer's name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to ‘look through’ the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund's customers. Thus, the fund would not be required to ‘look through’ the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

“Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature.68

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

Reports to Congress. Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.69

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

**International Cooperation.** Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.70

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (i.e., the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.

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70 H.R.Rep.No. 107-250, at 67 (2001)(“This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury's progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

“The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime”).
**Crimes.** Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, smuggling, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
expands 18 U.S.C. 1956 to cover financial transactions conducted in foreign financial institutions.\textsuperscript{71}

Section 329 makes it a federal crime to corruptly administer the money laundering regulatory scheme. Offenders are punishable by imprisonment for not more than 15 years and a fine of not more than three times the amount of the bribe.

Section 5326 of title 31 authorizes the Secretary of the Treasury to impose temporary, enhanced reporting requirements upon financial institutions in areas victimized by substantial money laundering activity (geographic targeting regulations and orders). Section 353 makes it clear that the civil sanctions, criminal penalties, and prohibitions on smurfing (structuring transactions to evade reporting requirements) apply to violations of the regulations and orders issued under 31 U.S.C. 5326.\textsuperscript{72} It also extends the permissible length of the temporary geographical orders from 60 to 180 days.

Violations of the special measures and special due diligence requirements of sections 311 and 312 are subject to both civil and criminal penalties by virtue of section 363's amendments to 31 U.S.C. 5321(a) and 5322. The amendments authorize civil penalties and criminal fines of twice the amount of the transaction but not more than $1 million. Criminal offenders would be subject to a fine in the same amount.

\textsuperscript{71} “[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

“The definition of ‘financial institution’ in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of ‘commercial bank’ or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad--say to a Mexican bank--and launders them through a series of financial transactions, the government conceivably could not rely on the definition of a ‘financial institution’ in 1956(c)(6) to establish that the transaction was a ‘financial transaction’ within the meaning of 1956(c)(4)(B) (defining a ‘financial transaction’ as a transaction involving the use of a ‘financial institution’), or that it was a ‘monetary transaction’ within the meaning of 1957(f) (defining ‘monetary transaction’ as, inter alia, a transaction that would be a ‘financial transaction’ under 1956(c)(4)(B)).

“Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launderers the proceeds of one of the crimes set forth on a list of ‘specified unlawful activities.’ 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),” H.R.Rep.No. 107-250, at 38 (2000).

Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.73

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents.74 They increase the maximum terms of imprisonment for violation of:

• 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
• 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
• 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

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73 “The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business.

“Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.

“Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive,” H.R.Rep.No. 107-250, at 54 (2001).

74 “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual, 31 U.S.C. 5332(a)(2).

- 18 U.S.C. 476 (taking impressions of tools used for obligations and securities) from 10 to 25 years;
- 18 U.S.C. 477 (possessing or selling impressions of tools used for obligations or securities) from 10 to 25 years;
- 18 U.S.C. 484 (connecting parts of different notes) from 5 to 10 years;
- 18 U.S.C. 493 (bonds and obligations of certain lending agencies) from 5 to 10 years;
- 18 U.S.C. 478 (foreign obligations or securities) from 5 to 20 years;
- 18 U.S.C. 479 (uttering counterfeit foreign obligations or securities) from 3 to 20 years;
- 18 U.S.C. 480 (possessing counterfeit foreign obligations or securities) from 1 to 20 years;
- 18 U.S.C. 481 (plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities) from 5 to 25 years;
- 18 U.S.C. 482 (foreign bank notes) from 2 to 20 years; and
- 18 U.S.C. 483 (uttering counterfeit foreign bank notes) from 1 to 20 years.

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

*Bulk Cash.* Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act’s bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting.75

The section appears to be the product of reactions to the Supreme Court’s decision in United States v. Bajakian, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court’s

75 “For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).
“As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency – representing the proceeds of drug trafficking and other criminal offenses – is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad.

Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United States without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

“Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute,” H.R.Rep.No. 107-250 at 36-7 (2001).
under either circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.\textsuperscript{77}

**Venue.** Section 1004 relies on *dicta* in *United States v. Cabrales*, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering,\textsuperscript{78} in the state and district in which the monetary transaction takes place. The Supreme Court in *Cabrales* held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in *dicta*, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.\textsuperscript{79}

**Forfeiture.** Forfeiture is the government confiscation of property as a consequence of crime.\textsuperscript{80} The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 *et seq.* (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

**Constitutional Considerations.** The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 *et seq.*, which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the


\textsuperscript{78} “The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed,” *U.S.Const.* Art.III, §2, cl.3.

“[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,” *U.S.Const.* Amend. VI.

\textsuperscript{79} See also, *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnapping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.

\textsuperscript{80} For general background information, see, Doyle, *Crime and Forfeiture*, CRS REP. NO. 97-139A (Oct. 11, 2000).
This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b) (TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App. U.S.C. §5(b).

This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress’s war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2),” DoJ at §159.

An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
excepted from the coverage of 18 U.S.C. 983.\footnote{18 U.S.C. 983(i)(2)(D).} The challenge proceedings permit the court to admit evidence, such as hearsay evidence, that would not otherwise be admissible under the Federal Rules of Evidence if the evidence is reliable and if national security might be imperiled should dictates of the Federal Rules be followed, §316(b). The section recognizes the rights of claimants to proceed alternatively under the Constitution or the Administrative Procedure Act.\footnote{"The exclusion of certain provisions of Federal law from the definition of the term ‘civil forfeiture statute’ in section 983(i) of title 18, United States Code, shall not be construed to deny an owner of property the right to contest the confiscation of assets of suspected international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C) subchapter II of chapter 5 of title 5, United States Code (commonly known as the ‘Administrative Procedure Act’).” Sec. 316(c)(1).}

The Justice Department also recommended enactment of an overlapping provision which ultimately passed as section 806 of the Act without any real discussion of the relationship of the two sections.\footnote{"Current law does not contain any authority tailored specifically to the confiscation of terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available current forfeiture laws require detailed tracing that is quite difficult for accounts coming through the banks of countries used by many terrorists. ‘This section increases the government’s ability to strike at terrorist organizations’ economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001,” DoJ, at §403. The House Report on H.R. 2975 which contained versions of both sections is no more explicit on the relation of the two sections.}

Section 806 authorizes confiscation of all property, regardless of where it is found, of any individual, entity, or organization engaged in domestic or international terrorism (as defined in 18 U.S.C. 2331),\footnote{“(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct}
of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5)(as amended by section 802 of the Act).

87 Austin v. United States, 509 U.S. 602, 611-12 (1993)(“Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture. . . . Of England’s three kinds of forfeiture, only the third took hold in the United States”).


89 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal in personam proceedings following criminal conviction as a means of accomplishing confiscation.
Neither section 106 nor 806 require conviction of the terrorist property owner.\(^{90}\) Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers.\(^{91}\) The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners.\(^{92}\) Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them.\(^{93}\) The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate

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\(^{90}\) Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c) (“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act”).

\(^{91}\) Silesian American Corp. v. Clark, 332 U.S. 469 (1947); cf., Societe Internationale v. Rogers, 357 U.S. 197, 211 (1958) (“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).

\(^{92}\) Zittman v. McGrath, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’”).

any presumption of remedial purposes.\textsuperscript{94} The same has been said of the applicability of the ex post facto clause.\textsuperscript{95}

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO.\textsuperscript{96} If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

\textbf{Other Forfeiture Amendments.} In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.\textsuperscript{97}

\textsuperscript{94} United States v. Ursery, 518 U.S. 267, 278 (1996).

\textsuperscript{95} See e.g., United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.), 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994).

\textsuperscript{96} DoJ, at §403.

\textsuperscript{97} 18 U.S.C. 1956(b). \textit{Cf.}, H.R.Rep.No. 107-250, at 54-5 (2001)(“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas.\textsuperscript{98} Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted

\textsuperscript{98} 18 U.S.C. 981(k). H.R.Rep.No. 107-250, at 57-8 (2001)(“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank's customers.

“Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank's correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

“The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”).
defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation.\textsuperscript{99}

Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here.\textsuperscript{100} Section 320 enlarges this provisions to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements.\textsuperscript{101} This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.\textsuperscript{102}

\textsuperscript{99} Cf., H.R.Rep.No. 107-250, at 58-9 (2001) ("Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of `substitute assets' when the defendant has placed the property otherwise subject to forfeiture `beyond the jurisdiction of the court.' Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

“This section amends 21 U.S.C. 853 to make clear that a court in a criminal case may issue a repatriation order--either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. 853(e) to restrain property--so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both”).

\textsuperscript{100} 18 U.S.C. 981(a)(1)(B).

\textsuperscript{101} H.R.Rep.No. 107-250, at 56 (2001)("This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act").

\textsuperscript{102} H.R.Rep.No. 107-250, at 59-60 (2001)("Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country.

“Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
A fugitive may not challenge a federal forfeiture. Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in “order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.”
Alien Terrorists and Victims

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

Border Protection. The border protection provisions:

- authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401
- authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402
- remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404
- authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405
- authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.
- instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007
- direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418
- express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414
- add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415
- call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416
- limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
• instruct the Attorney General to report on the feasibility of using biometric scanners to help prevent terrorists and other foreign criminals from entering the country, section 1008

• authorize appropriations of $250,000 for the FBI to determine the feasibility of providing airlines with computer access to the names of suspected terrorists, section 1009

• authorize reciprocal sharing of the State Department’s visa lookout data and related information with other nations in order to prevent terrorism, drug trafficking, slave marketing, and gun running, section 413

**Detention and Removal.** Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity, 8 U.S.C. 1227 (a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(iv). Aliens may be inadmissible for any number of terrorism-related reasons, 8 U.S.C. 1182 (a)(3)(B). Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported.


Section 411 defines “terrorist organization” to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the Federal Register as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C.

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104 As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).
Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).


An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security or endanger some individual or the general public. The Attorney General's determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

Victims. The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

- permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421

- extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422

105 “The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

106 “The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks. The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application. “Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

“Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 31.

“Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.


107 “Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

“The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

“The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death),” H.R.Rep.No. 107-236, at 68 (2001).

108 “Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien’s 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien’s 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
• a denial of benefits of the Act to terrorists and their families, section 427

• authority for the Attorney General to establish evidentiary standards to implement the alien victim provisions of the Act, section 426.

Other Crimes, Penalties, & Procedures

New Crimes. The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

- wreck, derail, burn, or disable mass transit;
- place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
- burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
- impair a mass transit signal system;
- interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
- act with the intent to kill or seriously injure someone on mass transit property;
- convey a false alarm concerning violations of the section;
- attempt to violate the section;
- threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department, the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offense for certain individuals — such as convicted felons, illegal aliens, and fugitives — to possess biological toxins or agents, 18 U.S.C. 175b.110 Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.111

109 “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . . .” DoJ at §305.

110 The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

111 “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2)(“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.112

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D). The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

112 U.S. Const. Art.III, §2, cl.3 (“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . .”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . .”); United States v. Cabrales, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from Cabrales when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnapping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999)(“By way of comparison, last Term in [Cabrales] we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).
The Justice Department sought the expansion along with the enlargement of the predicate offense list, "18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of `material support or resources' is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill ('Federal terrorism offenses')," DoJ, at §304.

Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.115


113 The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of ‘material support or resources’ is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’),” DoJ at 306.


115 “The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill (‘Federal terrorism offenses’) is used in identifying the relevant crimes,” DoJ, at §304.

New Penalties. The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. 3571(b),(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense.\(^{117}\)

The proposal, however, failed to identify the critical elements that would trigger the alternative.\(^{118}\) Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

- for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

- for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

\(^{117}\) “Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersede lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,” DoJ, at §302.

\(^{118}\) “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense,” Draft at §302.
“The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object of the offense – see e.g., 21 U.S.C. §§846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists. Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:

- for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;

- for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;

- for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;

- for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and

- for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism. Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:

- arson committed within a federal enclave, 18 U.S.C. 81;
- killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);
- destruction of communications facilities, 18 U.S.C. 1362;
- destruction of property within a federal enclave, 18 U.S.C. 1363;
- causing a train wreck, 18 U.S.C. 1922;
- providing material support to a terrorist, 18 U.S.C. 2339A;
- torture committed overseas under color of law, 18 U.S.C. 2340A;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

119 “The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §§846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

“This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.
• interfering with a flight crew within U.S. special aircraft jurisdiction, 49 U.S.C. 46504;
• carrying a weapon or explosive abroad an aircraft within U.S. special aircraft jurisdiction, 49 U.S.C. 46505; and
• sabotage of interstate gas pipeline facilities, 49 U.S.C. 60123.

When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years).\textsuperscript{120} The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission),\textsuperscript{121} a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

\textsuperscript{120} Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

\textsuperscript{121} “Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.

“This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders).\(^{122}\)

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

**Other Procedural Adjustments.** In other procedural adjustments designed to facilitate criminal investigations, the Act:

- increases the rewards for information in terrorism cases
- expands the Posse Comitatus Act exceptions
- authorizes “sneak and peek” search warrants
- permits nationwide and perhaps worldwide execution of warrants in terrorism cases
- eases government access to confidential information
- allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
- lengthens the statute of limitations applicable to crimes of terrorism
- clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
- adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B.\(^{123}\)

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\(^{122}\) It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, e.g., damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

\(^{123}\) When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001)(remarks of Rep. Sensenbrenner); for general background, see, Doyle, *McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys*, CRS REP.NO. RL30060 (Dec. 14, 2001).
**Rewards.** The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L.105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism.\(^{124}\)

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

**Posse Comitatus.** The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.\(^{125}\)

**Delayed notification of a search (sneak and peek).** Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take

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\(^{124}\) The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct threat assessments for federal agencies, and to reimburse federal agencies for the costs of detaining terrorist suspects overseas.

\(^{125}\) For a general discussion of the Posse Comitatus Act, see, Doyle, The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law, CRS Rep.No. 95-964 (June 1, 2000).
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim. P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, Richards v. Wisconsin, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, Wilson v. Arkansas, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, Dalia v. United States, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, cf., United States v. Miller, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, United States v. Freitas, 800 F.2d 1451, 1453 (9th Cir. 1986).126

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126 The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in United States v. New York Telephone Co., 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth
Amendment, demands that surreptitious entries be closely circumscribed,” *United States v. Freitas (Freitas I)*, 800 F.2d 1451, 1455-456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, *United States v. Freitas (Freitas II)*, 856 F.2d 1425 (9th Cir. 1988).

“No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in *Dalia v. United States*, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in Dalia, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property . . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. See *United States v. New York Telephone Co.*, 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry . . . . Although the Freitas I court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in *United States v. Villegas*, 899 F.2d 1324 (1999). Although the Freitas I court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in Villegas. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the Freitas I court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” *United States v. Pangburn*, 983 F.2d 449, 453-55 (2d Cir. 1993).

In *Simons*, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[i]there are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
The Justice Department urged that the conflict be resolved with a uniform rule which permitted sneak and peek warrants under the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage.\footnote{129}

The Act, in section 213, stops short of the Justice Department proposal. Characterized as a codification of the Second Circuit decision, 147 Cong.Rec. H7197 (daily ed. Oct. 23, 2001), the Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C. 3103a. Its sneak and peek authorization reaches all federal search and seizure warrants where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (\emph{e.g.}, risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (\emph{e.g.}, jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, \emph{i.e.}, in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation.\footnote{130} The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

\footnote{129} “The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities,” DoJ at §353.

\footnote{130} Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department’s initial proposal, the Department’s justification does not address the question.
constitutionally “reasonable,” that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

**Nationwide terrorism search warrants.** The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either “within or outside the district,” (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases. The provision may anticipate execution both in this country and overseas. The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage. Neither Rule 41 nor any other provision of federal

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131 The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

132 The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

133 *United States v. Barona*, 56 F.3d 1087, 1092 (9th Cir. 1995)(“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994)(“if American law enforcement officials substantially participated in the search or if the

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” F.R.Crim.P. 41, *Advisory Committee Notes: 1990 Amendment*. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

_Terrorists’ DNA._ The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards _per se_.  

Existing federal law allowed the Attorney General to collect samples from foreign officials conducting the search were actually acting as agents for their American counterparts’); *United States v. Maturo*, 982 F.2d 57, 61 (2d Cir. 1992)(“where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials” or “where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials”); *United States v. Mitro*, 880 F.2d 1480, 1482 (1st Cir. 1989)(“where American agents participated in the foreign search or the foreign officers acted as agents for their American counterparts”); *United States v. Mount*, 757 F.2d 1315, 1318 (D.C.Cir. 1985)(“if American officials or officers participated in some significant way”); *United States v. Marzano*, 537 F.2d 257, 270 (7th Cir. 1976)(declining to adopt the “joint venture” standards, but finding level of American participation in the case before it insignificant); *United States v. Morrow*, 537 F.2d 120, 139 (5th Cir. 1976)(“if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts”); each of the decisions also suggests that evidence secured in a manner which shocked the conscience of the court would be excluded.

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134 The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, see, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), reprinted, 78 *Cong.Rec.* 4982-983 (1934)(“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.)(confering judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

federal prisoners convicted of a variety of violent crimes, 42 U.S.C. 14135a. The Act enlarges the predicate offense list to include any crime of violence or any terrorism offense, section 503.136

**Access to Educational Records.** Finally, the Act calls for an ex parte court order procedure under which senior Justice Department officials may seek authorization to collect educational records relevant to an investigation or prosecution of a crime of terrorism, section 507 (as an exception to the confidentiality requirements of the General Education Provisions Act, 20 U.S.C. 1232g), section 508 (as an exception to the confidentiality requirements of the National Education Statistics Act, 20 U.S.C. 9007).

**Statute of Limitations.** Prosecution for murder in violation of federal law may be initiated at any time, 18 U.S.C. 3281. A five year statute of limitations applied for most other federal crimes before passage of the Act, with a few exceptions. Among the relevant exceptions were an eight year statute of limitations for several terrorist offenses, 18 U.S.C. 3286,137 and a ten year statute of limitations for a few arson and explosives offenses, 18 U.S.C. 3295. The Justice Department recommended the elimination of a statute of limitations in terrorism cases.138

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136 Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples form convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes.” DoJ at §353.


137 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

138 “This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

“This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in
connection with the September 11, 2001 terrorist attacks. The constitutionality of such retroactive applications of changes in statutes of limitations is well-settled, See, e.g., United States v. Grimes, 142 F.3d 1342, 1350-51 (11th Cir. 1998); People v. Frazer, 982 P.2d 180 (Cal. 1999).

"Existing federal law (18 U.S.C. §3282) bars prosecuting most offenses after five years. 18 U.S.C. §3286, as currently formulated, extends the limitation period for prosecution for certain offenses that may be committed by terrorists – but only to eight years. While this is a limited improvement over the five-year limitation period for most federal offenses, it is patently inadequate in relation to the catastrophic human and social costs that frequently follow from such crimes as destruction of aircraft (18 U.S.C. §32), aircraft hijackings ([49] U.S.C. §§46502, 46504-06, attempted political assassinations (18 U.S.C. §§351, 1116, 1751), or hostage taking (18 U.S.C. §1203). These are not minor acts of misconduct which can properly be forgiven or forgotten merely because the perpetrator has avoided apprehension for some period of time. Anomalously, existing law provides longer limitation periods for such offenses as bank frauds and certain artwork thefts (18 U.S.C.§§3293-94) than it does for crimes characteristically committed by terrorists.

"In many American jurisdictions, the limitation periods for prosecution for serious offenses are more permissible than those found in federal law, including a number of states which have no limitation period for the prosecution of felonies generally. While this section does not go so far, it does eliminate the limitation period for prosecution of the major crimes that are most likely to be committed by terrorists (‘Federal terrorism offenses’), as specified in section 309 of this bill,” DoJ at 301.

139 As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bomberg federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harping terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 (sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period.\textsuperscript{141} Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.\textsuperscript{142}

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (\textit{Grimes}, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (\textit{Frazer}, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

\textbf{Extraterritoriality.} Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States or elsewhere. . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.\textsuperscript{143}

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnapping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.

\textsuperscript{141} \textit{United States v. De La Matta}, 266 F.3d 1275, 1286 (11\textsuperscript{th} Cir. 2001); \textit{United States v. Grimes}, 142 F.3d 1342, 1351 (11\textsuperscript{th} Cir. 1998); \textit{United States v. Morrow}, 177 F.3d 272, 294 (5\textsuperscript{th} Cir. 1999); \textit{Falter v. United States}, 23 F.2d 420, 425-26 (2d Cir. 1928).

\textsuperscript{142} \textit{People v. Frazer}, 24 Cal.4th 737, 759, 982 P.2d 180, 1294, 88 Cal.Rptr.2d 312, 327 (1999).

\textsuperscript{143} \textit{United States v. Layton}, 855 F.2d 1388 (9\textsuperscript{th} Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); \textit{United States v. Benítez}, 741 F.2d 1312 (11\textsuperscript{th} Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.144

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

Victims. Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11th Victim Compensation Fund legislation before it passed the Act. Consequently, the Act’s victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 et seq., and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 et seq.

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:

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• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year) (42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d)(5)), section 621(d)

• waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

• eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
• makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

• prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

• allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

• reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

• makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

• allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

• establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

Increasing Institutional Capacity. A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

- $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)

- necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)

- $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)

- $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816

- $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701

- $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)

- $5 million for DEA police training in South and Central Asia, section 1007.

**Miscellaneous.** Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might be used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act, or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b), 807.146

145 *I.e.*, Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).

• a denial of benefits of the Act to terrorists and their families, section 427

• authority for the Attorney General to establish evidentiary standards to implement the alien victim provisions of the Act, section 426.

**Other Crimes, Penalties, & Procedures**

**New Crimes.** The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department,\textsuperscript{109} the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offenses for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents, 18 U.S.C. 175b.\textsuperscript{110} Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.\textsuperscript{111}

\textsuperscript{109} “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . . .” DoJ at §305.

\textsuperscript{110} The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

\textsuperscript{111} “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2)(“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.\(^{112}\)

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D). The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

\(^{112}\) *U.S. Const.* Art.III, §2, cl.3 (“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . .”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . .”); *United States v. Cabrales*, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from *Cabrales* when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnaping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280-81 n.4 (1999)(“By way of comparison, last Term in *Cabrales* we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).
The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of ‘material support or resources’ is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’),” DoJ, at §304.

And it adds expert advice or assistance to the types of assistance that may not be provided under section 2339A. This last addition may encounter the same First Amendment vagueness problems some courts have found in assistance which takes the form of “training” and “personnel,” Humanitarian Law Project v. Reno, 205 F.3d 1130, 1137-136 (9th Cir. 2000). Finally, the section announces that a prosecution for violation of section 2339A (support of terrorists) may be brought where the support is provided or where the predicate act of terrorism occurs. There may be some question whether the Constitution permits prosecution where the predicate act occurs.

Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.


113 The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of ‘material support or resources’ is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’),” DoJ at 306.


115 “The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill (‘Federal terrorism offenses’) is used in identifying the relevant crimes,” DoJ, at §304.

**New Penalties.** The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. 3571(b),(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense.\(^{117}\)

The proposal, however, failed to identify the critical elements that would trigger the alternative.\(^{118}\) Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

- for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

- for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

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117 “Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersede lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,” *DoJ*, at §302.

118 “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense,” *Draft* at §302.
The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object of offense – see e.g., 21 U.S.C. §846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.

- for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;

- for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;

- for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;

- for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and

- for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism. Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:

- arson committed within a federal enclave, 18 U.S.C. 81;
- killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);
- destruction of communications facilities, 18 U.S.C. 1362;
- destruction of property within a federal enclave, 18 U.S.C. 1363;
- causing a train wreck, 18 U.S.C. 1922;
- providing material support to a terrorist, 18 U.S.C. 2339A;
- torture committed overseas under color of law, 18 U.S.C. 2340A;
- sabotage of a nuclear facility, 42 U.S.C. 2284;
• interfering with a flight crew within U.S. special aircraft jurisdiction, 49 U.S.C. 46504;
• carrying a weapon or explosive abroad an aircraft within U.S. special aircraft jurisdiction, 49 U.S.C. 46505; and
• sabotage of interstate gas pipeline facilities, 49 U.S.C. 60123.

When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years). The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission), a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

120 Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

121 “Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.

“This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders).\(^{122}\)

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

**Other Procedural Adjustments.** In other procedural adjustments designed to facilitate criminal investigations, the Act:

- increases the rewards for information in terrorism cases
- expands the Posse Comitatus Act exceptions
- authorizes “sneak and peek” search warrants
- permits nationwide and perhaps worldwide execution of warrants in terrorism cases
- eases government access to confidential information
- allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
- lengthens the statute of limitations applicable to crimes of terrorism
- clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
- adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B.\(^{123}\)

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\(^{122}\) It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, *e.g.*, damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

\(^{123}\) When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001)(remarks of Rep. Sensenbrenner); for general background, see, Doyle, *McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys*, CRS REP.NO. RL30060 (Dec. 14, 2001).
**Rewards.** The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $10,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L.105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism.\(^{124}\)

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

**Posse Comitatus.** The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.\(^{125}\)

**Delayed notification of a search (sneak and peek).** Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take

\(^{124}\) The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct threat assessments for federal agencies, and to reimburse federal agencies for the costs of detaining terrorist suspects overseas.

\(^{125}\) For a general discussion of the Posse Comitatus Act, see, Doyle, *The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law*, CRS REP.NO. 95-964 (June 1, 2000).
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, *Richards v. Wisconsin*, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, *Wilson v. Arkansas*, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, *Dalia v. United States*, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, *cf.*, *United States v. Miller*, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, *United States v. Freitas*, 800 F.2d 1451, 1453 (9th Cir. 1986).126

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126 *The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in *United States v. New York Telephone Co.*, 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth Amendment, . . .
The Second Circuit was less convinced and preferred to hold sneak and peek searches to the demands of Rule 41, United States v. Pangburn, 983 F.2d 449 (2d Cir. 1993). The Fourth Circuit was, if anything, less convinced. Moreover, the facts in the case demonstrate the potential impact of the issue on computer privacy, United States v. Simons, 206 F.3d 392 (4th Cir. 2000).

Amendment, demands that surreptitious entries be closely circumscribed,” United States v. Freitas (Freitas I), 800 F.2d 1451, 1455-456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, United States v. Freitas (Freitas II), 856 F.2d 1425 (9th Cir. 1988).

127 “No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in Dalia v. United States, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in Dalia, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property. . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. See United States v. New York Telephone Co., 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . . Although the Freitas I court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in United States v. Villegas, 899 F.2d 1324 (1999). Although the Freitas I court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in Villegas. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the Freitas I court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” United States v. Pangburn, 983 F.2d 449, 453-55 (2d Cir. 1993).

128 In Simons, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
Fourth Amendment does not mention notice, and the Supreme Court has stated that the constitution does not categorically proscribe covert entries, which necessarily involve a delay in notice. And insofar as the August search satisfied the requirements of the Fourth Amendment, i.e., it was conducted pursuant to a warrant based on probable cause issued by a neutral and detached magistrate, we perceive no basis for concluding that the 45-day delay in notice rendered the search unconstitutional. Having concluded that the Rule 41(d) violation at issue here did not infringe on Simons' constitutional rights, we must now evaluate his argument that the violation was deliberate. . . . The district court did not address the intent issue when it ruled on Simons' motion to suppress. . . . We therefore remand for the district court to consider whether the Government intentionally and deliberately disregarded the notice provision of Rule 41(d) when it carried out the August 6, 1998 search,” 206 F.3d at 403.

129 The Act, in section 213, stops short of the Justice Department proposal. Characterized as a codification of the Second Circuit decision, 147 Cong.Rec. H7197 (daily ed. Oct. 23, 2001), the Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C. 3103a. Its sneak and peek authorization reaches all federal search and seizure warrants where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (e.g., risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (e.g., jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, i.e., in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation. 130 The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

129 “The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities,” DoJ at §353.

130 Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department’s initial proposal, the Department’s justification does not address the question.
constitutionally “reasonable,” that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

**Nationwide terrorism search warrants.** The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either “within or outside the district,” (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases. The provision may anticipate execution both in this country and overseas.

The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage. Neither Rule 41 nor any other provision of federal

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131 The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

132 The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

133 *United States v. Barona*, 56 F.3d 1087, 1092 (9th Cir. 1995)(“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994)(“if American law enforcement officials substantially participated in the search or if the

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” F.R.Crim.P. 41, *Advisory Committee Notes: 1990 Amendment*. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

**Terrorists' DNA.** The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards *per se*.  

Existing federal law allowed the Attorney General to collect samples from foreign officials conducting the search were actually acting as agents for their American counterparts’); *United States v. Maturo*, 982 F.2d 57, 61 (2d Cir. 1992)(“where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials” or “where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials”); *United States v. Mitro*, 880 F.2d 1480, 1482 (1st Cir. 1989)(“where American agents participated in the foreign search or the foreign officers acted as agents for their American counterparts”); *United States v. Mount*, 757 F.2d 1315, 1318 (D.C.Cir. 1985)(“if American officials or officers participated in some significant way”); *United States v. Marzano*, 537 F.2d 257, 270 (7th Cir. 1976)(declining to adopt the “joint venture” standards, but finding level of American participation in the case before it insignificant); *United States v. Morrow*, 537 F.2d 120, 139 (5th Cir. 1976)(“if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts”); each of the decisions also suggests that evidence secured in a manner which shocked the conscience of the court would be excluded.

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134 The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, *see*, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), *reprinted*, 78 *Cong.Rec.* 4982-983 (1934)(“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.) (conferring judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

federal prisoners convicted of a variety of violent crimes, 42 U.S.C. 14135a. The Act enlarges the predicate offense list to include any crime of violence or any terrorism offense, section 503.136

**Access to Educational Records.** Finally, the Act calls for an ex parte court order procedure under which senior Justice Department officials may seek authorization to collect educational records relevant to an investigation or prosecution of a crime of terrorism, section 507 (as an exception to the confidentiality requirements of the General Education Provisions Act, 20 U.S.C. 1232g), section 508 (as an exception to the confidentiality requirements of the National Education Statistics Act, 20 U.S.C. 9007).

**Statute of Limitations.** Prosecution for murder in violation of federal law may be initiated at any time, 18 U.S.C. 3281. A five year statute of limitations applied for most other federal crimes before passage of the Act, with a few exceptions. Among the relevant exceptions were an eight year statute of limitations for several terrorist offenses, 18 U.S.C. 3286,137 and a ten year statute of limitations for a few arson and explosives offenses, 18 U.S.C. 3295. The Justice Department recommended the elimination of a statute of limitations in terrorism cases.138

136 Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples form convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes,” DoJ at §353.


137 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

138 “This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

“This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in
connection with the September 11, 2001 terrorist attacks. The constitutionality of such retroactive applications of changes in statutes of limitations is well-settled, See, e.g., United States v. Grimes, 142 F.3d 1342, 1350-51 (11th Cir. 1998); People v. Frazer, 982 P.2d 180 (Cal. 1999).

"Existing federal law (18 U.S.C. §3282) bars prosecuting most offenses after five years. 18 U.S.C. §3286, as currently formulated, extends the limitation period for prosecution for certain offenses that may be committed by terrorists – but only to eight years. While this is a limited improvement over the five-year limitation period for most federal offenses, it is patently inadequate in relation to the catastrophic human and social costs that frequently follow from such crimes as destruction of aircraft (18 U.S.C. §32), aircraft hijackings ([49] U.S.C. §§46502, 46504-06, attempted political assassinations (18 U.S.C. §§351, 1116, 1751), or hostage taking (18 U.S.C. §1203). These are not minor acts of misconduct which can properly be forgiven or forgotten merely because the perpetrator has avoided apprehension for some period of time. Anomalously, existing law provides longer limitation periods for such offenses as bank frauds and certain artwork thefts (18 U.S.C.§§3293-94) than it does for crimes characteristically committed by terrorists.

"In many American jurisdictions, the limitation periods for prosecution for serious offenses are more permissible than those found in federal law, including a number of states which have no limitation period for the prosecution of felonies generally. While this section does not go so far, it does eliminate the limitation period for prosecution of the major crimes that are most likely to be committed by terrorists (‘Federal terrorism offenses’), as specified in section 309 of this bill,” DoJ at 301.

139 As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)–(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 (sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period.\footnote{United States v. De La Matta, 266 F.3d 1275, 1286 (11th Cir. 2001); United States v. Grimes, 142 F.3d 1342, 1351 (11th Cir. 1998); United States v. Morrow, 177 F.3d 272, 294 (5th Cir. 1999); Falter v. United States, 23 F.2d 420, 425-26 (2d Cir. 1928).} Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.\footnote{People v. Frazer, 24 Cal.4th 737, 759, 982 P.2d 180, 1294, 88 Cal.Rptr.2d 312, 327 (1999).}

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (Grimes, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (Frazer, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

**Extraterritoriality.** Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States or elsewhere. . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.\footnote{United States v. Layton, 855 F.2d 1388 (9th Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i); United States v. Benítez, 741 F.2d 1312 (11th Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).}

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnaping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.¹⁴⁴

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

Victims. Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11th Victim Compensation Fund legislation before it passed the Act. Consequently, the Act’s victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 et seq., and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 et seq.

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:

• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year) (42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d) (5)), section 621(d)

• waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

• eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
• makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

• prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

• allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

• reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

• makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

• allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

• establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

Increasing Institutional Capacity. A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

- $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)

- necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)

- $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)

- $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816

- $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701

- $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)

- $5 million for DEA police training in South and Central Asia, section 1007.

**Miscellaneous.** Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might to used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act,\textsuperscript{145} or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b), 807.\textsuperscript{146}

\textsuperscript{145} I.e., Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).

\textsuperscript{146} For a general discussion of trade sanctions legislation, see, Jurenas, Exempting Food and Agriculture Products from U.S. Economic Sanctions: Status and Implementation, CRS Issue Brief IB100061.
expands 18 U.S.C. 1956 to cover financial transactions conducted in foreign financial institutions.\footnote{71}{\[S\]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

‘The definition of ‘financial institution’ in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of ‘commercial bank’ or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad--say to a Mexican bank--and launders them through a series of financial transactions, the government conceivably could not rely on the definition of a ‘financial institution’ in 1956(c)(6) to establish that the transaction was a ‘financial transaction’ within the meaning of 1956(c)(4)(B) (defining a ‘financial transaction’ as a transaction involving the use of a ‘financial institution’), or that it was a ‘monetary transaction’ within the meaning of 1957(f) (defining ‘monetary transaction’ as, inter alia, a transaction that would be a ‘financial transaction’ under 1956(c)(4)(B)).

‘Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launders the proceeds of one of the crimes set forth on a list of ‘specified unlawful activities.’ 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),’ H.R.Rep.No. 107-250, at 38 (2000).\footnote{72}{Cf., H.R.Rep.No. 107-250, at 57.}}

Section 329 makes it a federal crime to corruptly administer the money laundering regulatory scheme. Offenders are punishable by imprisonment for not more than 15 years and a fine of not more than three times the amount of the bribe.

Section 5326 of title 31 authorizes the Secretary of the Treasury to impose temporary, enhanced reporting requirements upon financial institutions in areas victimized by substantial money laundering activity (geographic targeting regulations and orders). Section 353 makes it clear that the civil sanctions, criminal penalties, and prohibitions on smurfing (structuring transactions to evade reporting requirements) apply to violations of the regulations and orders issued under 31 U.S.C. 5326.\footnote{72}{It also extends the permissible length of the temporary geographical orders from 60 to 180 days.}

Violations of the special measures and special due diligence requirements of sections 311 and 312 are subject to both civil and criminal penalties by virtue of section 363's amendments to 31 U.S.C. 5321(a) and 5322. The amendments authorize civil penalties and criminal fines of twice the amount of the transaction but not more than $1 million. Criminal offenders would be subject to a fine in the same amount.
Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.73

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents.74 They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

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73 "The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business.

"Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.

"Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive,” H.R.Rep.No. 107-250, at 54 (2001).

74 “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).

- 18 U.S.C. 476 (taking impressions of tools used for obligations and securities) from 10 to 25 years;
- 18 U.S.C. 477 (possessing or selling impressions of tools used for obligations or securities) from 10 to 25 years;
- 18 U.S.C. 484 (connecting parts of different notes) from 5 to 10 years;
- 18 U.S.C. 493 (bonds and obligations of certain lending agencies) from 5 to 10 years;
- 18 U.S.C. 478 (foreign obligations or securities) from 5 to 20 years;
- 18 U.S.C. 479 (uttering counterfeit foreign obligations or securities) from 3 to 20 years;
- 18 U.S.C. 480 (possessing counterfeit foreign obligations or securities) from 1 to 20 years;
- 18 U.S.C. 481 (plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities) from 5 to 25 years;
- 18 U.S.C. 482 (foreign bank notes) from 2 to 20 years; and
- 18 U.S.C. 483 (uttering counterfeit foreign bank notes) from 1 to 20 years.

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

**Bulk Cash.** Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act’s bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting.

The section appears to be the product of reactions to the Supreme Court’s decision in *United States v. Bajakian*, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court’s

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As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency – representing the proceeds of drug trafficking and other criminal offenses – is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad.

Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United States without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute,” H.R.Rep.No. 107-250 at 36-7 (2001).

Section 5317 of title 31 once called for civil forfeiture of property traceable to a violation of 31 U.S.C. 5316 (reports on exporting or importing money instruments worth $10,000 or more). Section 372 of the Act recasts section 5317 to provide for civil and criminal forfeitures for violations of 31 U.S.C. 5316, of 31 U.S.C. 5313 (reports on domestic coins and currency transactions involving $10,000 or more) and of 31 U.S.C. 5324 (structuring transactions to evade reporting requirements (smurfing)).

Extraterritorial Jurisdiction. The Act makes 18 U.S.C. 1029, the federal statute condemning various crimes involving credit cards, PIN numbers and other access devices, applicable overseas if the card or device is issued by or controlled by an American bank or other entity and some article is held in or transported to or through the United States during the course of the offense, section 377. The change was part of the original Justice Department proposals. Justice explained that, “[financial crime[] admits of no border, utilizing the integrated global financial network for ill purposes. This provision would apply the financial crimes prohibitions to conduct committed abroad, so long as the tools or proceeds of the crimes pass through or are in the United States,” DoJ at §408. The section, however, appears to limit the otherwise applicable extraterritorial jurisdiction implicit in section 1029, since federal courts would likely recognize extraterritorial jurisdiction over a violation of that section.

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under either circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.\footnote{United States v. Bowman, 260 U.S. 94, 97-8 (1922); Ford v. United States, 273 U.S. 593, 623 (1927). For a general discussion of the extraterritorial application of federal criminal law, see, Doyle, Extraterritorial Application of American Criminal Law, CRS REP.NO. 94-166A (Mar. 13, 1999).}

**Venue.** Section 1004 relies on dicta in United States v. Cabrales, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering,\footnote{“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed,” U.S. Const. Art.III, §2, cl.3. “[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,” U.S.Const. Amend. VI.} in the state and district in which the monetary transaction takes place. The Supreme Court in Cabrales held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in dicta, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.\footnote{See also, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnaping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.}

**Forfeiture.** Forfeiture is the government confiscation of property as a consequence of crime.\footnote{For general background information, see, Doyle, Crime and Forfeiture, CRS REP.NO. 97-139A (Oct. 11, 2000).} The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 et seq. (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

**Constitutional Considerations.** The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 et seq., which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the
This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App.U.S.C. §5(b).

“This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress’s war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

“The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2),” DoJ at §159.

“An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
excepted from the coverage of 18 U.S.C. 983. The challenge proceedings permit the court to admit evidence, such as hearsay evidence, that would not otherwise be admissible under the Federal Rules of Evidence if the evidence is reliable and if national security might be imperiled should dictates of the Federal Rules be followed, §316(b). The section recognizes the rights of claimants to proceed alternatively under the Constitution or the Administrative Procedure Act.

The Justice Department also recommended enactment of an overlapping provision which ultimately passed as section 806 of the Act without any real discussion of the relationship of the two sections. Section 806 authorizes confiscation of all property, regardless of where it is found, of any individual, entity, or organization engaged in domestic or international terrorism (as defined in 18 U.S.C. 2331), against the United States, Americans or their property, 18 U.S.C.

83 18 U.S.C. 983(i)(2)(D).

84 “The exclusion of certain provisions of Federal law from the definition of the term ‘civil forfeiture statute’ in section 983(i) of title 18, United States Code, shall not be construed to deny an owner of property the right to contest the confiscation of assets of suspected international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C) subchapter II of chapter 5 of title 5, United States Code (commonly known as the ‘Administrative Procedure Act’).” Sec. 316(c)(1).

85 “Current law does not contain any authority tailored specifically to the confiscation of terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available current forfeiture laws require detailed tracing that is quite difficult for accounts coming through the banks of countries used by many terrorists.

‘This section increases the government's ability to strike at terrorist organizations' economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001,” DoJ, at §403. The House Report on H.R. 2975 which contained versions of both sections is no more explicit on the relation of the two sections.

86 “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
981(a)(1)(G). Section 806 as discussed below also calls for the more common confiscation of property derived from and or facilitating acts of domestic or international terrorism against the United States or its citizens. Confiscations under 806 may be challenged under the procedures of 18 U.S.C. 983, since they are not exempted there. To the extent that forfeiture under section 806 is based on international rather than domestic terrorism, claimants may also use the procedures of section 316.

Confiscation based solely on the fact that the property is owned by a criminal offender, rather than that it is derived from or facilitates some crime is fairly uncommon. It is the mark of common law forfeiture of estate. At common law, a felon forfeited all of his property. Most contemporary forfeiture statutes employ statutory forfeiture, a more familiar presence in American law, which consists of the confiscation of things whose possession is criminal, of the fruits of crime, and of the means of crime – untaxed whiskey, the drug dealer’s profits, and the rum runner’s ship.

Three characteristics set forfeiture of estate apart. The property is lost solely by reason of its ownership by a felon. All of a felon’s property is confiscated, not merely that which is related to the crime for which he is convicted. Finally, it occasions attainder which negates the felon’s right to hold property or for title to property to pass through him to his heirs. It was with this in mind, that the Framers declared that “no attainder of treason shall work corruption of blood or forfeiture exception during the life of the person attained.” And for this reason, President Lincoln insisted that the confiscated real estate of Confederate supporters should revert their heirs at death.

of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5)(as amended by section 802 of the Act).

87 Austin v. United States, 509 U.S. 602, 611-12 (1993)(“Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture . . . . Of England’s three kinds of forfeiture, only the third took hold in the United States”).


89 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal in personam proceedings following criminal conviction as a means of accomplishing confiscation.
Neither section 106 nor 806 require conviction of the terrorist property owner.\textsuperscript{90} Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers.\textsuperscript{91} The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners.\textsuperscript{92} Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them.\textsuperscript{93} The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate

\textsuperscript{90} Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c)(“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act”).

\textsuperscript{91} *Silesian American Corp. V. Clark*, 332 U.S. 469 (1947); cf., *Societe Internationale v. Rogers*, 357 U.S. 197, 211 (1958)(“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).

\textsuperscript{92} *Zittman v. McGrath*, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’”).

any presumption of remedial purposes. The same has been said of the applicability of the ex post facto clause.

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO. If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

Other Forfeiture Amendments. In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.

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95 See e.g., United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.), 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994).

96 DoJ, at §403.

97 18 U.S.C. 1956(b). Cf., H.R.Rep.No. 107-250, at 54-5 (2001)(“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas.98 Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted

American Bank, 191 F.3d 30 (1st Cir. 1999).

“The second provision, modeled on 18 U.S.C. 1345(b), gives the district court the power to restrain property, issue seizure warrants, or take other action necessary to ensure that a defendant in an action covered by the statute does not dissipate the assets that would be needed to satisfy a judgment.

“This section also authorizes a court, on the motion of the Government or a State or Federal regulator, to appoint a receiver to gather and protect assets needed to satisfy a judgment under sections 1956 and 957, and the forfeiture provisions in sections 981 and 982. This authority is intended to apply in three circumstances: (1) when there is a judgment in a criminal case, including an order of restitution, following a conviction for a violation of section 1956 or 1957; (2) when there is a judgment in a civil case under section 1956(b) assessing a penalty for a violation of either section 1956 or 1957; and (3) when there is a civil forfeiture judgment under section 981 or a criminal forfeiture judgment, including a personal money judgment, under section 982.

“The amendment also makes section 1956(b) applicable to violations of section 1957. It applies to conduct occurring before the effective date of the Act”).

98 18 U.S.C. 981(k). H.R.Rep.No. 107-250, at 57-8 (2001)(“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank's customers.

“Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank's correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

“The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”).
defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation.  

Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here.  

Section 320 enlarges this provisions to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements.  

This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.

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99 Cf., H.R.Rep.No. 107-250, at 58-9 (2001) ("Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of 'substitute assets' when the defendant has placed the property otherwise subject to forfeiture 'beyond the jurisdiction of the court.' Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

"This section amends 21 U.S.C. 853 to make clear that a court in a criminal case may issue a repatriation order--either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. 853(e) to restrain property--so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both").


101 H.R.Rep.No. 107-250, at 56 (2001) ("This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act").

102 H.R.Rep.No. 107-250, at 59-60 (2001) ("Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country.

"Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
A fugitive may not challenge a federal forfeiture.\textsuperscript{103} Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in “order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.”

to contest the restraining order could do so on the ground that 28 U.S.C. 2467 was not properly applied to the particular case, but could not oppose the restraining order on any ground that could also be raised in the proceedings pending in a foreign court. This provision prevents a litigant from taking ‘two bites at the apple’ by raising objections to the basis for the forfeiture in the Federal court that he also raised, or is entitled to raise, in the foreign court where the forfeiture action is pending. It complements the existing provision in section 2467(e) providing that the Federal court is bound by the findings of fact of the foreign court, and may not look behind such findings in determining whether to enter an order enforcing a foreign forfeiture judgment.

“This section also amends 28 U.S.C. 2467 to make clear that it is not necessary to prove that the person asserting an interest in the property received actual notice of the forfeiture proceedings. As is the case with respect to forfeitures under U.S. law, it is sufficient if the foreign nation takes steps to provide notice, in accordance with the principles of due process. See Gonzalez v. United States, 1997 WL 278123 (S.D.N.Y. 1997) (‘the [G]overnment is not required to ensure actual receipt of notice that is properly mailed’); Albajon v. Gugliotta, 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant’s identifications, and mailed after claimant released from jail, is sufficient to satisfy due process, even if claimant never received notice); United States v. Schiavo, 897 F. Supp. 644, 648 49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; due process satisfied even if he did not receive the notice).

“Finally, 28 U.S.C. 2467 is amended to authorize the enforcement of a forfeiture judgment based on any foreign offense that would constitute an offense giving rise to a civil or criminal forfeiture of the same property if the offense had been committed in the United States. This is one of two safeguards that the statute contains against the enforcement of judgments that the United States does not consider appropriate for enforcement: if the judgment is based on an act that would not constitute a crime in the United States, such as removing assets from the reach of a repressive regime, it could not be enforced. In addition, section 2467 already provides that a foreign judgment may only be enforced by a Federal court at the request of the United States, and only after the Attorney General has certified that the judgment was obtained in accordance with the principles of due process. Thus, neither a foreign Government nor a foreign private party could enforce a foreign judgment on its own under this provision.”). Note that the safeguard to which the report refers is the range of foreign offenses that will support an enforceable confiscation order, \textit{i.e.}, drug offenses and crimes on the money laundering predicate offense list, and that the amendment narrows that safeguard by adding additional foreign offenses, \textit{i.e.}, any foreign equivalent of a federal crime which would support a confiscation order.

\textsuperscript{103} 28 U.S.C. 2466.
Alien Terrorists and Victims

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

Border Protection. The border protection provisions:

• authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401

• authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402

• remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404

• authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405

• authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.

• instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007

• direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418

• express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414

• add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415

• call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416

• limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
instruct the Attorney General to report on the feasibility of using biometric scanners to help prevent terrorists and other foreign criminals from entering the country, section 1008

authorize appropriations of $250,000 for the FBI to determine the feasibility of providing airlines with computer access to the names of suspected terrorists, section 1009

authorize reciprocal sharing of the State Department’s visa lookout data and related information with other nations in order to prevent terrorism, drug trafficking, slave marketing, and gun running, section 413

**Detention and Removal.** Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity, 8 U.S.C. 1227 (a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(iv). Aliens may be inadmissible for any number of terrorism-related reasons, 8 U.S.C. 1182(a)(3)(B). Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported.


Section 411 defines “terrorist organization” to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the *Federal Register* as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C.

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104 As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).
Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).


An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in “premeditated, politically motivated violence perpetrated against noncombatant targets,” or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security or endanger some individual or the general public. The Attorney General's determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

Victims. The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

- permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421
- extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422

105 “The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

106 “The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks.

“The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application.

“Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
• preservation of certain immigration benefits available to alien family members that would be otherwise lost as a consequence of the death of a victim of September 11, section 423

• limited easing of age restrictions on visas available to aliens under 21 years of age for those whose 21st birthday occurred immediately before or soon after September 11, section 424

• temporary administrative relief for alien family members of a victim of September 11 who are not otherwise entitled to relief under the Act, section 425

the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

“Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 31.

“Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.


107 “Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

“The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

“The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death),” H.R.Rep.No. 107-236, at 68 (2001).}

108 “Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien’s 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien’s 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
• a denial of benefits of the Act to terrorists and their families, section 427

• authority for the Attorney General to establish evidentiary standards to implement the alien victim provisions of the Act, section 426.

Other Crimes, Penalties, & Procedures

New Crimes. The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department,\(^{109}\) the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offenses for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents, 18 U.S.C. 175b.\(^{110}\) Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.\(^{111}\)

\(^{109}\) “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins, and confirm the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . . .” DoJ at §305.

\(^{110}\) The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175(b)(2).

\(^{111}\) “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2)(“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.112

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D). The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

112 U.S.Const. Art.III, §2, cl.3 (“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . . .”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . .”); United States v. Cabriles, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from Cabriles when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnapping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999)(“By way of comparison, last Term in [Cabriles] we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).
The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of ‘material support or resources’ is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’),” DoJ, at §304.

Finally, the section announces that a prosecution for violation of section 2339A (support of terrorists) may be brought where the support is provided or where the predicate act of terrorism occurs. There may be some question whether the Constitution permits prosecution where the predicate act occurs. 114

Section 813 of the Act also accepts the Justice Department’s suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961. 115


113 The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of ‘material support or resources’ is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’),” DoJ at 306.


115 “The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill (‘Federal terrorism offenses’) is used in identifying the relevant crimes,” DoJ, at §304.

New Penalties. The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. 3571(b),(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense.117

The proposal, however, failed to identify the critical elements that would trigger the alternative.118 Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

- for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

- for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

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117 “Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersede lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,”DoJ, at §302.

118 “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense,” Draft at §302.
• for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;

• for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;

• for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;

• for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and

• for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism.\(^{119}\) Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:

• arson committed within a federal enclave, 18 U.S.C. 81;
• killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);
• destruction of communications facilities, 18 U.S.C. 1362;
• destruction of property within a federal enclave, 18 U.S.C. 1363;
• causing a train wreck, 18 U.S.C. 1922;
• providing material support to a terrorist, 18 U.S.C. 2339A;
• torture committed overseas under color of law, 18 U.S.C. 2340A;
• sabotage of a nuclear facility, 42 U.S.C. 2284;

\(^{119}\) “The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §§846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

“This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.
• interfering with a flight crew within U.S. special aircraft jurisdiction, 49 U.S.C. 46504;
• carrying a weapon or explosive abroad an aircraft within U.S. special aircraft jurisdiction, 49 U.S.C. 46505; and
• sabotage of interstate gas pipeline facilities, 49 U.S.C. 60123.

When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years). The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission), a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

120 Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

121 “Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.

“This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders).122

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

Other Procedural Adjustments. In other procedural adjustments designed to facilitate criminal investigations, the Act:

• increases the rewards for information in terrorism cases
• expands the Posse Comitatus Act exceptions
• authorizes “sneak and peek” search warrants
• permits nationwide and perhaps worldwide execution of warrants in terrorism cases
• eases government access to confidential information
• allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
• lengthens the statute of limitations applicable to crimes of terrorism
• clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
• adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B.123

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122 It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, e.g., damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

123 When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001)(remarks of Rep. Sensenbrenner); for general background, see, Doyle, McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys, CRS REP.NO. RL30060 (Dec. 14, 2001).
Rewards. The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L.105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism.

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

Posse Comitatus. The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.

Delayed notification of a search (sneak and peek). Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, Richards v. Wisconsin, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, Wilson v. Arkansas, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, Dalia v. United States, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, cf., United States v. Miller, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, United States v. Freitas, 800 F.2d 1451, 1453 (9th Cir. 1986).126

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126 "The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in United States v. New York Telephone Co., 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth
Amendment, demands that surreptitious entries be closely circumscribed,” United States v. Freitas (Freitas I), 800 F.2d 1451, 1455-456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, United States v. Freitas (Freitas II), 856 F.2d 1425 (9th Cir. 1988).

127 “No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in Dalia v. United States, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in Dalia, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property... The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. See United States v. New York Telephone Co., 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . . Although the Freitas I court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in United States v. Villegas, 899 F.2d 1324 (1999). Although the Freitas I court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in Villegas. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the Freitas I court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” United States v. Pangburn, 983 F.2d 449, 453-55 (2d Cir. 1993).

128 In Simons, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
The Justice Department urged that the conflict be resolved with a uniform rule which permitted sneak and peek warrants under the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage.\textsuperscript{129}

The Act, in section 213, stops short of the Justice Department proposal. Characterized as a codification of the Second Circuit decision, \textit{147 Cong.Rec.} H7197 (daily ed. Oct. 23, 2001), the Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C. 3103a. Its sneak and peek authorization reaches all federal search and seizure warrants where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (\textit{e.g.}, risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (\textit{e.g.}, jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, \textit{i.e.}, in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation.\textsuperscript{130} The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

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\textsuperscript{129} “The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities,”\textit{ DoJ} at §353.

\textsuperscript{130} Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department’s initial proposal, the Department’s justification does not address the question.
constitutionally “reasonable,” that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

**Nationwide terrorism search warrants.** The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either “within or outside the district,” (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases. The provision may anticipate execution both in this country and overseas. The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage.  

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131 The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

132 The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

133 *United States v. Barona*, 56 F.3d 1087, 1092 (9th Cir. 1995)(“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994)(“if American law enforcement officials substantially participated in the search or if the

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” F.R.Crim.P. 41, *Advisory Committee Notes: 1990 Amendment*. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.  

**Terrorists’ DNA.** The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards *per se*. Existing federal law allowed the Attorney General to collect samples from foreign officials conducting the search were actually acting as agents for their American counterparts”); *United States v. Maturo*, 982 F.2d 57, 61 (2d Cir. 1992)(“where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials” or “where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials”); *United States v. Mitro*, 880 F.2d 1480, 1482 (1st Cir. 1989)(“where American agents participated in the foreign search or the foreign officers acted as agents for their American counterparts”); *United States v. Mount*, 757 F.2d 1315, 1318 (D.C.Cir. 1985)(“if American officials or officers participated in some significant way”); *United States v. Marzano*, 537 F.2d 120, 139 (5th Cir. 1976)(“if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts”); each of the decisions also suggests that evidence secured in a manner which shocked the conscience of the court would be excluded.

134 The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, *see*, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), *reprinted*, 78 Cong.Rec. 4982-983 (1934)(“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.)(conferring judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples form convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes,” DoJ at §353.

For a general discussion, see, Fischer, DNA Identification: Applications and Issues, CRS REP.NO. RL30717 (Jan. 12, 2001).

Access to Educational Records. Finally, the Act calls for an ex parte court order procedure under which senior Justice Department officials may seek authorization to collect educational records relevant to an investigation or prosecution of a crime of terrorism, section 507 (as an exception to the confidentiality requirements of the General Education Provisions Act, 20 U.S.C. 1232g), section 508 (as an exception to the confidentiality requirements of the National Education Statistics Act, 20 U.S.C. 9007).

Statute of Limitations. Prosecution for murder in violation of federal law may be initiated at any time, 18 U.S.C. 3281. A five year statute of limitations applied for most other federal crimes before passage of the Act, with a few exceptions. Among the relevant exceptions were an eight year statute of limitations for several terrorist offenses, 18 U.S.C. 3286, and a ten year statute of limitations for a few arson and explosives offenses, 18 U.S.C. 3295. The Justice Department recommended the elimination of a statute of limitations in terrorism cases.138

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137 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

138 “This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

“This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in
The Act takes less dramatic action in section 809. It eliminates the statute of limitations for any crime of terrorism\textsuperscript{139} that risks or results in a death or serious bodily injury, 18 U.S.C. 3286. In the absence of such a risk or result, all other terrorism offenses become subject to the eight year statute of limitations unless already covered by the ten year statute for explosives and arson offenses, 18 U.S.C. 3286.

Application of the statute of limitations rarely provokes a constitutional inquiry. Nevertheless, due process precludes prosecution when it can be shown that pre-indictment delay “caused substantial prejudice to [a defendant’s] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.”\textsuperscript{140} Moreover, a judicial difference of opinion has appeared in those cases connection with the September 11, 2001 terrorist attacks. The constitutionality of such retroactive applications of changes in statutes of limitations is well-settled, See, e.g., United States v. Grimes, 142 F.3d 1342, 1350-51 (11th Cir. 1998); People v. Frazer, 982 P.2d 180 (Cal. 1999).

“Existing federal law (18 U.S.C. §3282) bars prosecuting most offenses after five years. 18 U.S.C. §3286, as currently formulated, extends the limitation period for prosecution for certain offenses that may be committed by terrorists – but only to eight years. While this is a limited improvement over the five-year limitation period for most federal offenses, it is patently inadequate in relation to the catastrophic human and social costs that frequently follow from such crimes as destruction of aircraft (18 U.S.C. §32), aircraft hijackings ([49] U.S.C. §§46502, 46504-06, attempted political assassinations (18 U.S.C. §§351, 1116, 1751), or hostage taking (18 U.S.C. §1203). These are not minor acts of misconduct which can properly be forgiven or forgotten merely because the perpetrator has avoided apprehension for some period of time. Anomalously, existing law provides longer limitation periods for such offenses as bank frauds and certain artwork thefts (18 U.S.C.§§3293-94) than it does for crimes characteristically committed by terrorists.

“In many American jurisdictions, the limitation periods for prosecution for serious offenses are more permissible than those found in federal law, including a number of states which have no limitation period for the prosecution of felonies generally. While this section does not go so far, it does eliminate the limitation period for prosecution of the major crimes that are most likely to be committed by terrorists (‘Federal terrorism offenses’), as specified in section 309 of this bill,” DoJ at 301.

\textsuperscript{139} As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 (sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period. Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (Grimes, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (Frazer, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

**Extraterritoriality.** Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States or elsewhere. . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnapping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.

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141 United States v. De La Matta, 266 F.3d 1275, 1286 (11th Cir. 2001); United States v. Grimes, 142 F.3d 1342, 1351 (11th Cir. 1998); United States v. Morrow, 177 F.3d 272, 294 (5th Cir. 1999); Falter v. United States, 23 F.2d 420, 425-26 (2d Cir. 1928).


143 United States v. Layton, 855 F.2d 1388 (9th Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); United States v. Benitez, 741 F.2d 1312 (11th Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.144

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

Victims. Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11th Victim Compensation Fund legislation before it passed the Act. Consequently, the Act’s victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 et seq., and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 et seq.

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:

• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if funds in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year)(42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d)(5)), section 621(d)

• waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

• eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
• makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

• prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

• allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

• reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

• makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

• allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

• establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

Increasing Institutional Capacity. A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

- $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)

- necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)

- $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)

- $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816

- $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701

- $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)

- $5 million for DEA police training in South and Central Asia, section 1007.

**Miscellaneous.** Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might to used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act,\textsuperscript{145} or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b), 807.\textsuperscript{146}

\textsuperscript{145} \textit{I.e.}, Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).

\textsuperscript{146} For a general discussion of trade sanctions legislation, see, Jurenas, \textit{Exempting Food and Agriculture Products from U.S. Economic Sanctions: Status and Implementation}, CRS ISSUE BRIEF IB100061.
ed. Oct. 24, 2001), and H.R. 3162 was sent to the President who signed it on October 26, 2001.

**Criminal Investigations: Tracking and Gathering Communications**

A portion of the Act addresses issues suggested originally in a Department of Justice proposal circulated in mid-September. The first of its suggestions called for amendments to federal surveillance laws, laws which govern the capture and tracking of suspected terrorists’ communications within the United States. Federal law features a three tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications.

The tiers reflected the Supreme Court’s interpretation of the Fourth Amendment’s ban on unreasonable searches and seizures. The Amendment protects private conversations, *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967). It does not cloak information, even highly personal information, for which there is no individual justifiable expectation of privacy, such as telephone company records of calls made to and from an individual's home, *Smith v. Maryland*, 442 U.S. 735 (1979), or bank records of an individual's financial dealings, *United States v. Miller*, 425 U.S. 435 (1976).

Congress responded to *Berger* and *Katz*, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications, 18 U.S.C. 2511. At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious

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4 The Department’s proposal, dated September 20, 2001, came with a brief section by section analysis. Both the proposal (*Draft*) and analysis (*DoJ*) were printed as an appendix in *Administration's Draft Anti-Terrorism Act of 2001, Hearing Before the House Comm. on the Judiciary, 107th Cong., 1st Sess. 54 (2001).*


6 “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,” *U.S. Const.* Amend. IV.

7 Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
criminal cases. When approved by senior Justice Department officials,\textsuperscript{8} law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.\textsuperscript{9}

\textsuperscript{8} “The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of” one or more predicate offense, 18 U.S.C. 2516.

\textsuperscript{9} The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (strikes), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement), 1751 (presidential and presidential staff assassination, kidnapping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnaping, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or naturalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations, 18 U.S.C. 2518. The court notifies the parties to any conversations seized under the order after the order expires, 18 U.S.C. 2518(8).

Below Title III, the next tier of privacy protection covers some of those matters which the Supreme Court has described as beyond the reach of the Fourth Amendment protection—telephone records, e-mail held in third party storage, and the like, 18 U.S.C. 2701-2709 (Chapter 121). Here, the law permits law enforcement access, ordinarily pursuant to a warrant or court order or under a subpoena in some cases, but in connection with any criminal investigation and without the extraordinary levels of approval or constraint that mark a Title III interception, 18 U.S.C. 2703.

Least demanding and perhaps least intrusive of all is the procedure that governs court orders approving the government’s use of trap and trace devices and pen registers, a kind of secret “caller id”, which identify the source and destination of calls made to and from a particular telephone, 18 U.S.C. 3121-3127 (Chapter 206). The orders are available based on the government’s certification, rather than a finding of the court, that the use of the device is likely to produce information relevant to the investigation of a crime, any crime, 18 U.S.C. 3123. The devices record no more than the identity of the participants in a telephone conversation, 10 but neither the orders nor the results they produce need ever be revealed to the participants.

The Act modifies the procedures at each of the three levels. It:

offense involving counterfeiting punishable under 18 U.S.C. 471, 472, or 473; (e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States; (f) any offense including extortionate credit transactions under 18 U.S.C. 892, 893, or 894; (g) a violation of 31 U.S.C. 5322 (dealing with the reporting of currency transactions); (h) any felony violation of 18 U.S.C. 2511 and 2512 (interception and disclosure of certain communications and to certain intercepting devices); (i) any felony violation of 18 U.S.C. ch. 71 (obscenity); (j) 49 U.S.C. 60123(b) (destruction of a natural gas pipeline), 46502 (aircraft piracy); (k) 22 U.S.C. 2778 (Arms Export Control Act); (l) the location of any fugitive from justice from an offense described in this section; (m) a violation of 8 U.S.C. 1324, 1327, or 1328; (n) any felony violation of 18 U.S.C. 922, 924 (firearms); (o) any violation of 26 U.S.C. 5861 (firearms); (p) a felony violation of 18 U.S.C. 1028 (production of false identification documents), 1542 (false statements in passport applications), 1546 (fraud and misuse of visas, permits, and other documents) or a violation of 8 U.S.C. 1324, 1327, or 1328 (smuggling of aliens); (p) 229 (chemical weapons), 2332 (terrorist violence against Americans overseas), 2332a (weapons of mass destruction), 2332b (multinational terrorism), 2332d (financial transactions with countries supporting terrorism), 2339A (support of terrorist), 2332B (support of terrorist organizations); (r) any conspiracy to commit any of these, 18 U.S.C. 2516(1)(crimes added by the Act in italics). Other than telephone face to face conversations (i.e., electronic communications), the approval of senior Justice Department officials is not required and an order may be sought in any felony investigation, 18 U.S.C. 2516(3).

10 Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public the agency shall ensure that a record will be maintained which will identify – (i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of the such device.

(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof), section 216(b)(1).

Pen Registers and Trap and Trace Devices. In section 216, the Act allows court orders authorizing trap and trace devices and pen registers to be used to capture source and addressee information for computer conversations (e.g., e-mail) as well as telephone conversations, 18 U.S.C. 3121, 3123. In answer to objections that e-mail header information can be more revealing than a telephone number, it creates a detailed report to the court, 18 U.S.C. 3123(a)(3).11

11 "Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public the agency shall ensure that a record will be maintained which will identify – (i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of the such device.

“(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof),” section 216(b)(1).
The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” DoJ at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

Communications Records and Stored E-Mail. With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber, 18 U.S.C. 2703(a),(b). A warrant will also suffice to seize records describing telephone and other communications transactions without customer notice, 18 U.S.C. 2703(c). In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation, officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records, 18 U.S.C. 2703(b),(c). They can obtain a limited amount of record information (subscribers’ names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena, 18 U.S.C. 2703(c)(1)(C). There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial, 18 U.S.C. 2705.

In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider’s customer records, 18 U.S.C. 2703(c)(1)(C).13

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.

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13 Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user’s true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” DoJ at §107.
Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the 'property' to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

Previously, only a federal court in the district in which the e-mail was stored could issue the order. Under section 220, federal courts in the district where an offense under investigation occurred may issue orders applicable “without geographic limitation,” 18 U.S.C. 2703.14

The Act, in section 209, treats voice mail like e-mail, that is, subject to the warrant or court order procedure, rather than to the more demanding coverage of Title III once required, United States v. Smith, 155 F.3d 1050, 1055-56 (9th Cir. 1998).

Finally, the Act resolves a conflict between chapter 121 and the federal law governing cable companies. Government entities may have access to cable company customer records only under a court order following an adversary hearing if they can show that the records will evidence that the customer is or has engaged in criminal activity, 47 U.S.C. 511(h). When cable companies began offering telephone and other communications services the question arose whether the more demanding cable rules applied or whether law enforcement agencies were entitled to ex parte court orders under the no-notice procedures applicable to communications providers.15 The Act makes it clear that the cable rules apply when cable television viewing services are

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15 See e.g., DoJ at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement's access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

**Electronic Surveillance.** To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202. A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(i). Yet only the interloper's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.

**Criminal Investigators’ Access to Foreign Intelligence Information.** The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism. It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that “the purpose for the surveillance is to obtain foreign intelligence information,” 50 U.S.C. 1804(a)(7)(B)(2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps “the purpose” might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation

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16 18 U.S.C. 229 (chemical weapons), 2332(a)(use of weapons of mass destruction), 2332b(acts of terrorism transcending national boundaries), 2332d(financial transactions with countries which support terrorists), 2339A(providing material support to terrorists), and 2339B(providing material support to terrorist organizations).

17 “Because service providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves as permitted under current law, they often have no way to exercise their rights to protect themselves from unauthorized attackers. Moreover, such attackers can target critical infrastructures and engage in cyberterrorism,” DoJ at §106. Elsewhere the Act defines “electronic surveillance” for purposes of the Foreign Intelligence Surveillance Act (FISA) to emphasize that the law enforcement authority for this intruder surveillance does not confer similar authority for purposes of foreign intelligence gathering, section 1003 (50 U.S.C. 1801(f)(2)).

Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment's warrant clause. It is here that the “primary purpose” notion originated. In United States v. Truong Dinh Hung, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, “as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.” Subsequent case law, however, is not as clear as it might be: see e.g., United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984) (“FISA permits federal officials to obtain orders authorizing electronic surveillance ‘for the purpose of obtaining foreign intelligence information.’ The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying officials’ belief that the information sought is the type of foreign intelligence information described”); United States v. Pelton, 835 F.2d 1067, 1075-76 (4th Cir. 1987) (“We also reject Pelton’s claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial”); United States v. Sarkissian, 841 F.2d 959, 907-8 (9th Cir. 1988) (“Defendants rely on the primary purpose test articulated in United States v. Truong Dinh Hung. . . . One other court has applied the primary purpose test. Another court has rejected it . . . distinguishing Truong. A third court has declined to decide the issue. We also decline to decide the issue”); United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1991) (“Appellants attack the government’s surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance”).

Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” DoJ at §153.
demanding standard than the “a purpose” threshold proposed by the Justice Department, but a clear departure from the original “the purpose” entry point. FISA once described a singular foreign intelligence focus prerequisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k), 1825(k).

Protective Measures. The Act reinforces two kinds of safeguards, one set designed to prevent abuse and the other to protect those who assist the government. The sunset clause is perhaps the best known of the Act’s safeguards. Under the direction of section 224, many of the law enforcement and foreign intelligence authorities granted by the Act expire as of December 31, 2005. The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter

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21 “(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. (2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, infra, quoting, 50 U.S.C. 1801.

22 “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210[ subpoenas for communications provider customer records], 211[ access to cable company communication service records], 213[ sneak and peek], 216[ pen register and trap and trace device amendments], 221[ trade sanctions], and 222[ assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005. “(b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers' communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices).23 Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees,24 but could not recover against the United States.25 Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice's Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government's request until a court order authorizing access can be obtained.26 Another allows providers to disclose customer records to protect the provider's rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others.27 A third section,
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

**Foreign Intelligence Investigations**

Although both criminal investigations and foreign intelligence investigations are conducted in the United States, criminal investigations seek information about unlawful activity; foreign intelligence investigations seek information about other countries and their citizens. Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough.

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA), something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President's authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, United States v. United States District Court, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage

§110.

28 Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

29 Thus in the name of assisting in the execution of Title III, chapter 121, or chapter 206 order, the courts may not cite the Act as the basis for an order compelling a service provider to make system modifications or provide any other technical assistance not already required under 18 U.S.C. 2518(4), 2706, or 3124(c), see, H.R.Rep.No. 107-236, at 62-3 (2001) (emphasis added) (“This Act is not intended to affect obligations under Communications Assistance for Law Enforcement Act [which addresses law enforcement-beneficial system modifications and the compensation to be paid for the changes], nor does the act impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance”).

30 E.g., As amended by section 902 of the Act, “‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2)(language added by the Act in italics).

31 50 U.S.C. 1801 et seq.
In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs. There were and still are extra


33 "As used in this subchapter: (a) ‘Foreign power’ means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

"(b) ‘Agent of a foreign power’ means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C).

"(c) ‘International terrorism’ means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnaping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

"(d) ‘Sabotage’ means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

"(e) ‘Foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans (“United States persons,” i.e., citizens or permanent resident aliens). The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

- permits “roving” surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)
- increases the number of judges on the FISA court from 7 to 11
- allows application for a FISA surveillance or search order when gathering foreign intelligence is a *significant* reason for the application rather than the reason
- authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations
- sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses
- carries a sunset provision
- establishes a claim against the U.S. for certain communications privacy violations by government personnel
- expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

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agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to – (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States,” 50 U.S.C. 1801.

34 Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
**FISA.** FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases. It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

**Search and Surveillance for Intelligence Purposes.** Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, Draft at §151.36

Section 901 of the Act address a concern raised during the 106th Congress relating to the availability of the FISA orders and the effective use of information gleaned from the execution of a FISA order.37 It vests the Director of Central

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36 See also, DoJ at §151, “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order’s minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed (50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

37 See e.g., S.Rep.No. 106-352, at 3, 6, 7 (2000)(“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application
Intelligence with the responsibility to formulate requirements and priorities for the use of FISA to collect foreign intelligence information. He is also charged with the responsibility of assisting the Attorney General in the efficient and effective dissemination of FISA generated information (50 U.S.C. 403-3(c)).

Pen Registers and Trap and Trace Devices for Intelligence Gathering. Section 214 grants the request of the Department of Justice by dropping requirements which limited FISA pen register and trap and trace device orders to facilities used by foreign agents or those engaged in international terrorist or clandestine intelligence activities, 50 U.S.C. 1842(c)(3)(2000 ed.). It is enough that the order is sought as part of an investigation to protect against international terrorism or clandestine intelligence activities and is not motivated solely by an American’s exercise of his or her First Amendment rights. Elsewhere (section 505), the Act drops a similar limitation for intelligence officials’ access to telephone records, 18 U.S.C.

38 “When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevance, an additional factual showing that the communications device has been used to contact an ‘agent of a foreign power’ engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the ‘agent of a foreign power’ prong from the predication, and thus makes the FISA authority more closely track the criminal authority,” DoJ at §155.
Section 214 adjusts the language of the FISA pen register-trap and trace authority to permit its use to capture source and destination information relating to electronic communications (e.g., e-mail) as well as telephone communications, 50 U.S.C. 1842(d). The section makes it clear that requests for a FISA pen register-trap and trace order, like requests for other FISA orders, directed against Americans (U.S. persons) may not be based solely on activities protected by the First Amendment, 50 U.S.C. 1842, 1843.

Third Party Cooperation and Tangible Evidence. As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target's activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.  

Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise to be entitled to confidentiality. Section 505, in response to the Justice Department's suggestion, allows FBI field offices to make the requests, see DoJ at §157 (“At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an 'agent of a foreign power.' In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the 'agent of a foreign power' predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports”).

When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court's order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.’ This would enhance the FBI's ability to monitor international terrorists and intelligence officers who are
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian. The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities, in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B);
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a);
- the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a);
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v;

41 “The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigative contexts. The time and difficulty involved in getting such pleadings before the Court usually outweights the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” DoJ at §156.

42 Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.\textsuperscript{43}

\textbf{Access to Law Enforcement Information.} Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community’s access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, Draft at §103.\textsuperscript{44}

\textsuperscript{43} H.R.Rep.No. 107-205, at 60-1 (2001)(“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

“The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

“Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual’s credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding--without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information”).

\textsuperscript{44} See also, DoJ at §103, “This section facilities the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, Draft at §354.45

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, Draft at §154.46

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion.47 It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions."

45 See also, DoJ at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.” Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officers

46 See also, DoJ at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”

47 Blair v. United States, 250 U.S. 273, 281 (1919)(the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
affairs are conducted in private and outside the presence of the court. Only the attorney for the government, witnesses under examination, and a court reporter may attend its proceedings, F.R.Crim.P. 6(d). Matters occurring before the grand jury are secret and may be disclosed by the attending attorney for the government and those assisting the grand jury only in the performance of their duties; in presentation to a successor grand jury; or under court order for judicial proceedings, for inquiry into misconduct before the grand jury, or for state criminal proceedings, F.R.Crim.P. 6(e).

The Act, in section 203(a), allows disclosure of matters occurring before the grand jury to “any federal law enforcement, intelligence, protective, immigration, national defense, or national security” officer to assist in the performance of his official duties, F.R.Crim.P. 6(e)(3)(C)(i)(V). 48

Critics may protest that the change could lead to the use of the grand jury for intelligence gathering purposes, or less euphemistically, to spy on Americans. 49 The proposal was never among those scheduled to sunset, but earlier versions of the section followed the path used for most other disclosures of grand jury material: prior

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48 These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

49 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25 Harvard Journal of Law & Public Policy 699, 719-20 (2002)(“There is a significant danger that the rule permitting disclosure will be treated as the de facto authorization of an expansion of the grand jury’s investigative role to encompass seeking material relevant only to matters of national security, national defense, immigration, and so forth. The grand jury’s awesome powers should not be unwittingly extended to a much wider range of issues. . . Since the grand jury operates in secret, there are no public checks on the scope of its investigations, and witnesses are not permitted to challenge its jurisdiction. Only the supervising court is in a position to keep the grand jury’s investigation within proper bounds. Requiring judicial approval of foreign intelligence and counterintelligence information disclosures would provide a natural check against the temptation to manipulate the grand jury to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6 (Nov. 2001)(“The grand jury secrecy rule is a rule of policy which has always had exceptions, and it has been frequently modified. The secrecy rule has no credible claim to constitutional stature”).
Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

Law enforcement officials may share Title III information with the intelligence community under the same conditions, section 203(b), although the grand jury and Title III sharing provisions differ in at least three important respects. The court need not be notified of Title III disclosures. On the other hand, the authority for sharing Title III information expires on December 31, 2005, section 224, and agencies and their personnel guilty of intentional improper disclosures may be subject to a claim for damages and disciplinary action, 18 U.S.C. 2520.

The third subsection of section 203 remains something of an enigma. It speaks in much the same language as its counterparts. It allows law enforcement officials to share information with the intelligence community, “notwithstanding any other provisions of law,” section 203(d). It either swallows the other subsections, or supplements them. Several factors argue for its classification as a supplement. Congress is unlikely to have crafted subsections (a), (b) and (c) only to completely

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50 Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

51 “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person’s official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification. By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

Increasing Institutional Capacity. As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a

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52 *Duncan v. Walker*, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted) (“It is our duty to give effect, if possible, to every clause and word of a statute. *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)); see also *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879)(As early as in Bacon's Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage in any setting. *Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687, 698 (1995); see also *Ratzlaf v. United States*, 510 U.S. 135, 140 (1994)).

It is not possible to conclude that Congress intended the universal subsection (d) to apply until sunset and the grand jury and Title III subsections (a), (b), and (c) to operate thereafter, because the Title III subsection expires at the same time as the universal subsection.

53 *Draft* at §154, “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”
computerized translation capability to be used in foreign intelligence gathering. Section 907 instructs the Director of the Central Intelligence, in consultation with the Director of the FBI, to report on the creation of a National Virtual Translation Center. The report is to include information concerning staffing, allocation of resources, compatibility with comparable systems to be used for law enforcement purposes, and features which permit its efficient and secure use by all of the intelligence agencies.

**Money Laundering**

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture. The Act bolsters federal efforts in each area.

**Regulation.** Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.

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54 “The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

“The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so,” S.Rep.No. 107-63, at 11 (2001).

55 For a brief overview, see, Murphy, Money Laundering: Current Law and Proposals, CRS REP.NO. RS21032 (DEC. 21, 2001).

56 See e.g., 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
**Records and Reports.** For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler’s checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to files SARs as well,\(^{57}\) reflecting Congress’ view that the information provided the IRS may be valuable for other law enforcement purposes.\(^{58}\) This concern is likewise

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58 H.R.Rep.No. 107-250, at 38-9 (2001)(“Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

“Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a ‘Safeguard Procedures Report’ which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

“While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement...
reflected in section 357 which asks the Secretary of the Treasury to report on the Internal Revenue Service’s role in the administration of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311 et seq.), and what transfers of authority, if any, are appropriate.

Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action. Section 355 expands the immunity to cover disclosures in

authorities as the various reports mandated by the Bank Secrecy Act, which can typically be retrieved electronically from a database maintained by the Treasury Department. The differential access to the two kinds of reports is made anomalous by the fact that Form 8300 elicits much the same information that is required to be disclosed by the Bank Secrecy Act. For example, just as Form 8300 seeks the name, address, and social security number of a customer who engages in a cash transaction exceeding $10,000 with a trade or business, Currency Transaction Reports (CTRs) mandated by the Bank Secrecy Act require the same information to be reported on a cash transaction exceeding $10,000 between a financial institution and its customer”).

59 “Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

“First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor from civil liability applies in arbitration, as well as judicial, proceedings. Second, it amends section 5318(g)(3) to clarify the safe harbor’s coverage of voluntary disclosures (that is, those not covered by the SAR regulatory reporting requirement). The language in section 5318(g)(3)(A) providing that ‘any financial institution that *** makes a disclosure pursuant to *** any other authority *** shall not be liable to any person’ is not intended to avoid the application of the reporting and disclosure provisions of the Federal securities laws to any person, or to insulate any issuers from private rights of actions for disclosures made under the Federal securities laws.

“Subsection [351](b) amends section 5318(g)(2) of title 31—which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed—to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee’s official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
employment references to other insured depository financial institutions provided disclosure is not done with malicious intent.\textsuperscript{60}

The Financial Crimes Enforcement Network (FinCEN), a component within the Treasury Department long responsible for these anti-money laundering reporting and record-keeping requirements, 31 C.F.R. pt. 103, was administratively created in 1990 to provide other government agencies with an “intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes,” 55 Fed.Reg. 18433 (May 2, 1990).

The Act, in section 361, makes FinCEN a creature of statute, a bureau within the Treasury Department, 31 U.S.C. 310. Section 362 charges it with the responsibility of establishing a highly secure network to allow financial institutions to file required reports electronically and to permit FinCEN to provide those institutions with alerts and other information concerning money laundering protective measures, 31 U.S.C. 310 note.

**Special Measures.** In extraordinary circumstances involving international financial matters, the Act grants the Secretary of the Treasury, in consultation with other appropriate regulatory authorities, the power to issue regulations and orders involving additional required “special measures” and additional “due diligence” requirements to combat money laundering. The special measure authority, available under section 311, comes to life with the determination that particular institutions, jurisdictions, types of accounts, or types of transactions pose a primary money

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\footnote{31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 67 (2001).}
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laundry concern. These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

31 U.S.C. 5318A. The circumstances considered in the case of a suspect jurisdiction are: evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction’s banking regulation; the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’ including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

“Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate
business transactions.

“Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

“Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

“The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

“The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

“The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

“The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent’ account for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information that it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

“The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

“The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed
Due Diligence. Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.63

63 See generally, H.R.Rep. No. 107-250, at 71-2 (“Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

“The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

“The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

“For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
General Regulatory Matters. The Act establishes several other regulatory mechanisms directed at the activities involving U.S. financial institutions and foreign individuals or institutions. Section 313, for instance, in another restriction on correspondent accounts for foreign financial institutions, prohibits U.S. financial institutions from maintaining correspondent accounts either directly or indirectly for foreign shell banks (banks with no physical place of business) which have no affiliation with any financial institution through which their banking activities are subject to regulatory supervision.

The Act, in section 325, empowers the Secretary of the Treasury to promulgate regulations to prevent financial institutions from allowing their customers to conceal their financial activities by taking advantage of the institutions’ concentration account practices.

The Secretary of the Treasury is instructed in section 326 to issue regulations for financial institutions’ minimum new customer identification standards and record-
keeping and to recommend a means to effectively verify the identification of foreign customers.\(^{67}\)

\(^{67}\) 31 U.S.C. 5318(l); H.R.Rep.No. 107-250, at 62-3 (2001)(“Section [326](a) amends 31
U.S.C. 5318 by adding a new subsection governing the identification of account holders.
Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for
customer identification by financial institutions in connection with the opening of an account.
By referencing ‘customers’ in this section, the Committee intends that the regulations
prescribed by Treasury take an approach similar to that of regulations promulgated under title
V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined
‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this
approach, for example, where a mutual fund sells its shares to the public through a
broker-dealer and maintains a ‘street name’ or omnibus account in the broker-dealer's name,
the individual purchasers of the fund shares are customers of the broker-dealer, rather than
the mutual fund. The mutual fund would not be required to ‘look through’ the broker-dealer
to identify and verify the identities of those customers. Similarly, where a mutual fund sells
its shares to a qualified retirement plan, the plan, and not its participants, would be the fund's
customers. Thus, the fund would not be required to ‘look through’ the plan to identify its
participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial
institutions to implement procedures to verify (to the extent reasonable and practicable) the
identity of any person seeking to open an account, maintain records of the information used
to do so, and consult applicable lists of known or suspected terrorists or terrorist
organizations. The lists of known or suspected terrorists that the Committee intends financial
institutions to consult are those already supplied to financial institutions by the Office of
Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory
authorities, as in the days immediately following the September 11, 2001, attacks on the
World Trade Center and the Pentagon. It is the Committee's intent that the verification
procedures prescribed by Treasury make use of information currently obtained by most
financial institutions in the account opening process. It is not the Committee's intent for the
regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained
by various financial institutions, the various methods of opening accounts, and the various
types of identifying information available in promulgating its regulations. This would require
Treasury to consider, for example, the feasibility of obtaining particular types of information
for accounts opened through the mail, electronically, or in other situations where the
accountholder is not physically present at the financial institution. Millions of Americans open
accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is
not the Committee's intent that the regulations adopted pursuant to this legislation impose
burdens that would make this prohibitively expensive or impractical. This provision allows
Treasury to adopt regulations that are appropriately tailored to these types of accounts.

Current regulatory guidance instructs depository institutions to make reasonable efforts
to determine the true identity of all customers requesting an institution's services. (See, e.g.,
FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee
intends that the regulations prescribed under this section adopt a similar approach, and impose
requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator
in developing the regulations. This will help ensure that the regulations are appropriately
tailored to the business practices of various types of financial institutions, and the risks that
such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation
or order, any financial institution or type of account from the regulations prescribed under
paragraph (1).
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature.68

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

**Reports to Congress.** Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

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exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.\footnote{31 U.S.C. 5313 note; H.R.Rep.No. 107-205, at 65 (2001).}

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

**International Cooperation.** Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.\footnote{H.R.Rep.No. 107-250, at 67 (2001) (“This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury’s progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

“The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime”).}

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (\textit{i.e.}, the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.

\footnote{H.R.Rep.No. 107-250, at 67 (2001) (“This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury’s progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

“The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime”).}
Crimes. Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, smuggling, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
expands 18 U.S.C. 1956 to cover financial transactions conducted in foreign financial institutions.\footnote{71}

Section 329 makes it a federal crime to corruptly administer the money laundering regulatory scheme. Offenders are punishable by imprisonment for not more than 15 years and a fine of not more than three times the amount of the bribe.

Section 5326 of title 31 authorizes the Secretary of the Treasury to impose temporary, enhanced reporting requirements upon financial institutions in areas victimized by substantial money laundering activity (geographic targeting regulations and orders). Section 353 makes it clear that the civil sanctions, criminal penalties, and prohibitions on smurfing (structuring transactions to evade reporting requirements) apply to violations of the regulations and orders issued under 31 U.S.C. 5326.\footnote{72} It also extends the permissible length of the temporary geographical orders from 60 to 180 days.

Violations of the special measures and special due diligence requirements of sections 311 and 312 are subject to both civil and criminal penalties by virtue of section 363's amendments to 31 U.S.C. 5321(a) and 5322. The amendments authorize civil penalties and criminal fines of twice the amount of the transaction but not more than $1 million. Criminal offenders would be subject to a fine in the same amount.

\footnote{71} “[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

“The definition of ‘financial institution’ in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of ‘commercial bank’ or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad--say to a Mexican bank--and launders them through a series of financial transactions, the government conceivably could not rely on the definition of a ‘financial institution’ in 1956(c)(6) to establish that the transaction was a ‘financial transaction’ within the meaning of 1956(c)(4)(B) (defining a ‘financial transaction’ as a transaction involving the use of a ‘financial institution’), or that it was a ‘monetary transaction’ within the meaning of 1957(f) (defining ‘monetary transaction’ as, inter alia, a transaction that would be a ‘financial transaction’ under 1956(c)(4)(B)).

“Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launders the proceeds of one of the crimes set forth on a list of ‘specified unlawful activities.’ 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),” H.R.Rep.No. 107-250, at 38 (2000).

Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.  

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents. They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

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73 “The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the sciencer requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business.

“Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.

“Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive,” H.R.Rep.No. 107-250, at 54 (2001).

74 “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual, 31 U.S.C. 5332(a)(2).

- 18 U.S.C. 476 (taking impressions of tools used for obligations and securities) from 10 to 25 years;
- 18 U.S.C. 477 (possessing or selling impressions of tools used for obligations or securities) from 10 to 25 years;
- 18 U.S.C. 484 (connecting parts of different notes) from 5 to 10 years;
- 18 U.S.C. 493 (bonds and obligations of certain lending agencies) from 5 to 10 years;
- 18 U.S.C. 478 (foreign obligations or securities) from 5 to 20 years;
- 18 U.S.C. 479 (uttering counterfeit foreign obligations or securities) from 3 to 20 years;
- 18 U.S.C. 480 (possessing counterfeit foreign obligations or securities) from 1 to 20 years;
- 18 U.S.C. 481 (plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities) from 5 to 25 years;
- 18 U.S.C. 482 (foreign bank notes) from 2 to 20 years; and
- 18 U.S.C. 483 (uttering counterfeit foreign bank notes) from 1 to 20 years.

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

**Bulk Cash.** Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act’s bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting. 

The section appears to be the product of reactions to the Supreme Court’s decision in *United States v. Bajakian*, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court's

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As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency – representing the proceeds of drug trafficking and other criminal offenses – is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad.

Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United States without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute,” H.R.Rep.No. 107-250 at 36-7 (2001).

Section 5317 of title 31 once called for civil forfeiture of property traceable to a violation of 31 U.S.C. 5316 (reports on exporting or importing money instruments worth $10,000 or more). Section 372 of the Act recasts section 5317 to provide for civil and criminal forfeitures for violations of 31 U.S.C. 5316, of 31 U.S.C. 5313 (reports on domestic coins and currency transactions involving $10,000 or more) and of 31 U.S.C. 5324 (structuring transactions to evade reporting requirements (smurfing)).

Extraterritorial Jurisdiction. The Act makes 18 U.S.C. 1029, the federal statute condemning various crimes involving credit cards, PIN numbers and other access devices, applicable overseas if the card or device is issued by or controlled by an American bank or other entity and some article is held in or transported to or through the United States during the course of the offense, section 377. The change was part of the original Justice Department proposals. Justice explained that, “[financial crime[] admits of no border, utilizing the integrated global financial network for ill purposes. This provision would apply the financial crimes prohibitions to conduct committed abroad, so long as the tools or proceeds of the crimes pass through or are in the United States,” DoJ at §408. The section, however, appears to limit the otherwise applicable extraterritorial jurisdiction implicit in section 1029, since federal courts would likely recognize extraterritorial jurisdiction over a violation examination of forfeiture in false reporting cases under the Constitution's Excessive Fines Clause.76

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under either circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.\footnote{United States v. Bowman, 260 U.S. 94, 97-8 (1922); Ford v. United States, 273 U.S. 593, 623 (1927). For a general discussion of the extraterritorial application of federal criminal law, see, Doyle, Extraterritorial Application of American Criminal Law, CRS REP.NR. 94-166A (Mar. 13, 1999).}

\textbf{Venue.} Section 1004 relies on dicta in United States v. Cabrales, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering,\footnote{“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed,” U.S.Const. Art.III, §2, cl.3.  “[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,” U.S.Const. Amend. VI.} in the state and district in which the monetary transaction takes place. The Supreme Court in Cabrales held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in dicta, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.\footnote{See also, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnaping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.}

\textbf{Forfeiture.} Forfeiture is the government confiscation of property as a consequence of crime.\footnote{For general background information, see, Doyle, Crime and Forfeiture, CRS REP.NR. 97-139A (Oct. 11, 2000).} The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 et seq. (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

\textbf{Constitutional Considerations.} The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 et seq., which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the
jurisdiction of the United States, belonging to any foreign individual, foreign entity, or foreign country whom they determine to have planned, authorized, aided or engaged in an attack on the United States by a foreign country or foreign nationals. The section also permits the government to present secretly (ex parte and in camera) any classified information upon which the forfeiture was based should the decision be subject to judicial review. The Justice Department requested the section as a revival of the President's powers in times of unconventional wars. By virtue of section 316, property owners may initiate a challenge to a confiscation by filing a claim under the rules applicable in maritime confiscations. The section permits two defenses to forfeiture – that the property is not subject to confiscation under section 106 or that the claimant is entitled to the innocent owner defense of 18 U.S.C. 983(d). The characterization of the defenses as “affirmative defense” indicates that the claimant bears the burden of proof. The innocent owner defenses of 18 U.S.C. 983(d) are probably not available in cases under section 106, since that section is explicitly

81 “This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App.U.S.C. §5(b).

“This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress's war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

“The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2),” DoJ at §159.

82 “An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
excepted from the coverage of 18 U.S.C. 983. The challenge proceedings permit the court to admit evidence, such as hearsay evidence, that would not otherwise be admissible under the Federal Rules of Evidence if the evidence is reliable and if national security might be imperiled should dictates of the Federal Rules be followed, §316(b). The section recognizes the rights of claimants to proceed alternatively under the Constitution or the Administrative Procedure Act.

The Justice Department also recommended enactment of an overlapping provision which ultimately passed as section 806 of the Act without any real discussion of the relationship of the two sections. Section 806 authorizes confiscation of all property, regardless of where it is found, of any individual, entity, or organization engaged in domestic or international terrorism (as defined in 18 U.S.C. 2331), against the United States, Americans or their property, 18 U.S.C.

83 18 U.S.C. 983(i)(2)(D).

84 “The exclusion of certain provisions of Federal law from the definition of the term ‘civil forfeiture statute’ in section 983(i) of title 18, United States Code, shall not be construed to deny an owner of property the right to contest the confiscation of assets of suspected international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C) subchapter II of chapter 5 of title 5, United States Code (commonly known as the ‘Administrative Procedure Act’).” Sec. 316(c)(1).

85 “Current law does not contain any authority tailored specifically to the confiscation of terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available current forfeiture laws require detailed tracing that is quite difficult for accounts coming through the banks of countries used by many terrorists.

‘This section increases the government's ability to strike at terrorist organizations' economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001,” DoJ, at §403. The House Report on H.R. 2975 which contained versions of both sections is no more explicit on the relation of the two sections.

86 “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
981(a)(1)(G). Section 806 as discussed below also calls for the more common confiscation of property derived from and or facilitating acts of domestic or international terrorism against the United States or its citizens. Confiscations under 806 may be challenged under the procedures of 18 U.S.C. 983, since they are not exempted there. To the extent that forfeiture under section 806 is based on international rather than domestic terrorism, claimants may also use the procedures of section 316.

Confiscation based solely on the fact that the property is owned by a criminal offender, rather than that it is derived from or facilitates some crime is fairly uncommon. It is the mark of common law forfeiture of estate. At common law, a felon forfeited all of his property. Most contemporary forfeiture statutes employ statutory forfeiture, a more familiar presence in American law, which consists of the confiscation of things whose possession is criminal, of the fruits of crime, and of the means of crime – untaxed whiskey, the drug dealer’s profits, and the rum runner’s ship.

Three characteristics set forfeiture of estate apart. The property is lost solely by reason of its ownership by a felon. All of a felon’s property is confiscated, not merely that which is related to the crime for which he is convicted. Finally, it occasions attainder which negates the felon’s right to hold property or for title to property to pass through him to his heirs. It was with this in mind, that the Framers declared that “no attainder of treason shall work corruption of blood or forfeiture exception during the life of the person attainted.” And for this reason, President Lincoln insisted that the confiscated real estate of Confederate supporters should revert their heirs at death.

87 Austin v. United States, 509 U.S. 602, 611-12 (1993) (“Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture . . . . Of England’s three kinds of forfeiture, only the third took hold in the United States”).


89 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal in personam proceedings following criminal conviction as a means of accomplishing confiscation.
Neither section 106 nor 806 require conviction of the terrorist property owner.\textsuperscript{90} Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers.\textsuperscript{91} The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners.\textsuperscript{92} Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them.\textsuperscript{93} The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate

\textsuperscript{90} Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c)(“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act”).

\textsuperscript{91} Silesian American Corp. v. Clark, 332 U.S. 469 (1947); cf., Societe Internationale v. Rogers, 357 U.S. 197, 211 (1958)(“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).

\textsuperscript{92} Zittman v. McGrath, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’”).

any presumption of remedial purposes.\textsuperscript{94} The same has been said of the applicability of the ex post facto clause.\textsuperscript{95}

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO.\textsuperscript{96} If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

\textbf{Other Forfeiture Amendments.} In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.\textsuperscript{97}


\textsuperscript{95} See \textit{e.g.}, \textit{United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.)}, 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, \textit{Landgraf v. USI Film Products}, 511 U.S. 244, 265-66 (1994).

\textsuperscript{96} \textit{DoJ}, at §403.

\textsuperscript{97} 18 U.S.C. 1956(b). \textit{Cf.}, H.R.Rep.No. 107-250, at 54-5 (2001)(“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
American Bank, 191 F.3d 30 (1st Cir. 1999).

“The second provision, modeled on 18 U.S.C. 1345(b), gives the district court the power to restrain property, issue seizure warrants, or take other action necessary to ensure that a defendant in an action covered by the statute does not dissipate the assets that would be needed to satisfy a judgment.

“This section also authorizes a court, on the motion of the Government or a State or Federal regulator, to appoint a receiver to gather and protect assets needed to satisfy a judgment under sections 1956 and 957, and the forfeiture provisions in sections 981 and 982. This authority is intended to apply in three circumstances: (1) when there is a judgment in a criminal case, including an order of restitution, following a conviction for a violation of section 1956 or 1957; (2) when there is a judgment in a civil case under section 1956(b) assessing a penalty for a violation of either section 1956 or 1957; and (3) when there is a civil forfeiture judgment under section 981 or a criminal forfeiture judgment, including a personal money judgment, under section 982.

“The amendment also makes section 1956(b) applicable to violations of section 1957. It applies to conduct occurring before the effective date of the Act”).

98 18 U.S.C. 981(k). H.R.Rep.No. 107-250, at 57-8 (2001)(“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank's customers.

“Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank's correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

“The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”).
defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation.\textsuperscript{99}

Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here.\textsuperscript{100} Section 320 enlarges this provision to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements.\textsuperscript{101} This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.\textsuperscript{102}

\textsuperscript{99} Cf., H.R.Rep.No. 107-250, at 58-9 (2001) (“Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of ‘substitute assets’ when the defendant has placed the property otherwise subject to forfeiture ‘beyond the jurisdiction of the court.’ Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

“This section amends 21 U.S.C. 853 to make clear that a court in a criminal case may issue a repatriation order—either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. 853(e) to restrain property—so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both”.

\textsuperscript{100} 18 U.S.C. 981(a)(1)(B).

\textsuperscript{101} H.R.Rep.No. 107-250, at 56 (2001)(“This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act”).

\textsuperscript{102} H.R.Rep.No. 107-250, at 59-60 (2001)(“Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country.

“Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
A fugitive may not challenge a federal forfeiture.\textsuperscript{103} Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in “order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.”
Alien Terrorists and Victims

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

**Border Protection.** The border protection provisions:

- authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401

- authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402

- remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404

- authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405

- authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.

- instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007

- direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418

- express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414

- add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415

- call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416

- limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
• instruct the Attorney General to report on the feasibility of using biometric scanners to help prevent terrorists and other foreign criminals from entering the country, section 1008

• authorize appropriations of $250,000 for the FBI to determine the feasibility of providing airlines with computer access to the names of suspected terrorists, section 1009

• authorize reciprocal sharing of the State Department’s visa lookout data and related information with other nations in order to prevent terrorism, drug trafficking, slave marketing, and gun running, section 413

Detention and Removal. Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity, 8 U.S.C. 1227 (a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(iv). Aliens may be inadmissible for any number of terrorism-related reasons, 8 U.S.C. 1182 (a)(3)(B). Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported.


Section 411 defines “terrorist organization” to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the Federal Register as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C.

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104 As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).
Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).


An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in “premeditated, politically motivated violence perpetrated against noncombatant targets,” or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security or endanger some individual or the general public. The Attorney General's determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

**Victims.** The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

- permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421
- extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422

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105 “The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

106 “The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks.

“The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application.

“Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

“Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 31.

“Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.


107 “Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

“The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

“The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death),” H.R.Rep.No. 107-236, at 68 (2001).

108 “Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien’s 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien’s 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
• a denial of benefits of the Act to terrorists and their families, section 427

• authority for the Attorney General to establish evidentiary standards to implement the alien victim provisions of the Act, section 426.

**Other Crimes, Penalties, & Procedures**

**New Crimes.** The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department, the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offense for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents, 18 U.S.C. 175b. Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.

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109 “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . . .” DoJ at §305.

110 The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

111 “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2)(“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.112

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D). The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

112 *U.S. Const.* Art.III, §2, cl.3 (“The trial of all crimes ... shall be held in the state where the said crimes shall have been committed ... ”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. ... ”); *United States v. Cabrales*, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from *Cabrales* when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnaping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280-81 n.4 (1999)(“By way of comparison, last Term in *Cabrales* we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).
The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of ‘material support or resources’ is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’),” DoJ at §304.


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115 “The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill (‘Federal terrorism offenses’) is used in identifying the relevant crimes,” DoJ, at §304.

New Penalties. The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. 3571(b),(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense.\(^{117}\)

The proposal, however, failed to identify the critical elements that would trigger the alternative.\(^{118}\) Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

- for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

- for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

\(^{117}\) “Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersede lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,” DoJ, at §302.

\(^{118}\) “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense,” Draft at §302.
for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;

for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;

for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;

for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and

for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism. Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:

* arson committed within a federal enclave, 18 U.S.C. 81;
* killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);
* destruction of communications facilities, 18 U.S.C. 1362;
* destruction of property within a federal enclave, 18 U.S.C. 1363;
* causing a train wreck, 18 U.S.C. 1922;
* providing material support to a terrorist, 18 U.S.C. 2339A;
* torture committed overseas under color of law, 18 U.S.C. 2340A;
* sabotage of a nuclear facility, 42 U.S.C. 2284;

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119 The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §§846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

“This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.
• interfering with a flight crew within U.S. special aircraft jurisdiction, 49 U.S.C. 46504;
• carrying a weapon or explosive abroad an aircraft within U.S. special aircraft jurisdiction, 49 U.S.C. 46505; and
• sabotage of interstate gas pipeline facilities, 49 U.S.C. 60123.

When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years). The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission), a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

120 Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

121 “Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.

“This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” \((i.e.,\) those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders).\(^{122}\)

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

**Other Procedural Adjustments.** In other procedural adjustments designed to facilitate criminal investigations, the Act:

- increases the rewards for information in terrorism cases
- expands the Posse Comitatus Act exceptions
- authorizes “sneak and peek” search warrants
- permits nationwide and perhaps worldwide execution of warrants in terrorism cases
- eases government access to confidential information
- allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
- lengthens the statute of limitations applicable to crimes of terrorism
- clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
- adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B.\(^{123}\)

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\(^{122}\) It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, \(e.g.,\) damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

\(^{123}\) When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001) (remarks of Rep. Sensenbrenner); for general background, see, Doyle, McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys, CRS REP.NO. RL30060 (Dec. 14, 2001).
Rewards. The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L. 105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism.124

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

Posse Comitatus. The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.125

Delayed notification of a search (sneak and peek). Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take

124 The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct threat assessments for federal agencies, and to reimburse federal agencies for the costs of detaining terrorist suspects overseas.

125 For a general discussion of the Posse Comitatus Act, see, Doyle, *The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law*, CRS REP.NO. 95-964 (June 1, 2000).
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, Richards v. Wisconsin, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, Wilson v. Arkansas, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, Dalia v. United States, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, cf., United States v. Miller, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, United States v. Freitas, 800 F.2d 1451, 1453 (9th Cir. 1986).126

126 The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in United States v. New York Telephone Co., 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth
The Second Circuit was less convinced and preferred to hold sneak and peek searches to the demands of Rule 41, United States v. Pangburn, 983 F.2d 449 (2d Cir. 1993). The Fourth Circuit was, if anything, less convinced. Moreover, the facts in the case demonstrate the potential impact of the issue on computer privacy, United States v. Simons, 206 F.3d 392 (4th Cir. 2000).

Amendment, demands that surreptitious entries be closely circumscribed,” United States v. Freitas (Freitas I), 800 F.2d 1451, 1455-456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, United States v. Freitas (Freitas II), 856 F.2d 1425 (9th Cir. 1988).

“...No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in Dalia v. United States, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in Dalia, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property... The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. See United States v. New York Telephone Co., 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry... Although the Freitas I court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in United States v. Villegas, 899 F.2d 1324 (1999). Although the Freitas I court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in Villegas. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property... We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the Freitas I court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” United States v. Pangburn, 983 F.2d 449, 453-55 (2d Cir. 1993).

127 In Simons, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
The Justice Department urged that the conflict be resolved with a uniform rule which permitted sneak and peek warrants under the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage.129

The Act, in section 213, stops short of the Justice Department proposal. Characterized as a codification of the Second Circuit decision, 147 Cong.Rec. H7197 (daily ed. Oct. 23, 2001), the Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C. 3103a. Its sneak and peek authorization reaches all federal search and seizure warrants where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (e.g., risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (e.g., jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure "reasonably necessary." It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, i.e., in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation.130 The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

Fourth Amendment does not mention notice, and the Supreme Court has stated that the constitution does not categorically proscribe covert entries, which necessarily involve a delay in notice. And insofar as the August search satisfied the requirements of the Fourth Amendment, i.e., it was conducted pursuant to a warrant based on probable cause issued by a neutral and detached magistrate, we perceive no basis for concluding that the 45-day delay in notice rendered the search unconstitutional. Having concluded that the Rule 41(d) violation at issue here did not infringe on Simons' constitutional rights, we must now evaluate his argument that the violation was deliberate. . . . The district court did not address the intent issue when it ruled on Simons' motion to suppress. . . . We therefore remand for the district court to consider whether the Government intentionally and deliberately disregarded the notice provision of Rule 41(d) when it carried out the August 6, 1998 search,” 206 F.3d at 403.

129 "The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities," DoJ at §353.

130 Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department's initial proposal, the Department's justification does not address the question.
constitutionally “reasonable,” that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

**Nationwide terrorism search warrants.** The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either “within or outside the district,” (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases. The provision may anticipate execution both in this country and overseas. The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage. Neither Rule 41 nor any other provision of federal

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131 The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum. . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

132 The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

133 *United States v. Barona*, 56 F.3d 1087, 1092 (9th Cir. 1995)(“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994)(“if American law enforcement officials substantially participated in the search or if the

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” F.R.Crim.P. 41, *Advisory Committee Notes: 1990 Amendment*. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

**Terrorists' DNA.** The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards *per se*. 

Existing federal law allowed the Attorney General to collect samples from foreign officials conducting the search were actually acting as agents for their American counterparts”); *United States v. Maturo*, 982 F.2d 57, 61 (2d Cir. 1992)(“where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials” or “where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials”); *United States v. Mitro*, 880 F.2d 1480, 1482 (1st Cir. 1989)(“where American agents participated in the foreign search or the foreign officers acted as agents for their American counterparts”); *United States v. Mount*, 757 F.2d 1315, 1318 (D.C.Cir. 1985)(“if American officials or officers participated in some significant way”); *United States v. Marzano*, 537 F.2d 257, 270 (7th Cir. 1976)(declining to adopt the “joint venture” standards, but finding level of American participation in the case before it insignificant); *United States v. Morrow*, 537 F.2d 120, 139 (5th Cir. 1976)(“if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts”); each of the decisions also suggests that evidence secured in a manner which shocked the conscience of the court would be excluded.

134 The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, see, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), reprinted, 78 *Cong.Rec.* 4982-983 (1934)(“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.)(conferring judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

federal prisoners convicted of a variety of violent crimes, 42 U.S.C. 14135a. The Act enlarges the predicate offense list to include any crime of violence or any terrorism offense, section 503.\textsuperscript{136}

**Access to Educational Records.** Finally, the Act calls for an ex parte court order procedure under which senior Justice Department officials may seek authorization to collect educational records relevant to an investigation or prosecution of a crime of terrorism, section 507 (as an exception to the confidentiality requirements of the General Education Provisions Act, 20 U.S.C. 1232g), section 508 (as an exception to the confidentiality requirements of the National Education Statistics Act, 20 U.S.C. 9007).

**Statute of Limitations.** Prosecution for murder in violation of federal law may be initiated at any time, 18 U.S.C. 3281. A five year statute of limitations applied for most other federal crimes before passage of the Act, with a few exceptions. Among the relevant exceptions were an eight year statute of limitations for several terrorist offenses, 18 U.S.C. 3286,\textsuperscript{137} and a ten year statute of limitations for a few arson and explosives offenses, 18 U.S.C. 3295. The Justice Department recommended the elimination of a statute of limitations in terrorism cases.\textsuperscript{138}

\textsuperscript{136} Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples form convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes,” DoJ at §353.

For a general discussion, see, Fischer, DNA Identification: Applications and Issues, CRS REP.NO. RL30717 (Jan. 12, 2001).

\textsuperscript{137} 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

\textsuperscript{138} “This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

“This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in
connection with the September 11, 2001 terrorist attacks. The constitutionality of such retroactive applications of changes in statutes of limitations is well-settled, See, e.g., United States v. Grimes, 142 F.3d 1342, 1350-51 (11th Cir. 1998); People v. Frazer, 982 P.2d 180 (Cal. 1999).

“Existing federal law (18 U.S.C. §3282) bars prosecuting most offenses after five years. 18 U.S.C. §3286, as currently formulated, extends the limitation period for prosecution for certain offenses that may be committed by terrorists – but only to eight years. While this is a limited improvement over the five-year limitation period for most federal offenses, it is patently inadequate in relation to the catastrophic human and social costs that frequently follow from such crimes as destruction of aircraft (18 U.S.C. §32), aircraft hijackings (49 U.S.C. §§46502, 46504-06, attempted political assassinations (18 U.S.C. §§351, 1116, 1751), or hostage taking (18 U.S.C. §1203). These are not minor acts of misconduct which can properly be forgiven or forgotten merely because the perpetrator has avoided apprehension for some period of time. Anomalously, existing law provides longer limitation periods for such offenses as bank frauds and certain artwork thefts (18 U.S.C.§§3293-94) than it does for crimes characteristically committed by terrorists.

“In many American jurisdictions, the limitation periods for prosecution for serious offenses are more permissible than those found in federal law, including a number of states which have no limitation period for the prosecution of felonies generally. While this section does not go so far, it does eliminate the limitation period for prosecution of the major crimes that are most likely to be committed by terrorists (‘Federal terrorism offenses’), as specified in section 309 of this bill,” DoJ at 301.

139 As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 (sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period.141 Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.142

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (Grimes, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (Frazer, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

**Extraterritoriality.** Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States or elsewhere. . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.143

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnapping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.

141 United States v. De La Matta, 266 F.3d 1275, 1286 (11th Cir. 2001); United States v. Grimes, 142 F.3d 1342, 1351 (11th Cir. 1998); United States v. Morrow, 177 F.3d 272, 294 (5th Cir. 1999); Falter v. United States, 23 F.2d 420, 425-26 (2d Cir. 1928).


143 United States v. Layton, 855 F.2d 1388 (9th Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); United States v. Benitez, 741 F.2d 1312 (11th Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.144

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

Victims. Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11th Victim Compensation Fund legislation before it passed the Act. Consequently, the Act’s victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 et seq., and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 et seq.

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:

• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year)(42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d)(5)), section 621(d)

• waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

• eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
• makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

• prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

• allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

• reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

• makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

• allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

• establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

Increasing Institutional Capacity. A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

- $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)

- necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)

- $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)

- $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816

- $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701

- $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)

- $5 million for DEA police training in South and Central Asia, section 1007.

Miscellaneous. Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might be used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act, or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b), 807.

145 *I.e.*, Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).

involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

**Electronic Surveillance.** To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202.16 A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(i). Yet only the interloper's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.17

**Criminal Investigators' Access to Foreign Intelligence Information.**

The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism.18 It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that “the purpose for the surveillance is to obtain foreign intelligence information,” 50 U.S.C. 1804(a)(7)(B)(2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps “the purpose” might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation

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16 18 U.S.C. 229 (chemical weapons), 2332(terrorist acts of violence committed against Americans overseas), 2332a(use of weapons of mass destruction), 2332b(acts of terrorism transcending national boundaries), 2332d(financial transactions with countries which support terrorists), 2339A(providing material support to terrorists), and 2339B(providing material support to terrorist organizations).

17 “Because service providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves as permitted under current law, they often have no way to exercise their rights to protect themselves from unauthorized attackers. Moreover, such attackers can target critical infrastructures and engage in cyberterrorism,” DoJ at §106. Elsewhere the Act defines “electronic surveillance” for purposes of the Foreign Intelligence Surveillance Act (FISA) to emphasize that the law enforcement authority for this intruder surveillance does not confer similar authority for purposes of foreign intelligence gathering, section 1003 (50 U.S.C. 1801(f)(2)).

18 For a general discussion of federal intelligence and law enforcement cooperation, see, Best, Intelligence and Law Enforcement: Countering Transnational Threats to the U.S., CRS REP.NO. RL30252 (Dec. 3, 2001).
Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment's warrant clause. It is here that the “primary purpose” notion originated. In *United States v. Truong Dinh Hung*, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, “as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.” Subsequent case law, however, is not as clear as it might be: see e.g., *United States v. Duggan*, 743 F.2d 59, 77 (2d Cir. 1984)(“FISA permits federal officials to obtain orders authorizing electronic surveillance ‘for the purpose of obtaining foreign intelligence information.’ The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying officials’s belief that the information sought is the type of foreign intelligence information described”); *United States v. Pelton*, 835 F.2d 1067, 1075-76 (4th Cir. 1987)(“We also reject Pelton’s claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial”); *United States v. Sarkissian*, 841 F.2d 959, 907-8 (9th Cir. 1988)(“Defendants rely on the primary purpose test articulated in United States v. Truong Dinh Hung. . . . One other court has applied the primary purpose test. Another court has rejected it . . . distinguishing Truong. A third court has declined to decide the issue. We also decline to decide the issue”); *United States v. Johnson*, 952 F.2d 565, 572 (1st Cir. 1991)(“Appellants attack the government's surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance”).

*Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” DoJ at §153.*
demanding standard than the “a purpose” threshold proposed by the Justice Department, but a clear departure from the original “the purpose” entry point. FISA once described a singular foreign intelligence focus prerequisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k), 1825(k).21

**Protective Measures.** The Act reinforces two kinds of safeguards, one set designed to prevent abuse and the other to protect those who assist the government. The sunset clause is perhaps the best known of the Act’s safeguards. Under the direction of section 224, many of the law enforcement and foreign intelligence authorities granted by the Act expire as of December 31, 2005.22 The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter

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21 “(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. (2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, infra, quoting, 50 U.S.C. 1801.

22 “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210[subs peronas for communications provider customer records], 211[access to cable company communication service records], 213[sneak and peek], 216[pen register and trap and trace device amendments], 221[trade sanctions], and 222[assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005. (b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers' communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices).23 Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees,24 but could not recover against the United States.25 Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice's Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government's request until a court order authorizing access can be obtained.26 Another allows providers to disclose customer records to protect the provider's rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others.27 A third section,
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

**Foreign Intelligence Investigations**

Although both criminal investigations and foreign intelligence investigations are conducted in the United States, criminal investigations seek information about unlawful activity; foreign intelligence investigations seek information about other countries and their citizens. Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough.

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA), something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President's authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, *United States v. United States District Court*, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage

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28 Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

29 Thus in the name of assisting in the execution of Title III, chapter 121, or chapter 206 order, the courts may not cite the Act as the basis for an order compelling a service provider to make system modifications or provide any other technical assistance not already required under 18 U.S.C. 2518(4), 2706, or 3124(c), see, H.R.Rep.No. 107-236, at 62-3 (2001) (emphasis added) (“This Act is not intended to affect obligations under Communications Assistance for Law Enforcement Act [which addresses law enforcement-beneficial system modifications and the compensation to be paid for the changes], nor does the act impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance”).

30 *E.g.*, As amended by section 902 of the Act, “‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2)(language added by the Act in italics).

31 50 U.S.C. 1801 *et seq.*
In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs. There were and still are extra


33 “As used in this subchapter: (a) ‘Foreign power’ means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

(b) ‘Agent of a foreign power’ means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C).

(c) ‘International terrorism’ means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnapping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

(d) ‘Sabotage’ means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

(e) ‘Foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans ("United States persons," i.e., citizens or permanent resident aliens). The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

- permits “roving” surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)

- increases the number of judges on the FISA court from 7 to 11

- allows application for a FISA surveillance or search order when gathering foreign intelligence is a significant reason for the application rather than the reason

- authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations

- sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses

- carries a sunset provision

- establishes a claim against the U.S. for certain communications privacy violations by government personnel

- expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to – (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States,” 50 U.S.C. 1801.

34 Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
**FISA.** FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases.\textsuperscript{35} It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

**Search and Surveillance for Intelligence Purposes.** Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, Draft at §151.\textsuperscript{36}

Section 901 of the Act address a concern raised during the 106th Congress relating to the availability of the FISA orders and the effective use of information gleaned from the execution of a FISA order.\textsuperscript{37} It vests the Director of Central


\textsuperscript{36} See also, DoJ at §151, “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order’s minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed (50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

\textsuperscript{37} See e.g., S.Rep.No. 106-352, at 3, 6, 7 (2000)(“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application
process, as interpreted by the OIPR is administratively burdensome and, at times, extremely slow. Many applications undergo months of scrutiny before submission to the court because the OIPR prescribes standards and restrictions not imposed by the statute. . . . In particular, the OIPR has been criticized for an overly restrictive interpretation of the FISA ‘currency’ requirement. This is the issue of how recent a subject’s activities must be to support a finding of probable cause that the subject is engaged in clandestine intelligence gathering activities. . . . While existing law does not specifically address ‘past activities,’ it does not preclude, and legislative history supports, the conclusion that past activities may be part of the totality of circumstances considered by the FISC in making a probable cause determination. . . . By definition, information collected pursuant to a court order issued under the Foreign Intelligence Surveillance Act is foreign intelligence not law enforcement information. Accordingly, the Committee wants to clarify that the FISA ‘take’ can and must be shared by the Federal Bureau of Investigation with appropriate intelligence agencies. For the intelligence mission of the United States to be successful, there must be a cooperative and concerted effort among intelligence agencies. Any information collected by one agency under foreign intelligence authorities that could assist another agency in executing its lawful mission should be shared fully and promptly. Only then can the United States Government pursue aggressively important national security targets including, for example, counterterrorist and counternarcotics targets’; see also, 147 Cong.Rec. S799-803 (daily ed. Feb. 24, 2000)(remarks of Sens. Specter, Torricelli and Biden).

38 “When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevance, an additional factual showing that the communications device has been used to contact an ‘agent of a foreign power’ engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the ‘agent of a foreign power’ prong from the predication, and thus makes the FISA authority more closely track the criminal authority,” DoJ at §155.
Section 214 adjusts the language of the FISA pen register-trap and trace authority to permit its use to capture source and destination information relating to electronic communications (e.g., e-mail) as well as telephone communications, 50 U.S.C. 1842(d). The section makes it clear that requests for a FISA pen register-trap and trace order, like requests for other FISA orders, directed against Americans (U.S. persons) may not be based solely on activities protected by the First Amendment, 50 U.S.C. 1842, 1843.

**Third Party Cooperation and Tangible Evidence.** As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target's activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.

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39 Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise to be entitled to confidentiality. Section 505, in response to the Justice Department's suggestion, allows FBI field offices to make the requests, see DoJ at §157 (“At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports.”).

40 When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court's order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.’ This would enhance the FBI's ability to monitor international terrorists and intelligence officers who are
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian. The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities, in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.


In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B));
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a);
- the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a);
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v;

trained to thwart surveillance by rapidly changing hotel accommodations, cell phones, Internet accounts, etc., just prior to important meetings or communications. Under the current law, the government would have to return to the FISA Court for an order that named the new carrier, landlord, etc., before effecting surveillance. Under the proposed amendment, the FBI could simply present the newly discovered carrier, landlord, custodian or other person with a generic order issued by the Court and could then effect FISA coverage as soon as technically feasible,” DoJ at 152.


- The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigatory contexts. The time and difficulty involved in getting such pleadings before the Court usually outweighs the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” DoJ at §156.

Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.43

**Access to Law Enforcement Information.** Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community’s access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, *Draft* at §103.44

43 H.R.Rep.No. 107-205, at 60-1 (2001) (“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

“The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

“Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual’s credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding--without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information”).

44 *See also, DoJ* at §103, “This section facilities the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, *Draft* at §354.\(^45\)

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, *Draft* at §154.\(^46\)

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion.\(^47\) It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions.”

\(^{45}\) *See also, DoJ* at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.” Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officers.

\(^{46}\) *See also, DoJ* at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”

\(^{47}\) *Blair v. United States*, 250 U.S. 273, 281 (1919)(the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

Critics may protest that the change could lead to the use of the grand jury for intelligence gathering purposes, or less euphemistically, to spy on Americans. The proposal was never among those scheduled to sunset, but earlier versions of the section followed the path used for most other disclosures of grand jury material: prior

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48 These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

49 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25 HARVARD JOURNAL OF LAW & PUBLIC POLICY 699, 719-20 (2002)(“There is a significant danger that the rule permitting disclosure will be treated as the de facto authorization of an expansion of the grand jury’s investigative role to encompass seeking material relevant only to matters of national security, national defense, immigration, and so forth. The grand jury’s awesome powers should not be unwittingly extended to a much wider range of issues. . . Since the grand jury operates in secret, there are no public checks on the scope of its investigations, and witnesses are not permitted to challenge its jurisdiction. Only the supervising court is in a position to keep the grand jury’s investigation within proper bounds. Requiring judicial approval of foreign intelligence and counterintelligence information disclosures would provide a natural check against the temptation to manipulate the grand jury to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6 (Nov. 2001)(“The grand jury secrecy rule is a rule of policy which has always had exceptions, and it has been frequently modified. The secrecy rule has no credible claim to constitutional stature”).
court approval, H.R.Rep.No. 107- 236, at 73 (2001). The Act, in section 203(a), instead calls for confidential notification of the court that a disclosure has occurred and the entity to whom it was made, F.R.Crim.P. 6(e)(3)(C)(iii). It also insists that the Attorney General establish implementing procedures for instances when the disclosure “identifies” Americans (U.S. persons), section 203(c).

Law enforcement officials may share Title III information with the intelligence community under the same conditions, section 203(b), although the grand jury and Title III sharing provisions differ in at least three important respects. The court need not be notified of Title III disclosures. On the other hand, the authority for sharing Title III information expires on December 31, 2005, section 224, and agencies and their personnel guilty of intentional improper disclosures may be subject to a claim for damages and disciplinary action, 18 U.S.C. 2520.

The third subsection of section 203 remains something of an enigma. It speaks in much the same language as its counterparts. It allows law enforcement officials to share information with the intelligence community, “notwithstanding any other provisions of law,” section 203(d). It either swallows the other subsections, or supplements them. Several factors argue for its classification as a supplement. Congress is unlikely to have crafted subsections (a), (b) and (c) only to completely

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50 Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

51 “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person’s official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification. By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

**Increasing Institutional Capacity.** As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a

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52 *Duncan v. Walker*, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted) (“It is our duty to give effect, if possible, to every clause and word of a statute. United States v. Menasche, 348 U.S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)); see also *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879) (As early as in Bacon's Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

53 Draft at §154, “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”
The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so,” S.Rep.No. 107-63, at 11 (2001).

Money Laundering

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture. The Act bolsters federal efforts in each area.

Regulation. Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular. 56

54 “The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

55 For a brief overview, see, Murphy, Money Laundering: Current Law and Proposals, CRS REP.NO. RS21032 (DEC. 21, 2001).

56 See e.g., 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
**Records and Reports.** For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler’s checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to file SARs as well, reflecting Congress’ view that the information provided the IRS may be valuable for other law enforcement purposes. This concern is likewise

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58 H.R.Rep.No. 107-250, at 38-9 (2001) (“Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

“Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a ‘Safeguard Procedures Report’ which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

“While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement
Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action. 59 Section 355 expands the immunity to cover disclosures in

59 “Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

“First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor from civil liability applies in arbitration, as well as judicial, proceedings. Second, it amends section 5318(g)(3) to clarify the safe harbor's coverage of voluntary disclosures (that is, those not covered by the SAR regulatory reporting requirement). The language in section 5318(g)(3)(A) providing that ‘any financial institution that *** makes a disclosure pursuant to *** any other authority *** shall not be liable to any person’ is not intended to avoid the application of the reporting and disclosure provisions of the Federal securities laws to any person, or to insulate any issuers from private rights of actions for disclosures made under the Federal securities laws.

“Subsection [351](b) amends section 5318(g)(2) of title 31--which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed--to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee's official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the

authorities as the various reports mandated by the Bank Secrecy Act, which can typically be retrieved electronically from a database maintained by the Treasury Department. The differential access to the two kinds of reports is made anomalous by the fact that Form 8300 elicits much the same information that is required to be disclosed by the Bank Secrecy Act. For example, just as Form 8300 seeks the name, address, and social security number of a customer who engages in a cash transaction exceeding $10,000 with a trade or business, Currency Transaction Reports (CTRs) mandated by the Bank Secrecy Act require the same information to be reported on a cash transaction exceeding $10,000 between a financial institution and its customer”).
employment references to other insured depository financial institutions provided disclosure is not done with malicious intent.\textsuperscript{60}

The Financial Crimes Enforcement Network (FinCEN), a component within the Treasury Department long responsible for these anti-money laundering reporting and record-keeping requirements, 31 C.F.R. pt. 103, was administratively created in 1990 to provide other government agencies with an “intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes,” 55 Fed.Reg. 18433 (May 2, 1990).

The Act, in section 361, makes FinCEN a creature of statute, a bureau within the Treasury Department, 31 U.S.C. 310. Section 362 charges it with the responsibility of establishing a highly secure network to allow financial institutions to file required reports electronically and to permit FinCEN to provide those institutions with alerts and other information concerning money laundering protective measures, 31 U.S.C. 310 note.

\textit{Special Measures}. In extraordinary circumstances involving international financial matters, the Act grants the Secretary of the Treasury, in consultation with other appropriate regulatory authorities, the power to issue regulations and orders involving additional required “special measures” and additional “due diligence” requirements to combat money laundering. The special measure authority, available under section 311, comes to life with the determination that particular institutions, jurisdictions, types of accounts, or types of transactions pose a primary money laundering problem.

\textsuperscript{60} 31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 66 (2001).
These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

31 U.S.C. 5318A. The circumstances considered in the case of a suspect jurisdiction are: evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction’s banking regulation; the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’ including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

“Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate
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Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent’ account for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information that it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed
**Due Diligence.** Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.63

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63 See generally, H.R.Rep. No. 107-250, at 71-2 (“Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

“The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

“The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

“For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
detect and report transactions that may involve the proceeds of foreign corruption. A private bank account is defined as an account (or any combination of accounts) that requires a minimum aggregate deposit of funds or other assets of not less than $1 million; is established on behalf of one or more individuals who have a direct or beneficial ownership in the account; and is assigned to, or administered or managed by, an officer, employee or agent of a financial institution acting as a liaison between the institution and the direct or beneficial owner of the account.

"This section directs the Secretary of the Treasury, within 6 months of enactment of this bill and in consultation with appropriate Federal functional regulators, to further define and clarify, by regulation, the requirements imposed by this section").

64 Or more exactly, a bank which has no physical presence in any country; a “physical presence” for a foreign bank is defined as “a place of business that – (i) is maintained by a foreign bank; (ii) is located at a fixed address (other than solely an electronic address) in a country in which the foreign bank is authorized to conduct banking activities, at which location the foreign bank – (I) employs 1 or more individuals on a full-time basis; and (II) maintains operating records relating to its banking activities; and (iii) is subject to inspection by the banking authority which licensed the foreign bank to conduct banking activities,” 31 U.S.C. 5318(j)(4).


66 The Act does not define “concentration accounts,” although the House Financial Services Committee report provides some incite into the section’s intent, H.R.Rep.No. 107-250, at 72-3 (2001) (“This section gives the Secretary of the Treasury discretionary authority to prescribe regulations governing the maintenance of concentration accounts by financial institutions, to ensure that these accounts are not used to prevent association of the identity of an individual customer with the movement of funds of which the customer is the direct or beneficial owner. If promulgated, the regulations are required to prohibit financial institutions from allowing clients to direct transactions into, out of, or through the concentration accounts of the institution; prohibit financial institutions and their employees from informing customers of the existence of, or means of identifying, the concentration accounts of the institution; and to establish written procedures governing the documentation of all transactions involving a concentration account.”)
31 U.S.C. 5318(l); H.R.Rep.No. 107-250, at 62-3 (2001)(“Section [326](a) amends 31 U.S.C. 5318 by adding a new subsection governing the identification of account holders. Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a 'street name' or omnibus account in the broker-dealer's name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to ‘look through’ the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund's customers. Thus, the fund would not be required to ‘look through’ the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature.68

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

Reports to Congress. Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.69

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

**International Cooperation.** Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.70

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (i.e., the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.

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70 H.R.Rep.No. 107-250, at 67 (2001)(“This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury's progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

“The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime”).
**Crimes.** Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, smuggling, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
Section 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

The definition of ‘financial institution’ in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of ‘commercial bank’ or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad—say to a Mexican bank—and launders them through a series of financial transactions, the government conceivably could not rely on the definition of a ‘financial institution’ in 1956(c)(6) to establish that the transaction was a ‘financial transaction’ within the meaning of 1956(c)(4)(B) (defining a ‘financial transaction’ as a transaction involving the use of a ‘financial institution’), or that it was a ‘monetary transaction’ within the meaning of 1957(f) (defining ‘monetary transaction’ as, inter alia, a transaction that would be a ‘financial transaction’ under 1956(c)(4)(B)).

Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launders the proceeds of one of the crimes set forth on a list of ‘specified unlawful activities.’ 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),” H.R.Rep.No. 107-250, at 38 (2000).

Section 329 makes it a federal crime to corruptly administer the money laundering regulatory scheme. Offenders are punishable by imprisonment for not more than 15 years and a fine of not more than three times the amount of the bribe.

Section 5326 of title 31 authorizes the Secretary of the Treasury to impose temporary, enhanced reporting requirements upon financial institutions in areas victimized by substantial money laundering activity (geographic targeting regulations and orders). Section 353 makes it clear that the civil sanctions, criminal penalties, and prohibitions on smurfing (structuring transactions to evade reporting requirements) apply to violations of the regulations and orders issued under 31 U.S.C. 5326. It also extends the permissible length of the temporary geographical orders from 60 to 180 days.

Violations of the special measures and special due diligence requirements of sections 311 and 312 are subject to both civil and criminal penalties by virtue of section 363's amendments to 31 U.S.C. 5321(a) and 5322. The amendments authorize civil penalties and criminal fines of twice the amount of the transaction but not more than $1 million. Criminal offenders would be subject to a fine in the same amount.

71 “[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.73

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents.74 They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

73 “The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business.

“Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.

“Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive,” H.R.Rep.No. 107-250, at 54 (2001).

74 “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
“For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).
As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency — representing the proceeds of drug trafficking and other criminal offenses — is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad. . . .

Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United States without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute,” H.R.Rep.No. 107-250 at 36-7 (2001).

Section 5317 of title 31 once called for civil forfeiture of property traceable to a violation of 31 U.S.C. 5316 (reports on exporting or importing money instruments worth $10,000 or more). Section 372 of the Act recasts section 5317 to provide for civil and criminal forfeitures for violations of 31 U.S.C. 5316, of 31 U.S.C. 5313 (reports on domestic coins and currency transactions involving $10,000 or more) and of 31 U.S.C. 5324 (structuring transactions to evade reporting requirements (smurfing)).

Extraterritorial Jurisdiction. The Act makes 18 U.S.C. 1029, the federal statute condemning various crimes involving credit cards, PIN numbers and other access devices, applicable overseas if the card or device is issued by or controlled by an American bank or other entity and some article is held in or transported to or through the United States during the course of the offense, section 377. The change was part of the original Justice Department proposals. Justice explained that, “[financial crime[] admits of no border, utilizing the integrated global financial network for ill purposes. This provision would apply the financial crimes prohibitions to conduct committed abroad, so long as the tools or proceeds of the crimes pass through or are in the United States,” DoJ at §408. The section, however, appears to limit the otherwise applicable extraterritorial jurisdiction implicit in section 1029, since federal courts would likely recognize extraterritorial jurisdiction over a violation of title 31, United States Code, because it makes it a crime to transport more than $10,000 in currency or monetary instruments into, or out of, the United States without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

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under either circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.\textsuperscript{77}

**Venue.** Section 1004 relies on *dicta* in *United States v. Cabrales*, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering,\textsuperscript{78} in the state and district in which the monetary transaction takes place. The Supreme Court in *Cabrales* held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in *dicta*, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.\textsuperscript{79}

**Forfeiture.** Forfeiture is the government confiscation of property as a consequence of crime.\textsuperscript{80} The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 et seq. (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

**Constitutional Considerations.** The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 et seq., which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the


\textsuperscript{78} “The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed,” U.S.Const. Art.III, §2, cl.3.

“[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,” U.S.Const. Amend. VI.

\textsuperscript{79} See also, *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnapping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.

\textsuperscript{80} For general background information, see, Doyle, Crime and Forfeiture, CRS REP.NO. 97-139A (Oct. 11, 2000).
This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App.U.S.C. §5(b).

“This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress's war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

“The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2),” DoJ at §159.

An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
excepted from the coverage of 18 U.S.C. 983. The challenge proceedings permit the court to admit evidence, such as hearsay evidence, that would not otherwise be admissible under the Federal Rules of Evidence if the evidence is reliable and if national security might be imperiled should dictates of the Federal Rules be followed, §316(b). The section recognizes the rights of claimants to proceed alternatively under the Constitution or the Administrative Procedure Act.

The Justice Department also recommended enactment of an overlapping provision which ultimately passed as section 806 of the Act without any real discussion of the relationship of the two sections. Section 806 authorizes confiscation of all property, regardless of where it is found, of any individual, entity, or organization engaged in domestic or international terrorism (as defined in 18 U.S.C. 2331), against the United States, Americans or their property, 18 U.S.C. 2331.

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83 18 U.S.C. 983(i)(2)(D).

84 “The exclusion of certain provisions of Federal law from the definition of the term ‘civil forfeiture statute’ in section 983(i) of title 18, United States Code, shall not be construed to deny an owner of property the right to contest the confiscation of assets of suspected international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C) subchapter II of chapter 5 of title 5, United States Code (commonly known as the ‘Administrative Procedure Act’).” Sec. 316(c)(1).

85 “Current law does not contain any authority tailored specifically to the confiscation of terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available current forfeiture laws require detailed tracing that is quite difficult for accounts coming through the banks of countries used by many terrorists.

‘This section increases the government's ability to strike at terrorist organizations' economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001,” DoJ, at §403. The House Report on H.R. 2975 which contained versions of both sections is no more explicit on the relation of the two sections.

86 “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
981(a)(1)(G). Section 806 as discussed below also calls for the more common confiscation of property derived from and or facilitating acts of domestic or international terrorism against the United States or its citizens. Confiscations under 806 may be challenged under the procedures of 18 U.S.C. 983, since they are not exempted there. To the extent that forfeiture under section 806 is based on international rather than domestic terrorism, claimants may also use the procedures of section 316.

Confiscation based solely on the fact that the property is owned by a criminal offender, rather than that it is derived from or facilitates some crime is fairly uncommon. It is the mark of common law forfeiture of estate. At common law, a felon forfeited all of his property. Most contemporary forfeiture statutes employ statutory forfeiture, a more familiar presence in American law, which consists of the confiscation of things whose possession is criminal, of the fruits of crime, and of the means of crime – untaxed whiskey, the drug dealer’s profits, and the rum runner’s ship.

Three characteristics set forfeiture of estate apart. The property is lost solely by reason of its ownership by a felon. All of a felon’s property is confiscated, not merely that which is related to the crime for which he is convicted. Finally, it occasions attainder which negates the felon’s right to hold property or for title to property to pass through him to his heirs. It was with this in mind, that the Framers declared that “no attainder of treason shall work corruption of blood or forfeiture exception during the life of the person attainted.” And for this reason, President Lincoln insisted that the confiscated real estate of Confederate supporters should revert their heirs at death.

of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5)(as amended by section 802 of the Act).

87 Austin v. United States, 509 U.S. 602, 611-12 (1993)(“Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture . . . . Of England’s three kinds of forfeiture, only the third took hold in the United States”).


89 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal in personam proceedings following criminal conviction as a means of accomplishing confiscation.
Neither section 106 nor 806 require conviction of the terrorist property owner.\textsuperscript{90} Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers.\textsuperscript{91} The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners.\textsuperscript{92} Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them.\textsuperscript{93} The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate

\textsuperscript{90} Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c)(“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act”).

\textsuperscript{91} Silesian American Corp. V. Clark, 332 U.S. 469 (1947); cf., Societe Internationale v. Rogers, 357 U.S. 197, 211 (1958)(“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).

\textsuperscript{92} Zittman v. McGrath, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’”).

any presumption of remedial purposes. The same has been said of the applicability of the ex post facto clause.

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO. If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

Other Forfeiture Amendments. In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.

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95 See e.g., United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.), 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994).

96 DoJ, at §403.

97 18 U.S.C. 1956(b). Cf., H.R.Rep.No. 107-250, at 54-5 (2001)(“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas.\footnote{Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.}

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted

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American Bank, 191 F.3d 30 (1st Cir. 1999).

“The second provision, modeled on 18 U.S.C. 1345(b), gives the district court the power to restrain property, issue seizure warrants, or take other action necessary to ensure that a defendant in an action covered by the statute does not dissipate the assets that would be needed to satisfy a judgment.

“This section also authorizes a court, on the motion of the Government or a State or Federal regulator, to appoint a receiver to gather and protect assets needed to satisfy a judgment under sections 1956 and 957, and the forfeiture provisions in sections 981 and 982. This authority is intended to apply in three circumstances: (1) when there is a judgment in a criminal case, including an order of restitution, following a conviction for a violation of section 1956 or 1957; (2) when there is a judgment in a civil case under section 1956(b) assessing a penalty for a violation of either section 1956 or 1957; and (3) when there is a civil forfeiture judgment under section 981 or a criminal forfeiture judgment, including a personal money judgment, under section 982.

“The amendment also makes section 1956(b) applicable to violations of section 1957. It applies to conduct occurring before the effective date of the Act.”

\footnote{18 U.S.C. 981(k). H.R.Rep.No. 107-250, at 57-8 (2001)(“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank's customers.

“Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank's correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

“The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”).
defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation.\textsuperscript{99}

Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here.\textsuperscript{100} Section 320 enlarges this provision to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements.\textsuperscript{101} This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.\textsuperscript{102}

\textsuperscript{99} Cf., H.R.Rep.No. 107-250, at 58-9 (2001) ("Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of 'substitute assets' when the defendant has placed the property otherwise subject to forfeiture 'beyond the jurisdiction of the court.' Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

"This section amends 21 U.S.C. 853 to make clear that a court in a criminal case may issue a repatriation order--either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. 853(e) to restrain property--so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both").

\textsuperscript{100} 18 U.S.C. 981(a)(1)(B).

\textsuperscript{101} H.R.Rep.No. 107-250, at 56 (2001)("This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act").

\textsuperscript{102} H.R.Rep.No. 107-250, at 59-60 (2001)("Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country.

"Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
to contest the restraining order could do so on the ground that 28 U.S.C. 2467 was not properly applied to the particular case, but could not oppose the restraining order on any ground that could also be raised in the proceedings pending in a foreign court. This provision prevents a litigant from taking ‘two bites at the apple’ by raising objections to the basis for the forfeiture in the Federal court that he also raised, or is entitled to raise, in the foreign court where the forfeiture action is pending. It complements the existing provision in section 2467(e) providing that the Federal court is bound by the findings of fact of the foreign court, and may not look behind such findings in determining whether to enter an order enforcing a foreign forfeiture judgment.

“This section also amends 28 U.S.C. 2467 to make clear that it is not necessary to prove that the person asserting an interest in the property received actual notice of the forfeiture proceedings. As is the case with respect to forfeitures under U.S. law, it is sufficient if the foreign nation takes steps to provide notice, in accordance with the principles of due process. See Gonzalez v. United States, 1997 WL 278123 (S.D.N.Y. 1997) (‘the [G]overnment is not required to ensure actual receipt of notice that is properly mailed’); Albajon v. Gugliotta, 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant’s identifications, and mailed after claimant released from jail, is sufficient to satisfy due process, even if claimant never received notice); United States v. Schiavo, 897 F. Supp. 644, 648 49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; due process satisfied even if he did not receive the notice).

“Finally, 28 U.S.C. 2467 is amended to authorize the enforcement of a forfeiture judgment based on any foreign offense that would constitute an offense giving rise to a civil or criminal forfeiture of the same property if the offense had been committed in the United States. This is one of two safeguards that the statute contains against the enforcement of judgments that the United States does not consider appropriate for enforcement: if the judgment is based on an act that would not constitute a crime in the United States, such as removing assets from the reach of a repressive regime, it could not be enforced. In addition, section 2467 already provides that a foreign judgment may only be enforced by a Federal court at the request of the United States, and only after the Attorney General has certified that the judgment was obtained in accordance with the principles of due process. Thus, neither a foreign Government nor a foreign private party could enforce a foreign judgment on its own under this provision.”)

Note that the safeguard to which the report refers is the range of foreign offenses that will support an enforceable confiscation order, i.e., drug offenses and crimes on the money laundering predicate offense list, and that the amendment narrows that safeguard by adding additional foreign offenses, i.e., any foreign equivalent of a federal crime which would support a confiscation order.


**Alien Terrorists and Victims**

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

**Border Protection.** The border protection provisions:

- authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401

- authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402

- remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404

- authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405

- authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.

- instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007

- direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418

- express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414

- add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415

- call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416

- limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
• instruct the Attorney General to report on the feasibility of using biometric scanners to help prevent terrorists and other foreign criminals from entering the country, section 1008\textsuperscript{104}

• authorize appropriations of $250,000 for the FBI to determine the feasibility of providing airlines with computer access to the names of suspected terrorists, section 1009

• authorize reciprocal sharing of the State Department’s visa lookout data and related information with other nations in order to prevent terrorism, drug trafficking, slave marketing, and gun running, section 413

**Detention and Removal.** Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity, 8 U.S.C. 1227 (a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(iv). Aliens may be inadmissible for any number of terrorism-related reasons, 8 U.S.C. 1182 (a)(3)(B). Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported.


Section 411 defines “terrorist organization” to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the Federal Register as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C.

\textsuperscript{104} As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).
Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).


An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in “premeditated, politically motivated violence perpetrated against noncombatant targets,” or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security or endanger some individual or the general public. The Attorney General's determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

**Victims.** The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

- permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421
- extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422

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105 “The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

106 “The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks. The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application.

“Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

“Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 31.

“Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.


107 “Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

“The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

“The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death),” H.R.Rep.No. 107-236, at 68 (2001).

108 “Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien’s 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien’s 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
- a denial of benefits of the Act to terrorists and their families, section 427

- authority for the Attorney General to establish evidentiary standards to implement the alien victim provisions of the Act, section 426.

Other Crimes, Penalties, & Procedures

New Crimes. The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

- wreck, derail, burn, or disable mass transit;
- place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
- burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
- impair a mass transit signal system;
- interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
- act with the intent to kill or seriously injure someone on mass transit property;
- convey a false alarm concerning violations of the section;
- attempt to violate the section;
- threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department, the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offense for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents, 18 U.S.C. 175b. Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.

109 “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . . .” DoJ at §305.

110 The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

111 “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2)(“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.112

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D). The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

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112 U.S. Const. Art.III, §2, cl.3 (“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . .”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . .”); United States v. Cabrales, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from Cabrales when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnapping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999)(“By way of comparison, last Term in Cabrales we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).
The Justice Department sought the expansion along with the enlargement of the predicate offense list, "18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of 'material support or resources' is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill ('Federal terrorism offenses')," DoJ at 306.

Finally, the section announces that a prosecution for violation of section 2339A (support of terrorists) may be brought where the support is provided or where the predicate act of terrorism occurs. There may be some question whether the Constitution permits prosecution where the predicate act occurs.114

Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.115


113 The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of 'material support or resources' is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill ('Federal terrorism offenses'),” DoJ at 306.


115 “The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill ('Federal terrorism offenses') is used in identifying the relevant crimes,” DoJ, at §304.

**New Penalties.** The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. 3571(b),(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense.\(^\text{117}\)

The proposal, however, failed to identify the critical elements that would trigger the alternative.\(^\text{118}\) Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

- for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

- for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

\(^\text{117}\) “Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersede lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,” DoJ, at §302.

\(^\text{118}\) “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense,” Draft at §302.
• for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;

• for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;

• for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;

• for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and

• for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism.119 Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:

• arson committed within a federal enclave, 18 U.S.C. 81;
• killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);
• destruction of communications facilities, 18 U.S.C. 1362;
• destruction of property within a federal enclave, 18 U.S.C. 1363;
• causing a train wreck, 18 U.S.C. 1922;
• providing material support to a terrorist, 18 U.S.C. 2339A;
• torture committed overseas under color of law, 18 U.S.C. 2340A;
• sabotage of a nuclear facility, 42 U.S.C. 2284;

119 “The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §§846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

“This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.
• interfering with a flight crew within U.S. special aircraft jurisdiction, 49 U.S.C. 46504;
• carrying a weapon or explosive abroad an aircraft within U.S. special aircraft jurisdiction, 49 U.S.C. 46505; and
• sabotage of interstate gas pipeline facilities, 49 U.S.C. 60123.

When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years).

The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission), a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

120 Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

121 “Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.

“This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (*i.e.*, those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders).

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

**Other Procedural Adjustments.** In other procedural adjustments designed to facilitate criminal investigations, the Act:

- increases the rewards for information in terrorism cases
- expands the Posse Comitatus Act exceptions
- authorizes “sneak and peek” search warrants
- permits nationwide and perhaps worldwide execution of warrants in terrorism cases
- eases government access to confidential information
- allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
- lengthens the statute of limitations applicable to crimes of terrorism
- clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
- adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B.

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122 It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, *e.g.*, damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

Rewards. The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L.105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism. 124

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

Posse Comitatus. The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104. 125

Delayed notification of a search (sneak and peek). Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take

124 The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct threat assessments for federal agencies, and to reimburse federal agencies for the costs of detaining terrorist suspects overseas.

125 For a general discussion of the Posse Comitatus Act, see, Doyle, The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law, CRS REP.NO. 95-964 (June 1, 2000).
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, Richards v. Wisconsin, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, Wilson v. Arkansas, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, Dalia v. United States, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, cf., United States v. Miller, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, United States v. Freitas, 800 F.2d 1451, 1453 (9th Cir. 1986).

The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in United States v. New York Telephone Co., 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth Amendment.
The Second Circuit was less convinced and preferred to hold sneak and peek searches to the demands of Rule 41, *United States v. Pangburn*, 983 F.2d 449 (2d Cir. 1993). The Fourth Circuit was, if anything, less convinced. Moreover, the facts in the case demonstrate the potential impact of the issue on computer privacy, *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000).

Amendment, demands that surreptitious entries be closely circumscribed,” *United States v. Freitas (Freitas I)*, 800 F.2d 1451, 1455-1456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, *United States v. Freitas (Freitas II)*, 856 F.2d 1425 (9th Cir. 1988).

127 “No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in *Dalia v. United States*, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in *Dalia*, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property. . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. See *United States v. New York Telephone Co.*, 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . . Although the *Freitas I* court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in *United States v. Villegas*, 899 F.2d 1324 (1999). Although the *Freitas I* court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in *Villegas*. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the *Freitas I* court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” *United States v. Pangburn*, 983 F.2d 449, 453-55 (2d Cir. 1993).

128 In *Simons*, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
The Justice Department urged that the conflict be resolved with a uniform rule which permitted sneak and peek warrants under the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage.  

The Act, in section 213, stops short of the Justice Department proposal. Characterized as a codification of the Second Circuit decision, 147 Cong.Rec. H7197 (daily ed. Oct. 23, 2001), the Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C. 3103a. Its sneak and peek authorization reaches all federal search and seizure warrants where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (e.g., risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (e.g., jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, i.e., in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation.  

The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

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129 "The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities," DoJ at §353.

130 Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department's initial proposal, the Department's justification does not address the question.
constitutionally “reasonable,” that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

**Nationwide terrorism search warrants.** The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either “within or outside the district,” (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases. The provision may anticipate execution both in this country and overseas. The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage. Neither Rule 41 nor any other provision of federal

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131 The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum. . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1), (5).

132 The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

133 *United States v. Barona*, 56 F.3d 1087, 1092 (9th Cir. 1995) ("United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials"); *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994) ("if American law enforcement officials substantially participated in the search or if the
law apparently contemplated extraterritorial execution, cf., F.R.Crim.P.41, Advisory Committee Notes: 1990 Amendment (discussing a proposal for extraterritorial execution that the Supreme Court rejected). 134

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” F.R.Crim.P. 41, Advisory Committee Notes: 1990 Amendment. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

Terrorists' DNA. The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards per se. 135 Existing federal law allowed the Attorney General to collect samples from

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134 The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, see, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), reprinted, 78 Cong.Rec. 4982-983 (1934)(“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.) (conferring judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

135 Roe v. Marcotte, 193 F.3d 72 (2d Cir. 1999); Shaffer v. Saffle, 148 F.3d 1180 (10th Cir. 1998); Rise v. Oregon, 59 F.3d 1556 (9th Cir. 1995); Jones v. Murray, 962 F.2d 302 (4th Cir. 1992).
Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples form convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes,” DoJ at §353.

For a general discussion, see, Fischer, DNA Identification: Applications and Issues, CRS REP.NO. RL30717 (Jan. 12, 2001).

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137 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

138 “This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

“This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in
The Act takes less dramatic action in section 809. It eliminates the statute of limitations for any crime of terrorism that risks or results in a death or serious bodily injury, 18 U.S.C. 3286. In the absence of such a risk or result, all other terrorism offenses become subject to the eight year statute of limitations unless already covered by the ten year statute for explosives and arson offenses, 18 U.S.C. 3286.

Application of the statute of limitations rarely provokes a constitutional inquiry. Nevertheless, due process precludes prosecution when it can be shown that pre-indictment delay “caused substantial prejudice to [a defendant’s] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.”140 Moreover, a judicial difference of opinion has appeared in those cases

correlation with the September 11, 2001 terrorist attacks. The constitutionality of such retroactive applications of changes in statutes of limitations is well-settled, See, e.g., United States v. Grimes, 142 F.3d 1342, 1350-51 (11th Cir. 1998); People v. Frazer, 982 P.2d 180 (Cal. 1999).

“Existing federal law (18 U.S.C. §3282) bars prosecuting most offenses after five years. 18 U.S.C. §3286, as currently formulated, extends the limitation period for prosecution for certain offenses that may be committed by terrorists – but only to eight years. While this is a limited improvement over the five-year limitation period for most federal offenses, it is patently inadequate in relation to the catastrophic human and social costs that frequently follow from such crimes as destruction of aircraft (18 U.S.C. §32), aircraft hijackings ([49] U.S.C. §§46502, 46504-06, attempted political assassinations (18 U.S.C. §§351, 1116, 1751), or hostage taking (18 U.S.C. §1203). These are not minor acts of misconduct which can properly be forgiven or forgotten merely because the perpetrator has avoided apprehension for some period of time. Anomalously, existing law provides longer limitation periods for such offenses as bank frauds and certain artwork thefts (18 U.S.C.§§3293-94) than it does for crimes characteristically committed by terrorists.

“In many American jurisdictions, the limitation periods for prosecution for serious offenses are more permissible than those found in federal law, including a number of states which have no limitation period for the prosecution of felonies generally. While this section does not go so far, it does eliminate the limitation period for prosecution of the major crimes that are most likely to be committed by terrorists (‘Federal terrorism offenses’), as specified in section 309 of this bill,” DoJ at 301.

139 As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results; 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(ii), (5)(B)(i)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 ( sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period. Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (Grimes, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (Frazer, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

**Extraterritoriality.** Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States or elsewhere. . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnapping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.

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141 United States v. De La Matta, 266 F.3d 1275, 1286 (11th Cir. 2001); United States v. Grimes, 142 F.3d 1342, 1351 (11th Cir. 1998); United States v. Morrow, 177 F.3d 272, 294 (5th Cir. 1999); Falter v. United States, 23 F.2d 420, 425-26 (2d Cir. 1928).


143 United States v. Layton, 855 F.2d 1388 (9th Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); United States v. Benítez, 741 F.2d 1312 (11th Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.\(^{144}\)

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

**Victims.** Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11\(^{th}\) Victim Compensation Fund legislation before it passed the Act. Consequently, the Act’s victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 *et seq.*, and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 *et seq*.

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:

authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year) (42 U.S.C. 10601(c)), section 621(b)

reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d)(5)), section 621(d)

waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
• makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

• prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

• allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

• reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

• makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

• allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

• establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

**Increasing Institutional Capacity.** A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

- $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)

- necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)

- $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)

- $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816

- $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701

- $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)

- $5 million for DEA police training in South and Central Asia, section 1007.

**Miscellaneous.** Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might to used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act, or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b), 807.

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145 *I.e.*, Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).

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The USA PATRIOT Act: A Legal Analysis

Introduction

Congress passed the USA PATRIOT Act (the Act) in response to the terrorists’ attacks of September 11, 2001. The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to further close our borders to foreign terrorists and to detain and remove those within our borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it is not without safeguards, critics contend some of its provisions go too far. Although it grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough.


1 P.L. 107-56, 115 Stat. 272 (2001); its full title is the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT).”

2 H.R. 2975 was introduced by Representative Sensenbrenner for himself and Representatives Conyers, Hyde, Coble, Goodlatte, Jenkins, Jackson-Lee, Cannon, Meehan, Graham, Bachus, Wexler, Hostettler, Keller, Issa, Hart, Flake, Schiff, Thomas, Goss, Rangel, Berman and Lofgren; S.1510 by Senator Daschle for himself and Senators Lott, Leahy, Hatch, Graham, Shelby and Sarbanes.

3 H.R. 3004 was introduced by Representative Oxley for himself and Representatives LaFalce, Leach, Maloney, Roukema, Bentsen, Hooley, Bereuter, Baker, Bachus, King, Kelly, Gillmore, Cantor, Riley, Latourette, Green (of Wisconsin), and Grucci; and reported out of the House Financial Services Committee with amendments on October 15, 2001, H.R.Rep.No. 107-250. H.R. 3004, as reported out, included Internet gambling amendments that were not included in H.R. 2975/H.R.3108.
The Department’s proposal, dated September 20, 2001, came with a brief section by section analysis. Both the proposal (Draft) and analysis (DoJ) were printed as an appendix in Administration’s Draft Anti-Terrorism Act of 2001, Hearing Before the House Comm. on the Judiciary, 107th Cong., 1st Sess. 54 (2001).

Criminal Investigations: Tracking and Gathering Communications

A portion of the Act addresses issues suggested originally in a Department of Justice proposal circulated in mid-September. The first of its suggestions called for amendments to federal surveillance laws, laws which govern the capture and tracking of suspected terrorists’ communications within the United States. Federal law features a three tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications.

The tiers reflected the Supreme Court’s interpretation of the Fourth Amendment’s ban on unreasonable searches and seizures. The Amendment protects private conversations, Berger v. New York, 388 U.S. 41 (1967); Katz v. United States, 389 U.S. 347 (1967). It does not cloak information, even highly personal information, for which there is no individual justifiable expectation of privacy, such as telephone company records of calls made to and from an individual’s home, Smith v. Maryland, 442 U.S. 735 (1979), or bank records of an individual’s financial dealings, United States v. Miller, 425 U.S. 435 (1976).

Congress responded to Berger and Katz, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications, 18 U.S.C. 2511. At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious

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6 “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,” U.S. Const. Amend. IV.

7 Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
criminal cases. When approved by senior Justice Department officials,8 law
enforcement officers may seek a court order authorizing them to secretly capture
conversations concerning any of a statutory list of offenses (predicate offenses), 18
U.S.C. 2516.9

8 “The Attorney General, Deputy Attorney General, Associate Attorney General, or any
Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant
Attorney General or acting Deputy Assistant Attorney General in the Criminal Division
specially designated by the Attorney General, may authorize an application to a Federal judge
of competent jurisdiction for, and such judge may grant in conformity with section 2518 of
this chapter an order authorizing or approving the interception of wire or oral communications
by the Federal Bureau of Investigation, or a Federal agency having responsibility for the
investigation of the offense as to which the application is made, when such interception may
provide or has provided evidence of” one or more predicate offense, 18 U.S.C. 2516.

9 The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277
(enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear
facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch.
105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111
(destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c)
(restrictions on payments and loans to labor organizations), or any offense which involves
murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United
States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public
officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests),
844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets),
1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit
applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring
an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511
(obstruction of State or local law enforcement), 1751 (presidential and presidential staff
assassination, kidnapping, or assault), 1951 (interference with commerce by threats or
violence), 1952 (interstate and foreign travel or transportation in aid of racketeering
enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire),
1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation
to influence operations of employee benefit plan), 1955 (prohibition of business enterprises
of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary
transactions in property derived from specified unlawful activity), 659 (theft from interstate
shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse
felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252
(sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of
stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203
(hostage taking), 1029 (fraud and related activity in connection with access devices), 3146
(penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction
of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to
racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a
Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet,
or Supreme Court assassinations, kidnapping, or assault), 831 (prohibited transactions
involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175
(biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false
identification documentation), 1425 (procurement of citizenship or nationalization
unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of
naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false
statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse
of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations, 18 U.S.C. 2518. The court notifies the parties to any conversations seized under the order after the order expires, 18 U.S.C. 2518(8).

Below Title III, the next tier of privacy protection covers some of those matters which the Supreme Court has described as beyond the reach of the Fourth Amendment protection – telephone records, e-mail held in third party storage, and the like, 18 U.S.C. 2701-2709 (Chapter 121). Here, the law permits law enforcement access, ordinarily pursuant to a warrant or court order or under a subpoena in some cases, but in connection with any criminal investigation and without the extraordinary levels of approval or constraint that mark a Title III interception, 18 U.S.C. 2703.

Least demanding and perhaps least intrusive of all is the procedure that governs court orders approving the government’s use of trap and trace devices and pen registers, a kind of secret “caller id”, which identify the source and destination of calls made to and from a particular telephone, 18 U.S.C. 3121-3127 (Chapter 206). The orders are available based on the government's certification, rather than a finding of the court, that the use of the device is likely to produce information relevant to the investigation of a crime, any crime, 18 U.S.C. 3123. The devices record no more than the identity of the participants in a telephone conversation, but neither the orders nor the results they produce need ever be revealed to the participants.

The Act modifies the procedures at each of the three levels. It:

offense involving counterfeiting punishable under 18 U.S.C. 471, 472, or 473; (e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States; (f) any offense including extortionate credit transactions under 18 U.S.C. 892, 893, or 894; (g) a violation of 31 U.S.C. 5322 (dealing with the reporting of currency transactions); (h) any felony violation of 18 U.S.C. 2511 and 2512 (interception and disclosure of certain communications and to certain intercepting devices); (i) any felony violation of 18 U.S.C. ch. 71 (obscenity); (j) 49 U.S.C. 60123(b) (destruction of a natural gas pipeline), 46502 (aircraft piracy); (k) 22 U.S.C. 2778 (Arms Export Control Act); (l) the location of any fugitive from justice from an offense described in this section; (m) a violation of 8 U.S.C. 1324, 1327, or 1328; (n) any felony violation of 18 U.S.C. 922, 924 (firearms); (o) any violation of 26 U.S.C. 5861 (firearms); (p) a felony violation of 18 U.S.C. 1028 (production of false identification documents), 1542 (false statements in passport applications), 1546 (fraud and misuse of visas, permits, and other documents) or a violation of 8 U.S.C. 1324, 1327, or 1328 (smuggling of aliens); (p) 229 (chemical weapons), 2332 (terrorist violence against Americans overseas), 2332a (weapons of mass destruction), 2332b (multinational terrorism), 2332d (financial transactions with countries supporting terrorism), 2339A (support of terrorist), 2332B (support of terrorist organizations); (r) any conspiracy to commit any of these, 18 U.S.C. 2516(1)(crimes added by the Act in italics). Other than telephone face to face conversations (i.e., electronic communications), the approval of senior Justice Department officials is not required and an order may be sought in any felony investigation, 18 U.S.C. 2516(3).

Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
permits pen register and trap and trace orders for electronic communications (e.g., e-mail)

authorizes nationwide execution of court orders for pen registers, trap and trace devices, and access to stored e-mail or communication records

treats stored voice mail like stored e-mail (rather than like telephone conversations)

permits authorities to intercept communications to and from a trespasser within a computer system (with the permission of the system’s owner)

adds terrorist and computer crimes to Title III’s predicate offense list

reenforces protection for those who help execute Title III, ch. 121, and ch. 206 orders

encourages cooperation between law enforcement and foreign intelligence investigators

establishes a claim against the U.S. for certain communications privacy violations by government personnel

terminates the authority found in many of the these provisions and several of the foreign intelligence amendments with a sunset provision (Dec. 31, 2005).

Pen Registers and Trap and Trace Devices. In section 216, the Act allows court orders authorizing trap and trace devices and pen registers to be used to capture source and addressee information for computer conversations (e.g., e-mail) as well as telephone conversations, 18 U.S.C. 3121, 3123. In answer to objections that e-mail header information can be more revealing than a telephone number, it creates a detailed report to the court, 18 U.S.C. 3123(a)(3).11

“Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public the agency shall ensure that a record will be maintained which will identify – (i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of the such device.

“(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof),” section 216(b)(1).
The use of pen registers or trap and trace devices was limited at one time to the judicial district in which the order was issued, 18 U.S.C. 3123 (2000 ed.). Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States, 18 U.S.C. 3123(b)(1)(C), 3127(2).\(^\text{12}\)

**Communications Records and Stored E-Mail.** With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber, 18 U.S.C. 2703(a),(b). A warrant will also suffice to seize records describing telephone and other communications transactions without customer notice, 18 U.S.C. 2703(c). In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation, officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records, 18 U.S.C. 2703(b),(c). They can obtain a limited amount of record information (subscribers’ names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena, 18 U.S.C. 2703(c)(1)(C). There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial, 18 U.S.C. 2705.

In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider’s customer records, 18 U.S.C. 2703(c)(1)(C).\(^\text{13}\)

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.

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\(^{12}\) The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” DoJ at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

\(^{13}\) Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user’s true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” DoJ at §107.
Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

The Act, in section 209, treats voice mail like e-mail, that is, subject to the warrant or court order procedure, rather than to the more demanding coverage of Title III once required, United States v. Smith, 155 F.3d 1050, 1055-56 (9th Cir. 1998).

Finally, the Act resolves a conflict between chapter 121 and the federal law governing cable companies. Government entities may have access to cable company customer records only under a court order following an adversary hearing if they can show that the records will evidence that the customer is or has engaged in criminal activity, 47 U.S.C. 511(h). When cable companies began offering telephone and other communications services the question arose whether the more demanding cable rules applied or whether law enforcement agencies were entitled to ex parte court orders under the no-notice procedures applicable to communications providers. The Act makes it clear that the cable rules apply when cable television viewing services are

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14 Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

15 See e.g., DoJ at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement’s access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

**Electronic Surveillance.** To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202. A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(i). Yet only the interloper's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.

**Criminal Investigators' Access to Foreign Intelligence Information.** The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism. It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that “the purpose for the surveillance is to obtain foreign intelligence information,” 50 U.S.C. 1804(a)(7)(B)(2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps “the purpose” might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation

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16 18 U.S.C. 229 (chemical weapons), 2332(terrorist acts of violence committed against Americans overseas), 2332a(use of weapons of mass destruction), 2332b(acts of terrorism transcending national boundaries), 2332d(financial transactions with countries which support terrorists), 2339A(providing material support to terrorists), and 2339B(providing material support to terrorist organizations).

17 “Because service providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves as permitted under current law, they often have no way to exercise their rights to protect themselves from unauthorized attackers. Moreover, such attackers can target critical infrastructures and engage in cyberterrorism,” DoJ at §106. Elsewhere the Act defines “electronic surveillance” for purposes of the Foreign Intelligence Surveillance Act (FISA) to emphasize that the law enforcement authority for this intruder surveillance does not confer similar authority for purposes of foreign intelligence gathering, section 1003 (50 U.S.C. 1801(f)(2)).

Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment's warrant clause. It is here that the “primary purpose” notion originated. In *United States v. Truong Dinh Hung*, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, “as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.”

Subsequent case law, however, is not as clear as it might be: see e.g., *United States v. Duggan*, 743 F.2d 59, 77 (2d Cir. 1984) (“FISA permits federal officials to obtain orders authorizing electronic surveillance ‘for the purpose of obtaining foreign intelligence information.’ The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying official’s belief that the information sought is the type of foreign intelligence information described”); *United States v. Pelton*, 835 F.2d 1067, 1075-76 (4th Cir. 1987) (“We also reject Pelton’s claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial”); *United States v. Sarkissian*, 841 F.2d 959, 907-8 (9th Cir. 1988) (“Defendants rely on the primary purpose test articulated in *United States v. Truong Dinh Hung*. . . . One other court has applied the primary purpose test. Another court has rejected it . . . distinguishing *Truong*. A third court has declined to decide the issue. We also decline to decide the issue”); *United States v. Johnson*, 952 F.2d 565, 572 (1st Cir. 1991) (“Appellants attack the government’s surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance”).

“Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” DoJ at §153.
Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105. FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, infra, quoting, 50 U.S.C. 1801.

**Protective Measures.** The Act reinforces two kinds of safeguards, one set designed to prevent abuse and the other to protect those who assist the government. The sunset clause is perhaps the best known of the Act’s safeguards. Under the direction of section 224, many of the law enforcement and foreign intelligence authorities granted by the Act expire as of December 31, 2005. The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter

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21 “(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, infra, quoting, 50 U.S.C. 1801.

22 “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210[subpoenas for communications provider customer records], 211[access to cable company communication service records], 213[“sneak and peek”], 216[pen register and trap and trace device amendments], 221[tradecraft], and 222[assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005. “(b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers' communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices). Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees, but could not recover against the United States. Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice's Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government's request until a court order authorizing access can be obtained. Another allows providers to disclose customer records to protect the provider's rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others.
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

**Foreign Intelligence Investigations**

Although both criminal investigations and foreign intelligence investigations are conducted in the United States, criminal investigations seek information about unlawful activity; foreign intelligence investigations seek information about other countries and their citizens. Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough.

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA), something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President's authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, *United States v. United States District Court*, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage

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28 Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

29 Thus in the name of assisting in the execution of Title III, chapter 121, or chapter 206 order, the courts may not cite the Act as the basis for an order compelling a service provider to make system modifications or provide any other technical assistance not already required under 18 U.S.C. 2518(4), 2706, or 3124(c), see, H.R.Rep.No. 107-236, at 62-3 (2001) (emphasis added) (“This Act is not intended to affect obligations under Communications Assistance for Law Enforcement Act [which addresses law enforcement-beneficial system modifications and the compensation to be paid for the changes], nor does the act impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance”).

30 *E.g.*, As amended by section 902 of the Act, “‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2)(language added by the Act in italics).

31 50 U.S.C. 1801 *et seq.*
In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs. There were and still are extra


33. “As used in this subchapter: (a) ‘Foreign power’ means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

(b) ‘Agent of a foreign power’ means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person’s presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C), knowingly conspires with any person to engage in activities described in subparagraph (A), (B), or (C).

(c) ‘International terrorism’ means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnaping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

(d) ‘Sabotage’ means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

(e) ‘Foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans ("United States persons," i.e., citizens or permanent resident aliens).\textsuperscript{34} The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

- permits “roving” surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)

- increases the number of judges on the FISA court from 7 to 11

- allows application for a FISA surveillance or search order when gathering foreign intelligence is a significant reason for the application rather than the reason

- authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations

- sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses

- carries a sunset provision

- establishes a claim against the U.S. for certain communications privacy violations by government personnel

- expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

\textsuperscript{34} Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
FISA. FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases. It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

Search and Surveillance for Intelligence Purposes. Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, Draft at §151.

Section 901 of the Act address a concern raised during the 106th Congress relating to the availability of the FISA orders and the effective use of information gleaned from the execution of a FISA order. It vests the Director of Central

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36 See also, DoJ at §151, “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order’s minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed (50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

37 See e.g., S.Rep.No. 106-352, at 3, 6, 7 (2000) (“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application
Intelligence with the responsibility to formulate requirements and priorities for the use of FISA to collect foreign intelligence information. He is also charged with the responsibility of assisting the Attorney General in the efficient and effective dissemination of FISA generated information (50 U.S.C. 403-3(c)).

**Pen Registers and Trap and Trace Devices for Intelligence Gathering.** Section 214 grants the request of the Department of Justice by dropping requirements which limited FISA pen register and trap and trace device orders to facilities used by foreign agents or those engaged in international terrorist or clandestine intelligence activities, 50 U.S.C. 1842(c)(3)(2000 ed.). It is enough that the order is sought as part of an investigation to protect against international terrorism or clandestine intelligence activities and is not motivated solely by an American’s exercise of his or her First Amendment rights. Elsewhere (section 505), the Act drops a similar limitation for intelligence officials’ access to telephone records, 18 U.S.C.

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38 “When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevancy, an additional factual showing that the communications device has been used to contact an ‘agent of a foreign power’ engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the ‘agent of a foreign power’ prong from the predication, and thus makes the FISA authority more closely track the criminal authority,” DoJ at §155.
2709(b), and under the Right to Financial Privacy Act, 12 U.S.C. 3414(a)(5)(A), as well as the Fair Credit Reporting Act, 15 U.S.C. 1681u.\(^{39}\)

Section 214 adjusts the language of the FISA pen register-trap and trace authority to permit its use to capture source and destination information relating to electronic communications (\textit{e.g.}, e-mail) as well as telephone communications, 50 U.S.C. 1842(d). The section makes it clear that requests for a FISA pen register-trap and trace order, like requests for other FISA orders, directed against Americans (U.S. persons) may not be based solely on activities protected by the First Amendment, 50 U.S.C. 1842, 1843.

**Third Party Cooperation and Tangible Evidence.** As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target's activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.\(^{40}\)

\(^{39}\) Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise to be entitled to confidentiality. Section 505, in response to the Justice Department's suggestion, allows FBI field offices to make the requests, \textit{see DoJ} at §157 ("At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an 'agent of a foreign power.' In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the 'agent of a foreign power' predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports").

\(^{40}\) When it requested the amendment, the Department of Justice explained that the "provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, 'in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court's order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.' This would enhance the FBI's ability to monitor international terrorists and intelligence officers who are
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian. The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities, in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B));
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a);
- the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a)
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v;

41 “The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigative contexts. The time and difficulty involved in getting such pleadings before the Court usually outweighs the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” DoJ at §156.

42 Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.43

**Access to Law Enforcement Information.** Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community’s access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, Draft at §103.44

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43 H.R.Rep.No. 107-205, at 60-1 (2001)(“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

“The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

“Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual’s credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding—without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information”).

44 See also, DoJ at §103, “This section facilities the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, Draft at §354.45

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, Draft at §154.46

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion.47 It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions.”

45 See also, DoJ at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.” Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officers

46 See also, DoJ at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”

47 Blair v. United States, 250 U.S. 273, 281 (1919) (the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

The Act, in section 203(a), allows disclosure of matters occurring before the grand jury to “any federal law enforcement, intelligence, protective, immigration, national defense, or national security” officer to assist in the performance of his official duties, F.R.Crim.P. 6(e)(3)(C)(i)(V). 48

Critics may protest that the change could lead to the use of the grand jury for intelligence gathering purposes, or less euphemistically, to spy on Americans. 49 The proposal was never among those scheduled to sunset, but earlier versions of the section followed the path used for most other disclosures of grand jury material: prior

48 These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

49 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25 H Arvard Journal of Law & Public Policy 699, 719-20 (2002)(“There is a significant danger that the rule permitting disclosure will be treated as the de facto authorization of an expansion of the grand jury’s investigative role to encompass seeking material relevant only to matters of national security, national defense, immigration, and so forth. The grand jury’s awesome powers should not be unwittingly extended to a much wider range of issues. . . Since the grand jury operates in secret, there are no public checks on the scope of its investigations, and witnesses are not permitted to challenge its jurisdiction. Only the supervising court is in a position to keep the grand jury’s investigation within proper bounds. Requiring judicial approval of foreign intelligence and counterintelligence information disclosures would provide a natural check against the temptation to manipulate the grand jury to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6 (Nov. 2001)(“The grand jury secrecy rule is a rule of policy which has always had exceptions, and it has been frequently modified. The secrecy rule has no credible claim to constitutional stature”).
Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

§203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).

The third subsection of section 203 remains something of an enigma. It speaks in much the same language as its counterparts. It allows law enforcement officials to share information with the intelligence community, “notwithstanding any other provisions of law,” section 203(d). It either swallows the other subsections, or supplements them. Several factors argue for its classification as a supplement. Congress is unlikely to have crafted subsections (a), (b) and (c) only to completely}

50 Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

51 “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. ) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification.\footnote{Duncan v. Walker, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted)("It is our duty to give effect, if possible, to every clause and word of a statute. United States v. Menasche, 348 U.S. 528, 538-539 (1955) (quoting Montclair v. Ramsdell, 107 U.S. 147, 152 (1883)); see also Williams v. Taylor, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); Market Co. v. Hoffman, 101 U.S. 112, 115 (1879)(As early as in Bacon's Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage in any setting. Babbitt v. Sweet Home Chapter, Communities for Great Ore., 515 U.S. 687, 698 (1995); see also Ratzlaf v. United States, 510 U.S. 135, 140 (1994)).")}. By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.\footnote{Draft at \S 154, "Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”} 

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

**Increasing Institutional Capacity.** As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a
The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of the Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so,” S.Rep.No. 107-63, at 11 (2001).

Money Laundering

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture. The Act bolsters federal efforts in each area.

Regulation. Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.

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56 See e.g., 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
Records and Reports. For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler’s checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to files SARs as well,57 reflecting Congress’ view that the information provided the IRS may be valuable for other law enforcement purposes.58 This concern is likewise

58 H.R.Rep.No. 107-250, at 38-9 (2001) (“Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

“Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a ‘Safeguard Procedures Report’ which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

“While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement
reflected in section 357 which asks the Secretary of the Treasury to report on the Internal Revenue Service’s role in the administration of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311 et seq.), and what transfers of authority, if any, are appropriate.

Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action.59 Section 355 expands the immunity to cover disclosures in

authorities as the various reports mandated by the Bank Secrecy Act, which can typically be retrieved electronically from a database maintained by the Treasury Department. The differential access to the two kinds of reports is made anomalous by the fact that Form 8300 elicits much the same information that is required to be disclosed by the Bank Secrecy Act. For example, just as Form 8300 seeks the name, address, and social security number of a customer who engages in a cash transaction exceeding $10,000 with a trade or business, Currency Transaction Reports (CTRs) mandated by the Bank Secrecy Act require the same information to be reported on a cash transaction exceeding $10,000 between a financial institution and its customer”.

59 “Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

“First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor from civil liability applies in arbitration, as well as judicial, proceedings. Second, it amends section 5318(g)(3) to clarify the safe harbor’s coverage of voluntary disclosures (that is, those not covered by the SAR regulatory reporting requirement). The language in section 5318(g)(3)(A) providing that ‘any financial institution that *** makes a disclosure pursuant to *** any other authority *** shall not be liable to any person’ is not intended to avoid the application of the reporting and disclosure provisions of the Federal securities laws to any person, or to insulate any issuers from private rights of actions for disclosures made under the Federal securities laws.

“Subsection [351](b) amends section 5318(g)(2) of title 31--which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed--to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee’s official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
employment references to other insured depository financial institutions provided disclosure is not done with malicious intent.\textsuperscript{60}

The Financial Crimes Enforcement Network (FinCEN), a component within the Treasury Department long responsible for these anti-money laundering reporting and record-keeping requirements, 31 C.F.R. pt. 103, was administratively created in 1990 to provide other government agencies with an “intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes,” 55 Fed.Reg. 18433 (May 2, 1990).

The Act, in section 361, makes FinCEN a creature of statute, a bureau within the Treasury Department, 31 U.S.C. 310. Section 362 charges it with the responsibility of establishing a highly secure network to allow financial institutions to file required reports electronically and to permit FinCEN to provide those institutions with alerts and other information concerning money laundering protective measures, 31 U.S.C. 310 note.

**Special Measures.** In extraordinary circumstances involving international financial matters, the Act grants the Secretary of the Treasury, in consultation with other appropriate regulatory authorities, the power to issue regulations and orders involving additional required “special measures” and additional “due diligence” requirements to combat money laundering. The special measure authority, available under section 311, comes to life with the determination that particular institutions, jurisdictions, types of accounts, or types of transactions pose a primary money

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\textsuperscript{60} 31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 66 (2001).
laundering concern. These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

31 U.S.C. 5318A. The circumstances considered in the case of a suspect jurisdiction are: evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction’s banking regulation; the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’ including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

“Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate
business transactions.

“Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

“Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

“The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

“The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

“The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

“The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent’ account for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information that it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

“The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

“The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed
Due Diligence. Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.63

63 See generally, H.R.Rep. No. 107-250, at 71-2 (“Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

“The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

“The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

“For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
General Regulatory Matters. The Act establishes several other regulatory mechanisms directed at the activities involving U.S. financial institutions and foreign individuals or institutions. Section 313, for instance, in another restriction on correspondent accounts for foreign financial institutions, prohibits U.S. financial institutions from maintaining correspondent accounts either directly or indirectly for foreign shell banks (banks with no physical place of business) which have no affiliation with any financial institution through which their banking activities are subject to regulatory supervision.

The Act, in section 325, empowers the Secretary of the Treasury to promulgate regulations to prevent financial institutions from allowing their customers to conceal their financial activities by taking advantage of the institutions’ concentration account practices.

The Secretary of the Treasury is instructed in section 326 to issue regulations for financial institutions’ minimum new customer identification standards and record-
Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a ‘street name’ or omnibus account in the broker-dealer's name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to ‘look through’ the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund's customers. Thus, the fund would not be required to ‘look through’ the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

“Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).

67 31 U.S.C. 5318(l); H.R.Rep.No. 107-250, at 62-3 (2001)(“Section [326](a) amends 31 U.S.C. 5318 by adding a new subsection governing the identification of account holders. Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a ‘street name’ or omnibus account in the broker-dealer's name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to ‘look through’ the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund's customers. Thus, the fund would not be required to ‘look through’ the plan to identify its participants.

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Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature. 68

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

**Reports to Congress.** Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

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“Paragraph (6) requires that Treasury's regulations prescribed under paragraph (1) become effective within one year after enactment of this bill”).
exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.  

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

**International Cooperation.** Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (i.e., the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.

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70 H.R.Rep.No. 107-250, at 67 (2001)(“This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury's progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

“The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime”).
**Crimes.** Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
expands 18 U.S.C. 1956 to cover financial transactions conducted in foreign financial institutions.\textsuperscript{71}

Section 329 makes it a federal crime to corruptly administer the money laundering regulatory scheme. Offenders are punishable by imprisonment for not more than 15 years and a fine of not more than three times the amount of the bribe.

Section 5326 of title 31 authorizes the Secretary of the Treasury to impose temporary, enhanced reporting requirements upon financial institutions in areas victimized by substantial money laundering activity (geographic targeting regulations and orders). Section 353 makes it clear that the civil sanctions, criminal penalties, and prohibitions on smurfing (structuring transactions to evade reporting requirements) apply to violations of the regulations and orders issued under 31 U.S.C. 5326.\textsuperscript{72} It also extends the permissible length of the temporary geographical orders from 60 to 180 days.

Violations of the special measures and special due diligence requirements of sections 311 and 312 are subject to both civil and criminal penalties by virtue of section 363's amendments to 31 U.S.C. 5321(a) and 5322. The amendments authorize civil penalties and criminal fines of twice the amount of the transaction but not more than $1 million. Criminal offenders would be subject to a fine in the same amount.

\textsuperscript{71} “[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

“The definition of ‘financial institution’ in 3132 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of ‘commercial bank’ or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad--say to a Mexican bank--and launders them through a series of financial transactions, the government conceivably could not rely on the definition of a ‘financial institution’ in 1956(c)(6) to establish that the transaction was a ‘financial transaction’ within the meaning of 1956(c)(4)(B) (defining a ‘financial transaction’ as a transaction involving the use of a ‘financial institution’), or that it was a ‘monetary transaction’ within the meaning of 1957(f) (defining ‘monetary transaction’ as, inter alia, a transaction that would be a ‘financial transaction’ under 1956(c)(4)(B)).

“Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launders the proceeds of one of the crimes set forth on a list of ‘specified unlawful activities.’ 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),” H.R.Rep.No. 107-250, at 38 (2000).

Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.\textsuperscript{73}

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents.\textsuperscript{74} They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

\textsuperscript{73} “The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business.

“Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.

“Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive,” H.R.Rep.No. 107-250, at 54 (2001).

\textsuperscript{74} “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

**Bulk Cash.** Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act’s bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting. 

The section appears to be the product of reactions to the Supreme Court’s decision in *United States v. Bajakian*, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court’s decision in *United States v. Bajakian*, 524 U.S. 321 (1998).

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75 “For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).
“As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency—representing the proceeds of drug trafficking and other criminal offenses—is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad.

Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United States without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

“Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute,” H.R. Rep. No. 107-250 at 36-7 (2001).

Section 5317 of title 31 once called for civil forfeiture of property traceable to a violation of 31 U.S.C. 5316 (reports on exporting or importing money instruments worth $10,000 or more). Section 372 of the Act recasts section 5317 to provide for civil and criminal forfeitures for violations of 31 U.S.C. 5316, of 31 U.S.C. 5313 (reports on domestic coins and currency transactions involving $10,000 or more) and of 31 U.S.C. 5324 (structuring transactions to evade reporting requirements (smurfing)).

Extraterritorial Jurisdiction. The Act makes 18 U.S.C. 1029, the federal statute condemning various crimes involving credit cards, PIN numbers and other access devices, applicable overseas if the card or device is issued by or controlled by an American bank or other entity and some article is held in or transported to or through the United States during the course of the offense, section 377. The change was part of the original Justice Department proposals. Justice explained that, “[financial crime] admits of no border, utilizing the integrated global financial network for ill purposes. This provision would apply the financial crimes prohibitions to conduct committed abroad, so long as the tools or proceeds of the crimes pass through or are in the United States,” DoJ at §408. The section, however, appears to limit the otherwise applicable extraterritorial jurisdiction implicit in section 1029, since federal courts would likely recognize extraterritorial jurisdiction over a violation of these provisions.
under *either* circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.\(^77\)

**Venue.** Section 1004 relies on *dicta* in *United States v. Cabrales*, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering,\(^78\) in the state and district in which the monetary transaction takes place. The Supreme Court in *Cabrales* held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in *dicta*, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.\(^79\)

**Forfeiture.** Forfeiture is the government confiscation of property as a consequence of crime.\(^80\) The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 *et seq.* (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

**Constitutional Considerations.** The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 *et seq.*, which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the

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\(^{78}\) "The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed," *U.S.Const.* Art.III, §2, cl.3.

"[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law," *U.S.Const.* Amend. VI.

\(^{79}\) See also, *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnaping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.

\(^{80}\) For general background information, see, Doyle, *Crime and Forfeiture*, CRS REP.NO. 97-139A (Oct. 11, 2000).
jurisdiction of the United States, belonging to any foreign individual, foreign entity, or foreign country whom they determine to have planned, authorized, aided or engaged in an attack on the United States by a foreign country or foreign nationals. The section also permits the government to present secretly (ex parte and in camera) any classified information upon which the forfeiture was based should the decision be subject to judicial review. The Justice Department requested the section as a revival of the President's powers in times of unconventional wars. By virtue of section 316, property owners may initiate a challenge to a confiscation by filing a claim under the rules applicable in maritime confiscations. The section permits two defenses to forfeiture – that the property is not subject to confiscation under section 106 or that the claimant is entitled to the innocent owner defense of 18 U.S.C. 983(d).

81 “This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App.U.S.C. §5(b).

“This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress's war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

“The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2),” DoJ at §159.

82 “An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
excepted from the coverage of 18 U.S.C. 983. The challenge proceedings permit
the court to admit evidence, such as hearsay evidence, that would not otherwise be
admissible under the Federal Rules of Evidence if the evidence is reliable and if
national security might be imperiled should dictates of the Federal Rules be followed,
§316(b). The section recognizes the rights of claimants to proceed alternatively
under the Constitution or the Administrative Procedure Act.

The Justice Department also recommended enactment of an overlapping
 provision which ultimately passed as section 806 of the Act without any real
discussion of the relationship of the two sections. Section 806 authorizes
confiscation of all property, regardless of where it is found, of any individual, entity,
or organization engaged in domestic or international terrorism (as defined in 18
U.S.C. 2331), against the United States, Americans or their property, 18 U.S.C.

83 18 U.S.C. 983(i)(2)(D).

84 “The exclusion of certain provisions of Federal law from the definition of the term ‘civil
forfeiture statute’ in section 983(i) of title 18, United States Code, shall not be construed to
deny an owner of property the right to contest the confiscation of assets of suspected
international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C)
subchapter II of chapter 5 of title 5, United States Code (commonly known as the
‘Administrative Procedure Act’).” Sec. 316(c)(1).

85 “Current law does not contain any authority tailored specifically to the confiscation of
terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for
the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of
such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available
current forfeiture laws require detailed tracing that is quite difficult for accounts coming
through the banks of countries used by many terrorists.

‘This section increases the government’s ability to strike at terrorist organizations’
economic base by permitting the forfeiture of its property regardless of the source of the
property, and regardless of whether the property has actually been used to commit a terrorism
offense. This is similar in concept to the forfeiture now available under RICO. In parity with
the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended
to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate
criminal forfeiture provision because criminal forfeiture is incorporated under current law by
reference. The provision is retroactive to permit it to be applied to the events of September
sections is no more explicit on the relation of the two sections.

86 “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or
acts dangerous to human life that are a violation of the criminal laws of the United States or
of any State, or that would be a criminal violation if committed within the jurisdiction of the
United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian
population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to
affect the conduct of a government by mass destruction, assassination or kidnapping; and (C)
occur primarily outside the territorial jurisdiction of the United States, or transcend national
boundaries in terms of the means by which they are accomplished, the persons they appear
intended to intimidate or coerce, or the locale in which their perpetrators operate or seek
asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts
dangerous to human life that are a violation of the criminal laws of the United States or of any
State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to
influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
Section 806 as discussed below also calls for the more common confiscation of property derived from and or facilitating acts of domestic or international terrorism against the United States or its citizens. Confiscations under 806 may be challenged under the procedures of 18 U.S.C. 983, since they are not exempted there. To the extent that forfeiture under section 806 is based on international rather than domestic terrorism, claimants may also use the procedures of section 316.

Confiscation based solely on the fact that the property is owned by a criminal offender, rather than that it is derived from or facilitates some crime is fairly uncommon. It is the mark of common law forfeiture of estate. At common law, a felon forfeited all of his property. Most contemporary forfeiture statutes employ statutory forfeiture, a more familiar presence in American law, which consists of the confiscation of things whose possession is criminal, of the fruits of crime, and of the means of crime – untaxed whiskey, the drug dealer’s profits, and the rum runner’s ship.

Three characteristics set forfeiture of estate apart. The property is lost solely by reason of its ownership by a felon. All of a felon’s property is confiscated, not merely that which is related to the crime for which he is convicted. Finally, it occasions attainder which negates the felon’s right to hold property or for title to property to pass through him to his heirs. It was with this in mind, that the Framers declared that “no attainder of treason shall work corruption of blood or forfeiture exception during the life of the person attainted.” And for this reason, President Lincoln insisted that the confiscated real estate of Confederate supporters should revert their heirs at death.

of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5)(as amended by section 802 of the Act).

87 Austin v. United States, 509 U.S. 602, 611-12 (1993)(“Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture . . . Of England’s three kinds of forfeiture, only the third took hold in the United States”).


89 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal in personam proceedings following criminal conviction as a means of accomplishing confiscation.
Neither section 106 nor 806 require conviction of the terrorist property owner.\textsuperscript{90} Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers.\textsuperscript{91} The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners.\textsuperscript{92} Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them.\textsuperscript{93} The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate

\textsuperscript{90} Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c)(“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act”).

\textsuperscript{91} Silesian American Corp. V. Clark, 332 U.S. 469 (1947); cf., Societe Internationale v. Rogers, 357 U.S. 197, 211 (1958)(“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).

\textsuperscript{92} Zittman v. McGrath, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’”).

any presumption of remedial purposes. The same has been said of the applicability of the ex post facto clause.

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO. If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

**Other Forfeiture Amendments.** In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.

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95 See e.g., United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.), 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994).

96 DoJ, at §403.

97 18 U.S.C. 1956(b). Cf., H.R.Rep.No. 107-250, at 54-5 (2001) (“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas.\textsuperscript{98} Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted American Bank, 191 F.3d 30 (1st Cir. 1999).

“The second provision, modeled on 18 U.S.C. 1345(b), gives the district court the power to restrain property, issue seizure warrants, or take other action necessary to ensure that a defendant in an action covered by the statute does not dissipate the assets that would be needed to satisfy a judgment.

“This section also authorizes a court, on the motion of the Government or a State or Federal regulator, to appoint a receiver to gather and protect assets needed to satisfy a judgment under sections 1956 and 957, and the forfeiture provisions in sections 981 and 982. This authority is intended to apply in three circumstances: (1) when there is a judgment in a criminal case, including an order of restitution, following a conviction for a violation of section 1956 or 1957; (2) when there is a judgment in a civil case under section 1956(b) assessing a penalty for a violation of either section 1956 or 1957; and (3) when there is a civil forfeiture judgment under section 981 or a criminal forfeiture judgment, including a personal money judgment, under section 982.

“The amendment also makes section 1956(b) applicable to violations of section 1957. It applies to conduct occurring before the effective date of the Act”.

\textsuperscript{98} 18 U.S.C. 981(k). H.R.Rep.No. 107-250, at 57-8 (2001)(“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture.

To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank's customers.

“Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank's correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

“The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”).
defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation.  

Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here.  

Section 320 enlarges this provision to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements.  

This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list.  

Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.  

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99 Cf., H.R.Rep.No. 107-250, at 58-9 (2001) (“Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of ‘substitute assets’ when the defendant has placed the property otherwise subject to forfeiture ‘beyond the jurisdiction of the court.’ Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.  

“Specifically, a court could order a defendant to transfer property to this country from overseas if the property is subject to confiscation.”


101 H.R.Rep. No. 107-250, at 56 (2001) (“This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act”).  

102 H.R.Rep. No. 107-250, at 59-60 (2001) (“Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country.  

“Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
A fugitive may not challenge a federal forfeiture. Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in “order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.”

to contest the restraining order could do so on the ground that 28 U.S.C. 2467 was not properly applied to the particular case, but could not oppose the restraining order on any ground that could also be raised in the proceedings pending in a foreign court. This provision prevents a litigant from taking ‘two bites at the apple’ by raising objections to the basis for the forfeiture in the Federal court that he also raised, or is entitled to raise, in the foreign court where the forfeiture action is pending. It complements the existing provision in section 2467(e) providing that the Federal court is bound by the findings of fact of the foreign court, and may not look behind such findings in determining whether to enter an order enforcing a foreign forfeiture judgment.

“This section also amends 28 U.S.C. 2467 to make clear that it is not necessary to prove that the person asserting an interest in the property received actual notice of the forfeiture proceedings. As is the case with respect to forfeitures under U.S. law, it is sufficient if the foreign nation takes steps to provide notice, in accordance with the principles of due process. See Gonzalez v. United States, 1997 WL 278123 (S.D.N.Y. 1997) (‘the [G]overnment is not required to ensure actual receipt of notice that is properly mailed’); Albajon v. Gugliotta, 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant’s identifications, and mailed after claimant released from jail, is sufficient to satisfy due process, even if claimant never received notice); United States v. Schiavo, 897 F. Supp. 644, 648 49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; due process satisfied even if he did not receive the notice).

“Finally, 28 U.S.C. 2467 is amended to authorize the enforcement of a forfeiture judgment based on any foreign offense that would constitute an offense giving rise to a civil or criminal forfeiture of the same property if the offense had been committed in the United States. This is one of two safeguards that the statute contains against the enforcement of judgments that the United States does not consider appropriate for enforcement: if the judgment is based on an act that would not constitute a crime in the United States, such as removing assets from the reach of a repressive regime, it could not be enforced. In addition, section 2467 already provides that a foreign judgment may only be enforced by a Federal court at the request of the United States, and only after the Attorney General has certified that the judgment was obtained in accordance with the principles of due process. Thus, neither a foreign Government nor a foreign private party could enforce a foreign judgment on its own under this provision.”). Note that the safeguard to which the report refers is the range of foreign offenses that will support an enforceable confiscation order, i.e., drug offenses and crimes on the money laundering predicate offense list, and that the amendment narrows that safeguard by adding additional foreign offenses, i.e., any foreign equivalent of a federal crime which would support a confiscation order.

Alien Terrorists and Victims

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

Border Protection. The border protection provisions:

- authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401

- authorize appropriations of an additional $50 million for both INS and the Customs Service to upgrade their border surveillance equipment, section 402

- remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404

- authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405

- authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.

- instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007

- direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418

- express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414

- add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415

- call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416

- limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
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• instruct the Attorney General to report on the feasibility of using biometric scanners to help prevent terrorists and other foreign criminals from entering the country, section 1008104

• authorize appropriations of $250,000 for the FBI to determine the feasibility of providing airlines with computer access to the names of suspected terrorists, section 1009

• authorize reciprocal sharing of the State Department’s visa lookout data and related information with other nations in order to prevent terrorism, drug trafficking, slave marketing, and gun running, section 413

**Detention and Removal.** Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity, 8 U.S.C. 1227 (a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(iv). Aliens may be inadmissible for any number of terrorism-related reasons, 8 U.S.C. 1182 (a)(3)(B). Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported.


Section 411 defines “terrorist organization” to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the Federal Register as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C.

104 As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).
Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).


An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in “premeditated, politically motivated violence perpetrated against noncombatant targets,” or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security or endanger some individual or the general public. The Attorney General’s determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
The USA PATRIOT Act: A Legal Analysis

April 15, 2002

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The USA PATRIOT Act: A Legal Analysis

Summary

The USA PATRIOT Act passed in the wake of the September 11 terrorist attacks. It flows from a consultation draft circulated by the Department of Justice, to which Congress made substantial modifications and additions. The stated purpose of the Act is to enable law enforcement officials to track down and punish those responsible for the attacks and to protect against any similar attacks.

The Act grants federal officials greater powers to trace and intercept terrorists’ communications both for law enforcement and foreign intelligence purposes. It reinforces federal anti-money laundering laws and regulations in an effort to deny terrorists the resources necessary for future attacks. It tightens our immigration laws to close our borders to foreign terrorists and to expel those among us. Finally, it creates a few new federal crimes, such as the one outlawing terrorists’ attacks on mass transit; increases the penalties for many others; and institutes several procedural changes, such as a longer statute of limitations for crimes of terrorism.

Critics have suggested that it may go too far. The authority to monitor e-mail traffic, to share grand jury information with intelligence and immigration officers, to confiscate property, and to impose new book-keeping requirements on financial institutions, are among the features troubling to some.

The Act itself responds to some of these reservations. Many of the wiretapping and foreign intelligence amendments sunset on December 31, 2005. The Act creates judicial safeguards for e-mail monitoring and grand jury disclosures; recognizes innocent owner defenses to forfeiture; and entrusts enhanced anti-money laundering powers to those regulatory authorities whose concerns include the well being of our financial institutions.

This report, stripped of its citations and footnotes, is available in an abbreviated form as The USA PATRIOT Act: A Sketch, CRS Rep.No. RS21203. In addition, much of the information contained here may also be found under a different arrangement in a report entitled, Terrorism: Section by Section Analysis of the USA PATRIOT Act, CRS Rep.No. RL31200 (Dec. 10, 2001). A wider array of terrorism-related analysis appears on the CRS terrorism electronic briefing book page.
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The USA PATRIOT Act: A Legal Analysis

Introduction

Congress passed the USA PATRIOT Act (the Act) in response to the terrorists’ attacks of September 11, 2001. The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to further close our borders to foreign terrorists and to detain and remove those within our borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it is not without safeguards, critics contend some of its provisions go too far. Although it grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough.


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1 P.L. 107-56, 115 Stat. 272 (2001); its full title is the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT).”

2 H.R. 2975 was introduced by Representative Sensenbrenner for himself and Representatives Conyers, Hyde, Coble, Goodlatte, Jenkins, Jackson-Lee, Cannon, Meehan, Graham, Bachus, Wexler, Hostettler, Keller, Issa, Hart, Flake, Schiff, Thomas, Goss, Rangel, Berman and Lofgren; S.1510 by Senator Daschle for himself and Senators Lott, Leahy, Hatch, Graham, Shelby and Sarbanes.

3 H.R. 3004 was introduced by Representative Oxley for himself and Representatives LaFalce, Leach, Maloney, Roukema, Bentsen, Hooley, Bereuter, Baker, Bachus, King, Kelly, Gillmore, Cantor, Riley, Latourette, Green (of Wisconsin), and Grucci; and reported out of the House Financial Services Committee with amendments on October 15, 2001, H.R.Rep.No. 107-250. H.R. 3004, as reported out, included Internet gambling amendments that were not included in H.R. 2975/H.R.3108.
ed. Oct. 24, 2001), and H.R. 3162 was sent to the President who signed it on October 26, 2001.

**Criminal Investigations: Tracking and Gathering Communications**

A portion of the Act addresses issues suggested originally in a Department of Justice proposal circulated in mid-September.\(^4\) The first of its suggestions called for amendments to federal surveillance laws, laws which govern the capture and tracking of suspected terrorists’ communications within the United States. Federal law features a three tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications.\(^5\)

The tiers reflected the Supreme Court’s interpretation of the Fourth Amendment’s ban on unreasonable searches and seizures.\(^6\) The Amendment protects private conversations, *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967). It does not cloak information, even highly personal information, for which there is no individual justifiable expectation of privacy, such as telephone company records of calls made to and from an individual's home, *Smith v. Maryland*, 442 U.S. 735 (1979), or bank records of an individual's financial dealings, *United States v. Miller*, 425 U.S. 435 (1976).

Congress responded to *Berger* and *Katz*, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications, 18 U.S.C. 2511.\(^7\) At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious

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\(^4\) The Department’s proposal, dated September 20, 2001, came with a brief section by section analysis. Both the proposal (*Draft*) and analysis (*DoJ*) were printed as an appendix in *Administration's Draft Anti-Terrorism Act of 2001, Hearing Before the House Comm. on the Judiciary*, 107th Cong., 1st Sess. 54 (2001).


\(^6\) “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,” *U.S. Const.* Amend. IV.

\(^7\) Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
criminal cases. When approved by senior Justice Department officials, law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.

8 “The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of” one or more predicate offense, 18 U.S.C. 2516.

9 The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement), 1751 (presidential and presidential staff assassination, kidnapping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnapings, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or naturalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations, 18 U.S.C. 2518. The court notifies the parties to any conversations seized under the order after the order expires, 18 U.S.C. 2518(8).

Below Title III, the next tier of privacy protection covers some of those matters which the Supreme Court has described as beyond the reach of the Fourth Amendment protection – telephone records, e-mail held in third party storage, and the like, 18 U.S.C. 2701-2709 (Chapter 121). Here, the law permits law enforcement access, ordinarily pursuant to a warrant or court order or under a subpoena in some cases, but in connection with any criminal investigation and without the extraordinary levels of approval or constraint that mark a Title III interception, 18 U.S.C. 2703.

Least demanding and perhaps least intrusive of all is the procedure that governs court orders approving the government’s use of trap and trace devices and pen registers, a kind of secret “caller id”, which identify the source and destination of calls made to and from a particular telephone, 18 U.S.C. 3121-3127 (Chapter 206). The orders are available based on the government’s certification, rather than a finding of the court, that the use of the device is likely to produce information relevant to the investigation of a crime, any crime, 18 U.S.C. 3123. The devices record no more than the identity of the participants in a telephone conversation, but neither the orders nor the results they produce need ever be revealed to the participants.

The Act modifies the procedures at each of the three levels. It:

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offense involving counterfeiting punishable under 18 U.S.C. 471, 472, or 473; (e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States; (f) any offense including extortionate credit transactions under 18 U.S.C. 892, 893, or 894; (g) a violation of 31 U.S.C. 5322 (dealing with the reporting of currency transactions); (h) any felony violation of 18 U.S.C. 2511 and 2512 (interception and disclosure of certain communications and to certain intercepting devices); (i) any felony violation of 18 U.S.C. ch. 71 (obscenity); (j) 49 U.S.C. 60123(b) (destruction of a natural gas pipeline), 46502 (aircraft piracy); (k) 22 U.S.C. 2778 (Arms Export Control Act); (l) the location of any fugitive from justice from an offense described in this section; (m) a violation of 8 U.S.C. 1324, 1327, or 1328; (n) any felony violation of 18 U.S.C. 922, 924 (firearms); (o) any violation of 26 U.S.C. 5861 (firearms); (p) a felony violation of 18 U.S.C. 1028 (production of false identification documents), 1542 (false statements in passport applications), 1546 (fraud and misuse of visas, permits, and other documents) or a violation of 8 U.S.C. 1324, 1327, or 1328 (smuggling of aliens); (p) 229 (chemical weapons), 2332 (terrorist violence against Americans overseas), 2332a (weapons of mass destruction), 2332b (multinational terrorism), 2332d (financial transactions with countries supporting terrorism), 2339A (support of terrorist), 2332B (support of terrorist organizations); (r) any conspiracy to commit any of these, 18 U.S.C. 2516(1)(crimes added by the Act in italics). Other than telephone face to face conversations (i.e., electronic communications), the approval of senior Justice Department officials is not required and an order may be sought in any felony investigation, 18 U.S.C. 2516(3).

10 Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
• permits pen register and trap and trace orders for electronic communications (e.g., e-mail)

• authorizes nationwide execution of court orders for pen registers, trap and trace devices, and access to stored e-mail or communication records

• treats stored voice mail like stored e-mail (rather than like telephone conversations)

• permits authorities to intercept communications to and from a trespasser within a computer system (with the permission of the system’s owner)

• adds terrorist and computer crimes to Title III’s predicate offense list

• reenforces protection for those who help execute Title III, ch. 121, and ch. 206 orders

• encourages cooperation between law enforcement and foreign intelligence investigators

• establishes a claim against the U.S. for certain communications privacy violations by government personnel

• terminates the authority found in many of the these provisions and several of the foreign intelligence amendments with a sunset provision (Dec. 31, 2005).

**Pen Registers and Trap and Trace Devices.** In section 216, the Act allows court orders authorizing trap and trace devices and pen registers to be used to capture source and addressee information for computer conversations (e.g., e-mail) as well as telephone conversations, 18 U.S.C. 3121, 3123. In answer to objections that e-mail header information can be more revealing than a telephone number, it creates a detailed report to the court, 18 U.S.C. 3123(a)(3).\footnote{Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public the agency shall ensure that a record will be maintained which will identify – (i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of the such device.

\footnote{(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof),” section 216(b)(1).}
The use of pen registers or trap and trace devices was limited at one time to the judicial district in which the order was issued, 18 U.S.C. 3123 (2000 ed.). Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States, 18 U.S.C. 3123(b)(1)(C), 3127(2).

**Communications Records and Stored E-Mail.** With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber, 18 U.S.C. 2703(a),(b). A warrant will also suffice to seize records describing telephone and other communications transactions without customer notice, 18 U.S.C. 2703(c). In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation, officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records, 18 U.S.C. 2703(b),(c). They can obtain a limited amount of record information (subscribers' names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena, 18 U.S.C. 2703(c)(1)(C). There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial, 18 U.S.C. 2705.

In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider’s customer records, 18 U.S.C. 2703(c)(1)(C).

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.

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12 The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” DoJ at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

13 Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user's true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” DoJ at §107.
Previously, only a federal court in the district in which the e-mail was stored could issue the order. Under section 220, federal courts in the district where an offense under investigation occurred may issue orders applicable “without geographic limitation,” 18 U.S.C. 2703.14

The Act, in section 209, treats voice mail like e-mail, that is, subject to the warrant or court order procedure, rather than to the more demanding coverage of Title III once required, United States v. Smith, 155 F.3d 1050, 1055-56 (9th Cir. 1998).

Finally, the Act resolves a conflict between chapter 121 and the federal law governing cable companies. Government entities may have access to cable company customer records only under a court order following an adversary hearing if they can show that the records will evidence that the customer is or has engaged in criminal activity, 47 U.S.C. 511(h). When cable companies began offering telephone and other communications services the question arose whether the more demanding cable rules applied or whether law enforcement agencies were entitled to ex parte court orders under the no-notice procedures applicable to communications providers.15 The Act makes it clear that the cable rules apply when cable television viewing services are

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14 Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

15 See e.g., DoJ at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement’s access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

**Electronic Surveillance.** To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202. A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(i). Yet only the interloper's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.  

**Criminal Investigators' Access to Foreign Intelligence Information.** The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism. It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that “the purpose for the surveillance is to obtain foreign intelligence information,” 50 U.S.C. 1804(a)(7)(B)(2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps “the purpose” might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation involved, the communications rules of chapter 121 apply.

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16 18 U.S.C. 229 (chemical weapons), 2332 (terrorist acts of violence committed against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2332d (financial transactions with countries which support terrorists), 2339A (providing material support to terrorists), and 2339B (providing material support to terrorist organizations).

17 “Because service providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves as permitted under current law, they often have no way to exercise their rights to protect themselves from unauthorized attackers. Moreover, such attackers can target critical infrastructures and engage in cyberterrorism,” DoJ at §106. Elsewhere the Act defines “electronic surveillance” for purposes of the Foreign Intelligence Surveillance Act (FISA) to emphasize that the law enforcement authority for this intruder surveillance does not confer similar authority for purposes of foreign intelligence gathering, section 1003 (50 U.S.C. 1801(f)(2)).

18 For a general discussion of federal intelligence and law enforcement cooperation, see, Best, Intelligence and Law Enforcement: Countering Transnational Threats to the U.S., CRS REP.NO. RL30252 (Dec. 3, 2001).
Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment's warrant clause. It is here that the “primary purpose” notion originated. In *United States v. Truong Dinh Hung*, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, “as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.”

Subsequent case law, however, is not as clear as it might be: see e.g., *United States v. Duggan*, 743 F.2d 59, 77 (2d Cir. 1984)(“FISA permits federal officials to obtain orders authorizing electronic surveillance ‘for the purpose of obtaining foreign intelligence information.’ The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying official’s belief that the information sought is the type of foreign intelligence information described”); *United States v. Pelton*, 835 F.2d 1067, 1075-76 (4th Cir. 1987)(“We also reject Pelton’s claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial”); *United States v. Sarkissian*, 841 F.2d 959, 907-8 (9th Cir. 1988)(“Defendants rely on the primary purpose test articulated in *United States v. Truong Dinh Hung*. . . . One other court has applied the primary purpose test. Another court has rejected it . . . distinguishing *Truong*. A third court has declined to decide the issue. We also decline to decide the issue”); *United States v. Johnson*, 952 F.2d 565, 572 (1st Cir. 1991)(“Appellants attack the government's surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance”).

“Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” DoJ at §153.
demanding standard than the “a purpose” threshold proposed by the Justice Department, but a clear departure from the original “the purpose” entry point. FISA once described a singular foreign intelligence focus prerequisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k), 1825(k).  

**Protective Measures.** The Act reenforces two kinds of safeguards, one set designed to prevent abuse and the other to protect those who assist the government. The sunset clause is perhaps the best known of the Act’s safeguards. Under the direction of section 224, many of the law enforcement and foreign intelligence authorities granted by the Act expire as of December 31, 2005. The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter 224.

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21 “(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. (2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, infra, quoting, 50 U.S.C. 1801.

22 “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)(sharing grand jury information), 203(c)(procedures for sharing grand jury information), 205 [FBI translators], 208 [seizure of stored voice-mail], 210[subpoenas for communications provider customer records], 211[access to cable company communication service records], 213[sneak and peek], 216[pen register and trap and trace device amendments], 217[trade sanctions], and 222[assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005. “(b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers’ communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices). 23 Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees, 24 but could not recover against the United States. 25 Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice's Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government's request until a court order authorizing access can be obtained. 26 Another allows providers to disclose customer records to protect the provider's rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others. 27 A third section,

26 Prior law already granted service providers immunity for disclosure of customer records in compliance with a court access order, 18 U.S.C. 2703(f).
27 “Existing law contains no provision that allows providers of electronic communications service to disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies that threaten death or serious bodily injury. This section amends 18 U.S.C. §2702 to authorize such disclosures if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.

“Current law also contains an odd disconnect: a provider may disclose the contents of the customer's communications in order to protect its rights or property but the current statute does not expressly permit a provider to voluntarily disclose non-content records (such as a subscriber's login records). 18 U.S.C. 2702(b)(5). This problem substantially hinders the ability of providers to protect themselves from cyber-terrorists and criminals. Yet the right to disclose the contents of communications necessarily implies the less intrusive ability to disclose non-content records. In order to promote the protection of our nation's critical infrastructures, this section's amendments allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems,” DoJ at
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

Foreign Intelligence Investigations

Although both criminal investigations and foreign intelligence investigations are conducted in the United States, criminal investigations seek information about unlawful activity; foreign intelligence investigations seek information about other countries and their citizens. Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough.

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA), something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President's authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, United States v. United States District Court, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage

§110.

28 Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

29 Thus in the name of assisting in the execution of Title III, chapter 121, or chapter 206 order, the courts may not cite the Act as the basis for an order compelling a service provider to make system modifications or provide any other technical assistance not already required under 18 U.S.C. 2518(4), 2706, or 3124(c), see, H.R.Rep.No. 107-236, at 62-3 (2001) (emphasis added) (“This Act is not intended to affect obligations under Communications Assistance for Law Enforcement Act [which addresses law enforcement-beneficial system modifications and the compensation to be paid for the changes], nor does the act impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance”).

30 E.g., As amended by section 902 of the Act, “‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2)(language added by the Act in italics).

31 50 U.S.C. 1801 et seq.
In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs. There were and still are extra


33 “As used in this subchapter: (a) ‘Foreign power’ means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

“(b) ‘Agent of a foreign power’ means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C).

“(c) ‘International terrorism’ means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnaping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

“(d) ‘Sabotage’ means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

“(e) ‘Foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans (“United States persons,” i.e., citizens or permanent resident aliens).\textsuperscript{34} The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

- permits “roving” surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)

- increases the number of judges on the FISA court from 7 to 11

- allows application for a FISA surveillance or search order when gathering foreign intelligence is a significant reason for the application rather than the reason

- authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations

- sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses

- carries a sunset provision

- establishes a claim against the U.S. for certain communications privacy violations by government personnel

- expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

\textsuperscript{34} Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
**FISA.** FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases.\(^{35}\) It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

**Search and Surveillance for Intelligence Purposes.** Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, Draft at §151.\(^{36}\)

Section 901 of the Act address a concern raised during the 106th Congress relating to the availability of the FISA orders and the effective use of information gleaned from the execution of a FISA order.\(^{37}\) It vests the Director of Central

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\(^{36}\) *See also, DoJ* at §151, “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order’s minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed (50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

\(^{37}\) *See e.g., S.Rep.No. 106-352, at 3, 6, 7 (2000)* (“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application
process, as interpreted by the OIPR is administratively burdensome and, at times, extremely slow. Many applications undergo months of scrutiny before submission to the court because the OIPR prescribes standards and restrictions not imposed by the statute. . . . In particular, the OIPR has been criticized for an overly restrictive interpretation of the FISA ‘currency’ requirement. This is the issue of how recent a subject’s activities must be to support a finding of probable cause that the subject is engaged in clandestine intelligence gathering activities. . . . While existing law does not specifically address “past activities,” it does not preclude, and legislative history supports, the conclusion that past activities may be part of the totality of circumstances considered by the FISC in making a probable cause determination. . . . By definition, information collected pursuant to a court order issued under the Foreign Intelligence Surveillance Act is foreign intelligence not law enforcement information. Accordingly, the Committee wants to clarify that the FISA ‘take’ can and must be shared by the Federal Bureau of Investigation with appropriate intelligence agencies. For the intelligence mission of the United States to be successful, there must be a cooperative and concerted effort among intelligence agencies. Any information collected by one agency under foreign intelligence authorities that could assist another agency in executing its lawful mission should be shared fully and promptly. Only then can the United States Government pursue aggressively important national security targets including, for example, counterterrorist and counternarcotics targets”); see also, 147 Cong. Rec. S799-803 (daily ed. Feb. 24, 2000)(remarks of Sens. Specter, Torricelli and Biden).

38 “When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevance, an additional factual showing that the communications device has been used to contact an ‘agent of a foreign power’ engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the ‘agent of a foreign power’ prong from the predication, and thus makes the FISA authority more closely track the criminal authority,” DoJ at §155.
Section 214 adjusts the language of the FISA pen register-trap and trace authority to permit its use to capture source and destination information relating to electronic communications (e.g., e-mail) as well as telephone communications, 50 U.S.C. 1842(d). The section makes it clear that requests for a FISA pen register-trap and trace order, like requests for other FISA orders, directed against Americans (U.S. persons) may not be based solely on activities protected by the First Amendment, 50 U.S.C. 1842, 1843.

Third Party Cooperation and Tangible Evidence. As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target's activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.40

39 Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise to be entitled to confidentiality. Section 505, in response to the Justice Department's suggestion, allows FBI field offices to make the requests, see DoJ at §157 (“At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports”).

40 When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court’s order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.’ This would enhance the FBI’s ability to monitor international terrorists and intelligence officers who are
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian. The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities, in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B);
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a);
- the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a);
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v;

41 “The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigatory contexts. The time and difficulty involved in getting such pleadings before the Court usually outweighs the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” DoJ at §156.

42 Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.43

**Access to Law Enforcement Information.** Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community’s access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, *Draft* at §103.44

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43 H.R.Rep.No. 107-205, at 60-1 (2001)(“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

“The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

“Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual’s credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding--without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information”).

44 *See also, DoJ* at §103, “This section facilities the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, Draft at §354.\textsuperscript{45}

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, Draft at §154.\textsuperscript{46}

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion.\textsuperscript{47} It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions.”

\textsuperscript{45} See also, DoJ at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.” Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officers

\textsuperscript{46} See also, DoJ at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”

\textsuperscript{47} Blair v. United States, 250 U.S. 273, 281 (1919)(the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
affairs are conducted in private and outside the presence of the court. Only the
officer for the government, witnesses under examination, and a court reporter may
attend its proceedings, F.R.Crim.P. 6(d). Matters occurring before the grand jury are
secret and may be disclosed by the attending attorney for the government and those
assisting the grand jury only in the performance of their duties; in presentation to a
successor grand jury; or under court order for judicial proceedings, for inquiry into
misconduct before the grand jury, or for state criminal proceedings, F.R.Crim.P. 6(e).

The Act, in section 203(a), allows disclosure of matters occurring before the
grand jury to “any federal law enforcement, intelligence, protective, immigration,
national defense, or national security” officer to assist in the performance of his

Critics may protest that the change could lead to the use of the grand jury for
intelligence gathering purposes, or less euphemistically, to spy on Americans. 49 The
proposal was never among those scheduled to sunset, but earlier versions of the
section followed the path used for most other disclosures of grand jury material: prior

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48 These officers may receive: (1) “foreign intelligence information” that is, information
regardless whether it involves Americans or foreign nationals that “[a] relates to the ability
of the United States to protect against – (aa) actual or potential attack or other grave hostile
acts of a foreign power or an agent of a foreign power; (bb) sabotage or international
terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence
activities by an intelligence service or network of a foreign power;” or [b] “with respect to a
foreign power or foreign territory that relates to – (aa) the national defense or security of the
United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P.
6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that
is, [a] “information relating to the capabilities, intentions, or activities of foreign governments
or elements thereof, foreign organizations, or foreign persons, or international terrorist
activities” or [b] “information gathered and activities conducted, to protect against espionage,
other intelligence activities, sabotage, or assassinations conducted on behalf of foreign
governments or elements thereof, foreign organizations, or foreign persons, or international
terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in
italics).

49 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on
Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25
HARVARD JOURNAL OF LAW & PUBLIC POLICY 699, 719-20 (2002)(“There is a significant
danger that the rule permitting disclosure will be treated as the de facto authorization of an
expansion of the grand jury’s investigative role to encompass seeking material relevant only
to matters of national security, national defense, immigration, and so forth. The grand jury’s
awesome powers should not be unwittingly extended to a much wider range of issues. . .
Since the grand jury operates in secret, there are no public checks on the scope of its
investigations, and witnesses are not permitted to challenge its jurisdiction. Only the
supervising court is in a position to keep the grand jury’s investigation within proper bounds.
Requiring judicial approval of foreign intelligence and counterintelligence information
disclosures would provide a natural check against the temptation to manipulate the grand jury
to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist
Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6
(Nov. 2001)(“The grand jury secrecy rule is a rule of policy which has always had exceptions,
and it has been frequently modified. The secrecy rule has no credible claim to constitutional
stature”).
Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

It either swallows the other subsections, or supplements them. Several factors argue for its classification as a supplement. Congress is unlikely to have crafted subsections (a), (b) and (c) only to completely swallow the other subsections, or to completely cut them off from the rest of the Act. Instead, it is more likely that Congress intended subsection (d) to serve as a supplement to the other subsections. This is supported by the fact that subsection (d) contains language that is similar to the language used in subsections (a), (b), and (c). For example, subsection (d) contains language that is similar to the language used in subsection (a) that defines “foreign intelligence information.” It also contains language that is similar to the language used in subsection (b) that defines “foreign intelligence or counterintelligence.”

Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification.\footnote{Duncan v. Walker, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted)} By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.\footnote{Draft at §154, “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”}

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

\textbf{Increasing Institutional Capacity.} As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a
computerized translation capability to be used in foreign intelligence gathering.\textsuperscript{54} Section 907 instructs the Director of the Central Intelligence, in consultation with the Director of the FBI, to report on the creation of a National Virtual Translation Center. The report is to include information concerning staffing, allocation of resources, compatibility with comparable systems to be used for law enforcement purposes, and features which permit its efficient and secure use by all of the intelligence agencies.

**Money Laundering**

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture.\textsuperscript{55} The Act bolsters federal efforts in each area.

**Regulation.** Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.\textsuperscript{56}

\textsuperscript{54} “The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

“The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so,” S.Rep.No. 107-63, at 11 (2001).

\textsuperscript{55} For a brief overview, see, Murphy, Money Laundering: Current Law and Proposals, CRS REP.NO. RS21032 (DEC. 21, 2001).

\textsuperscript{56} See e.g., 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
records and reports. For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department's Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler’s checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to files SARs as well, reflecting Congress’ view that the information provided the IRS may be valuable for other law enforcement purposes. This concern is likewise


H.R.Rep.No. 107-250, at 38-9 (2001)(“Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a ‘Safeguard Procedures Report’ which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement
reflected in section 357 which asks the Secretary of the Treasury to report on the Internal Revenue Service’s role in the administration of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311 et seq.), and what transfers of authority, if any, are appropriate.

Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action. 59 Section 355 expands the immunity to cover disclosures in

59 “Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

“First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor from civil liability applies in arbitration, as well as judicial, proceedings. Second, it amends section 5318(g)(3) to clarify the safe harbor’s coverage of voluntary disclosures (that is, those not covered by the SAR regulatory reporting requirement). The language in section 5318(g)(3)(A) providing that ‘any financial institution that *** makes a disclosure pursuant to *** any other authority *** shall not be liable to any person’ is not intended to avoid the application of the reporting and disclosure provisions of the Federal securities laws to any person, or to insulate any issuers from private rights of actions for disclosures made under the Federal securities laws.

“Subsection [351](b) amends section 5318(g)(2) of title 31--which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed—to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee’s official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
employment references to other insured depository financial institutions provided disclosure is not done with malicious intent.60

The Financial Crimes Enforcement Network (FinCEN), a component within the Treasury Department long responsible for these anti-money laundering reporting and record-keeping requirements, 31 C.F.R. pt. 103, was administratively created in 1990 to provide other government agencies with an “intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes,” 55 Fed.Reg. 18433 (May 2, 1990).

The Act, in section 361, makes FinCEN a creature of statute, a bureau within the Treasury Department, 31 U.S.C. 310. Section 362 charges it with the responsibility of establishing a highly secure network to allow financial institutions to file required reports electronically and to permit FinCEN to provide those institutions with alerts and other information concerning money laundering protective measures, 31 U.S.C. 310 note.

Special Measures. In extraordinary circumstances involving international financial matters, the Act grants the Secretary of the Treasury, in consultation with other appropriate regulatory authorities, the power to issue regulations and orders involving additional required “special measures” and additional “due diligence” requirements to combat money laundering. The special measure authority, available under section 311, comes to life with the determination that particular institutions, jurisdictions, types of accounts, or types of transactions pose a primary money

60 31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 67 (2001).
laundering concern. These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

61 31 U.S.C. 5318A. The circumstances considered in the case of a suspect jurisdiction are: evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction’s banking regulation; the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

62 The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’ including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

“Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate
business transactions.

"Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

"Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

"The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

"The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

"The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

"The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent’ account for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information that it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

"The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

"The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed
Due Diligence. Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.63

63 See generally, H.R.Rep.No. 107-250, at 71-2 ("Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

"The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

"The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

"For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
General Regulatory Matters. The Act establishes several other regulatory mechanisms directed at the activities involving U.S. financial institutions and foreign individuals or institutions. Section 313, for instance, in another restriction on correspondent accounts for foreign financial institutions, prohibits U.S. financial institutions from maintaining correspondent accounts either directly or indirectly for foreign shell banks (banks with no physical place of business\textsuperscript{64}) which have no affiliation with any financial institution through which their banking activities are subject to regulatory supervision.\textsuperscript{65}

The Act, in section 325, empowers the Secretary of the Treasury to promulgate regulations to prevent financial institutions from allowing their customers to conceal their financial activities by taking advantage of the institutions’ concentration account practices.\textsuperscript{66}

The Secretary of the Treasury is instructed in section 326 to issue regulations for financial institutions’ minimum new customer identification standards and record-
Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a ‘street name’ or omnibus account in the broker-dealer’s name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to ‘look through’ the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund’s customers. Thus, the fund would not be required to ‘look through’ the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).

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67 31 U.S.C. 5318(l); H.R.Rep.No. 107-250, at 62-3 (2001)(“Section [326](a) amends 31 U.S.C. 5318 by adding a new subsection governing the identification of account holders. Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a ‘street name’ or omnibus account in the broker-dealer's name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to ‘look through’ the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund's customers. Thus, the fund would not be required to ‘look through’ the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature. 68

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

**Reports to Congress.** Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

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“Paragraph (6) requires that Treasury's regulations prescribed under paragraph (1) become effective within one year after enactment of this bill”).

exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.69

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

International Cooperation. Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.70

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (i.e., the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.

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70 H.R.Rep.No. 107-250, at 67 (2001)(“This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury's progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

“The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime”.

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**Crimes.** Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, smuggling, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
expands 18 U.S.C. 1956 to cover financial transactions conducted in foreign financial institutions.71

Section 329 makes it a federal crime to corruptly administer the money laundering regulatory scheme. Offenders are punishable by imprisonment for not more than 15 years and a fine of not more than three times the amount of the bribe.

Section 5326 of title 31 authorizes the Secretary of the Treasury to impose temporary, enhanced reporting requirements upon financial institutions in areas victimized by substantial money laundering activity (geographic targeting regulations and orders). Section 353 makes it clear that the civil sanctions, criminal penalties, and prohibitions on smurfing (structuring transactions to evade reporting requirements) apply to violations of the regulations and orders issued under 31 U.S.C. 5326.72 It also extends the permissible length of the temporary geographical orders from 60 to 180 days.

Violations of the special measures and special due diligence requirements of sections 311 and 312 are subject to both civil and criminal penalties by virtue of section 363's amendments to 31 U.S.C. 5321(a) and 5322. The amendments authorize civil penalties and criminal fines of twice the amount of the transaction but not more than $1 million. Criminal offenders would be subject to a fine in the same amount.

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71 “[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

“The definition of ‘financial institution’ in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of ‘commercial bank’ or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad--say to a Mexican bank--and launders them through a series of financial transactions, the government conceivably could not rely on the definition of a ‘financial institution’ in 1956(c)(6) to establish that the transaction was a ‘financial transaction’ within the meaning of 1956(c)(4)(B) (defining a ‘financial transaction’ as a transaction involving the use of a ‘financial institution’), or that it was a ‘monetary transaction’ within the meaning of 1957(f) (defining ‘monetary transaction’ as, inter alia, a transaction that would be a ‘financial transaction’ under 1956(c)(4)(B)).

“Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launders the proceeds of one of the crimes set forth on a list of ‘specified unlawful activities.’ 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),” H.R.Rep.No. 107-250, at 38 (2000).

Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.\(^{73}\)

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents.\(^{74}\) They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

\(^{73}\) “The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business.

“Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.

“Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive,” H.R.Rep.No. 107-250, at 54 (2001).

\(^{74}\) “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).

• 18 U.S.C. 476 (taking impressions of tools used for obligations and securities) from 10 to 25 years;
• 18 U.S.C. 477 (possessing or selling impressions of tools used for obligations or securities) from 10 to 25 years;
• 18 U.S.C. 484 (connecting parts of different notes) from 5 to 10 years;
• 18 U.S.C. 493 (bonds and obligations of certain lending agencies) from 5 to 10 years;
• 18 U.S.C. 478 (foreign obligations or securities) from 5 to 20 years;
• 18 U.S.C. 479 (uttering counterfeit foreign obligations or securities) from 3 to 20 years;
• 18 U.S.C. 480 (possessing counterfeit foreign obligations or securities) from 1 to 20 years;
• 18 U.S.C. 481 (plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities) from 5 to 25 years;
• 18 U.S.C. 482 (foreign bank notes) from 2 to 20 years; and
• 18 U.S.C. 483 (uttering counterfeit foreign bank notes) from 1 to 20 years.

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

**Bulk Cash.** Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act’s bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting.75

The section appears to be the product of reactions to the Supreme Court’s decision in *United States v. Bajakian*, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court’s

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75 “For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).
As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency — representing the proceeds of drug trafficking and other criminal offenses — is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad.

Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United States without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute,” H.R.Rep.No. 107-250 at 36-7 (2001).

Extraterritorial Jurisdiction. The Act makes 18 U.S.C. 1029, the federal statute condemning various crimes involving credit cards, PIN numbers and other access devices, applicable overseas if the card or device is issued by or controlled by an American bank or other entity and some article is held in or transported to or through the United States during the course of the offense, section 377. The change was part of the original Justice Department proposals. Justice explained that, “[financial crime] admits of no border, utilizing the integrated global financial network for ill purposes. This provision would apply the financial crimes prohibitions to conduct committed abroad, so long as the tools or proceeds of the crimes pass through or are in the United States,” DoJ at §408. The section, however, appears to limit the otherwise applicable extraterritorial jurisdiction implicit in section 1029, since federal courts would likely recognize extraterritorial jurisdiction over a violation

Section 5317 of title 31 once called for civil forfeiture of property traceable to a violation of 31 U.S.C. 5316 (reports on exporting or importing money instruments worth $10,000 or more). Section 372 of the Act recasts section 5317 to provide for civil and criminal forfeitures for violations of 31 U.S.C. 5316, of 31 U.S.C. 5313 (reports on domestic coins and currency transactions involving $10,000 or more) and of 31 U.S.C. 5324 (structuring transactions to evade reporting requirements (smurfing)).
under *either* circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.77

**Venue.** Section 1004 relies on *dicta* in *United States v. Cabrales*, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering,78 in the state and district in which the monetary transaction takes place. The Supreme Court in *Cabrales* held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in *dicta*, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.79

**Forfeiture.** Forfeiture is the government confiscation of property as a consequence of crime.80 The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 *et seq.* (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

**Constitutional Considerations.** The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 *et seq.*, which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the


78 “The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed,” U.S.Const. Art.III, §2, cl.3.

“[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,” U.S.Const. Amend. VI.

79 See also, *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnapping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.

80 For general background information, see, Doyle, *Crime and Forfeiture*, CRS REP.NO. 97-139A (Oct. 11, 2000).
jurisdiction of the United States, belonging to any foreign individual, foreign entity, or foreign country whom they determine to have planned, authorized, aided or engaged in an attack on the United States by a foreign country or foreign nationals. The section also permits the government to present secretly (ex parte and in camera) any classified information upon which the forfeiture was based should the decision be subject to judicial review. The Justice Department requested the section as a revival of the President's powers in times of unconventional wars.\textsuperscript{81} By virtue of section 316, property owners may initiate a challenge to a confiscation by filing a claim under the rules applicable in maritime confiscations. The section permits two defenses to forfeiture – that the property is not subject to confiscation under section 106 or that the claimant is entitled to the innocent owner defense of 18 U.S.C. 983(d).\textsuperscript{82} The characterization of the defenses as “affirmative defense” indicates that the claimant bears the burden of proof. The innocent owner defenses of 18 U.S.C. 983(d) are probably not available in cases under section 106, since that section is explicitly

\textsuperscript{81} “This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App.U.S.C. §5(b).

“This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress’s war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

“The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2),” DoJ at §159.

\textsuperscript{82} “An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
excepted from the coverage of 18 U.S.C. 983. The challenge proceedings permit the court to admit evidence, such as hearsay evidence, that would not otherwise be admissible under the Federal Rules of Evidence if the evidence is reliable and if national security might be imperiled should dictates of the Federal Rules be followed, §316(b). The section recognizes the rights of claimants to proceed alternatively under the Constitution or the Administrative Procedure Act.

The Justice Department also recommended enactment of an overlapping provision which ultimately passed as section 806 of the Act without any real discussion of the relationship of the two sections. Section 806 authorizes confiscation of all property, regardless of where it is found, of any individual, entity, or organization engaged in domestic or international terrorism (as defined in 18 U.S.C. 2331), against the United States, Americans or their property, 18 U.S.C.

83 18 U.S.C. 983(i)(2)(D).

84 “The exclusion of certain provisions of Federal law from the definition of the term ‘civil forfeiture statute’ in section 983(i) of title 18, United States Code, shall not be construed to deny an owner of property the right to contest the confiscation of assets of suspected international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C) subchapter II of chapter 5 of title 5, United States Code (commonly known as the ‘Administrative Procedure Act’).” Sec. 316(c)(1).

85 “Current law does not contain any authority tailored specifically to the confiscation of terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available current forfeiture laws require detailed tracing that is quite difficult for accounts coming through the banks of countries used by many terrorists.

“This section increases the government's ability to strike at terrorist organizations' economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001,” DoJ, at §403. The House Report on H.R. 2975 which contained versions of both sections is no more explicit on the relation of the two sections.

86 “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
Section 806 as discussed below also calls for the more common confiscation of property derived from and or facilitating acts of domestic or international terrorism against the United States or its citizens. Confiscations under 806 may be challenged under the procedures of 18 U.S.C. 983, since they are not exempted there. To the extent that forfeiture under section 806 is based on international rather than domestic terrorism, claimants may also use the procedures of section 316.

Confiscation based solely on the fact that the property is owned by a criminal offender, rather than that it is derived from or facilitates some crime is fairly uncommon. It is the mark of common law forfeiture of estate. At common law, a felon forfeited all of his property. Most contemporary forfeiture statutes employ statutory forfeiture, a more familiar presence in American law, which consists of the confiscation of things whose possession is criminal, of the fruits of crime, and of the means of crime – untaxed whiskey, the drug dealer’s profits, and the rum runner’s ship.

Three characteristics set forfeiture of estate apart. The property is lost solely by reason of its ownership by a felon. All of a felon’s property is confiscated, not merely that which is related to the crime for which he is convicted. Finally, it occasions attainder which negates the felon’s right to hold property or for title to property to pass through him to his heirs. It was with this in mind, that the Framers declared that “no attainder of treason shall work corruption of blood or forfeiture exception during the life of the person attainted.” And for this reason, President Lincoln insisted that the confiscated real estate of Confederate supporters should revert their heirs at death.

of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,“ 18 U.S.C. 2331(1),(5)(as amended by section 802 of the Act).

87 Austin v. United States, 509 U.S. 602, 611-12 (1993)(“Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture . . . . Of England’s three kinds of forfeiture, only the third took hold in the United States”).


89 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal in personam proceedings following criminal conviction as a means of accomplishing confiscation.
Neither section 106 nor 806 require conviction of the terrorist property owner. Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers. The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners. Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them. The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate

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90 Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c)("If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act.").

91 Silesian American Corp. V. Clark, 332 U.S. 469 (1947); cf., Societe Internationale v. Rogers, 357 U.S. 197, 211 (1958)(“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).

92 Zittman v. McGrath, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts”’).

any presumption of remedial purposes. The same has been said of the applicability of the ex post facto clause.

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO. If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

Other Forfeiture Amendments. In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.

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95 See e.g., United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.), 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994).

96 DoJ, at §403.

97 18 U.S.C. 1956(b). Cf., H.R.Rep.No. 107-250, at 54-5 (2001)(“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas. Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted

American Bank, 191 F.3d 30 (1st Cir. 1999).

“The second provision, modeled on 18 U.S.C. 1345(b), gives the district court the power to restrain property, issue seizure warrants, or take other action necessary to ensure that a defendant in an action covered by the statute does not dissipate the assets that would be needed to satisfy a judgment.

“This section also authorizes a court, on the motion of the Government or a State or Federal regulator, to appoint a receiver to gather and protect assets needed to satisfy a judgment under sections 1956 and 957, and the forfeiture provisions in sections 981 and 982. This authority is intended to apply in three circumstances: (1) when there is a judgment in a criminal case, including an order of restitution, following a conviction for a violation of section 1956 or 1957; (2) when there is a judgment in a civil case under section 1956(b) assessing a penalty for a violation of either section 1956 or 1957; and (3) when there is a civil forfeiture judgment under section 981 or a criminal forfeiture judgment, including a personal money judgment, under section 982.

“The amendment also makes section 1956(b) applicable to violations of section 1957. It applies to conduct occurring before the effective date of the Act”).

18 U.S.C. 981(k). H.R.Rep.No. 107-250, at 57-8 (2001)(“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank's customers.

“Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank's correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

“The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”).
defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation.\footnote{Cf., H.R.Rep.No. 107-250, at 58-9 (2001) ("Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of 'substitute assets' when the defendant has placed the property otherwise subject to forfeiture 'beyond the jurisdiction of the court.' Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

"This section amends 21 U.S.C. 853 to make clear that a court in a criminal case may issue a repatriation order--either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. 853(e) to restrain property--so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both").}

Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here.\footnote{18 U.S.C. 981(a)(1)(B).} Section 320 enlarges this provisions to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements.\footnote{H.R.Rep.No. 107-250, at 56 (2001)("This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act").} This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.\footnote{Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country.

"Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
A fugitive may not challenge a federal forfeiture. Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in “order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.”

to contest the restraining order could do so on the ground that 28 U.S.C. 2467 was not properly applied to the particular case, but could not oppose the restraining order on any ground that could also be raised in the proceedings pending in a foreign court. This provision prevents a litigant from taking ‘two bites at the apple’ by raising objections to the basis for the forfeiture in the Federal court that he also raised, or is entitled to raise, in the foreign court where the forfeiture action is pending. It complements the existing provision in section 2467(e) providing that the Federal court is bound by the findings of fact of the foreign court, and may not look behind such findings in determining whether to enter an order enforcing a foreign forfeiture judgment.

“This section also amends 28 U.S.C. 2467 to make clear that it is not necessary to prove that the person asserting an interest in the property received actual notice of the forfeiture proceedings. As is the case with respect to forfeitures under U.S. law, it is sufficient if the foreign nation takes steps to provide notice, in accordance with the principles of due process. See Gonzalez v. United States, 1997 WL 278123 (S.D.N.Y. 1997) (‘the [G]overnment is not required to ensure actual receipt of notice that is properly mailed’); Albajon v. Gugliotta , 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant’s identifications, and mailed after claimant released from jail, is sufficient to satisfy due process, even if claimant never received notice); United States v. Schiavo , 897 F. Supp. 644, 648 49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; due process satisfied even if he did not receive the notice).

“Finally, 28 U.S.C. 2467 is amended to authorize the enforcement of a forfeiture judgment based on any foreign offense that would constitute an offense giving rise to a civil or criminal forfeiture of the same property if the offense had been committed in the United States. This is one of two safeguards that the statute contains against the enforcement of judgments that the United States does not consider appropriate for enforcement: if the judgment is based on an act that would not constitute a crime in the United States, such as removing assets from the reach of a repressive regime, it could not be enforced. In addition, section 2467 already provides that a foreign judgment may only be enforced by a Federal court at the request of the United States, and only after the Attorney General has certified that the judgment was obtained in accordance with the principles of due process. Thus, neither a foreign Government nor a foreign private party could enforce a foreign judgment on its own under this provision.”). Note that the safeguard to which the report refers is the range of foreign offenses that will support an enforceable confiscation order, i.e., drug offenses and crimes on the money laundering predicate offense list, and that the amendment narrows that safeguard by adding additional foreign offenses, i.e., any foreign equivalent of a federal crime which would support a confiscation order.

Alien Terrorists and Victims

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

Border Protection. The border protection provisions:

• authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401

• authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402

• remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404

• authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405

• authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.

• instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007

• direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418

• express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414

• add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415

• call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416

• limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).

• instruct the Attorney General to report on the feasibility of using biometric scanners to help prevent terrorists and other foreign criminals from entering the country, section 1008

• authorize appropriations of $250,000 for the FBI to determine the feasibility of providing airlines with computer access to the names of suspected terrorists, section 1009

• authorize reciprocal sharing of the State Department’s visa lookout data and related information with other nations in order to prevent terrorism, drug trafficking, slave marketing, and gun running, section 413

**Detention and Removal.** Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity, 8 U.S.C. 1227(a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(iv). Aliens may be inadmissible for any number of terrorism-related reasons, 8 U.S.C. 1182 (a)(3)(B). Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported.


Section 411 defines “terrorist organization” to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the Federal Register as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C.
Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).

Prior law made representatives of terrorist organizations designated by the Secretary under section 219 (8 U.S.C. 1189) inadmissible, 8 U.S.C. 1182(a)(3)(B)(i)(IV)(2000 ed.). And so they remain. Section 411 makes representatives of political, social or similar groups, whose public endorsements of terrorist activities undermines U.S. efforts to reduce or eliminate terrorism, inadmissible as well, 8 U.S.C. 1882(a)(3) (B)(i)(IV).

An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in “premeditated, politically motivated violence perpetrated against noncombatant targets,” or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security or endanger some individual or the general public. The Attorney General's determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

**Victims.** The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

- permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421
- extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422

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105 “The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

106 “The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks.

“The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application.

“Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

“Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 31.

“Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.


107 “Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

“The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

“The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death),” H.R.Rep.No. 107-236, at 68 (2001).

108 “Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien’s 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien’s 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
• a denial of benefits of the Act to terrorists and their families, section 427

• authority for the Attorney General to establish evidentiary standards to implement the alien victim provisions of the Act, section 426.

Other Crimes, Penalties, & Procedures

New Crimes. The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department,\(^\text{109}\) the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offense for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents, 18 U.S.C. 175b.\(^\text{110}\) Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.\(^\text{111}\)

\(^{109}\) “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . . .” DoJ at §305.

\(^{110}\) The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

\(^{111}\) “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2)(“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.112

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D). The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

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112 U.S. Const. Art.III, §2, cl.3 (“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . .”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . .”); United States v. Cabrales, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from Cabrales when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnaping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999)(“By way of comparison, last Term in [Cabrales] we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).
The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of ‘material support or resources’ is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’),” DoJ at 306.

And it adds expert advice or assistance to the types of assistance that may not be provided under section 2339A. This last addition may encounter the same First Amendment vagueness problems some courts have found in assistance which takes the form of “training” and “personnel,” Humanitarian Law Project v. Reno, 205 F.3d 1130, 1137-136 (9th Cir. 2000). Finally, the section announces that a prosecution for violation of section 2339A (support of terrorists) may be brought where the support is provided or where the predicate act of terrorism occurs. There may be some question whether the Constitution permits prosecution where the predicate act occurs.114

Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.115


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115 “The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill (‘Federal terrorism offenses’) is used in identifying the relevant crimes,” DoJ, at §304.

**New Penalties.** The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. 3571(b),(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense.117

The proposal, however, failed to identify the critical elements that would trigger the alternative.118 Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

- for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

- for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

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117 “Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersede lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,” DoJ, at §302.

118 “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense,” Draft at §302.
The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object of offense — see e.g., 21 U.S.C. §846 (drug crimes) — but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

This section accordingly adds a new §2332c to the terrorism chapter of the criminal code — parallel to the drug crime conspiracy provision in 21 U.S.C. §846 — which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.
• interfering with a flight crew within U.S. special aircraft jurisdiction, 49 U.S.C. 46504;
• carrying a weapon or explosive abroad an aircraft within U.S. special aircraft jurisdiction, 49 U.S.C. 46505; and
• sabotage of interstate gas pipeline facilities, 49 U.S.C. 60123.

When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years).120 The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission),121 a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

120 Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

121 “Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.

“This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders).\(^{122}\)

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

**Other Procedural Adjustments.** In other procedural adjustments designed to facilitate criminal investigations, the Act:

- increases the rewards for information in terrorism cases
- expands the Posse Comitatus Act exceptions
- authorizes “sneak and peek” search warrants
- permits nationwide and perhaps worldwide execution of warrants in terrorism cases
- eases government access to confidential information
- allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
- lengthens the statute of limitations applicable to crimes of terrorism
- clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
- adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B.\(^{123}\)

\(^{122}\) It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, e.g., damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

\(^{123}\) When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001)(remarks of Rep. Sensenbrenner); for general background, see, Doyle, *McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys*, CRS REP.NO. RL30060 (Dec. 14, 2001).
Rewards. The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L.105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism.124

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

Posse Comitatus. The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.125

Delayed notification of a search (sneak and peek). Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take

124 The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct threat assessments for federal agencies, and to reimburse federal agencies for the costs of detaining terrorist suspects overseas.

125 For a general discussion of the Posse Comitatus Act, see, Doyle, The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law, CRS REP.NO. 95-964 (June 1, 2000).
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, Richards v. Wisconsin, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, Wilson v. Arkansas, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, Dalia v. United States, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, cf., United States v. Miller, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, United States v. Freitas, 800 F.2d 1451, 1453 (9th Cir. 1986).126

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126 The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in United States v. New York Telephone Co., 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth
Amendment, demands that surreptitious entries be closely circumscribed,” United States v. Freitas (Freitas I), 800 F.2d 1451, 1455-456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, United States v. Freitas (Freitas II), 856 F.2d 1425 (9th Cir. 1988).

127 “No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in Dalia v. United States, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in Dalia, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property. . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. See United States v. New York Telephone Co., 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . . Although the Freitas I court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in United States v. Villegas, 899 F.2d 1324 (1999). Although the Freitas I court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in Villegas. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the Freitas I court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” United States v. Pangburn, 983 F.2d 449, 453-55 (2d Cir. 1993).

128 In Simons, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
The Justice Department urged that the conflict be resolved with a uniform rule which permitted sneak and peek warrants under the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage.129

The Act, in section 213, stops short of the Justice Department proposal. Characterized as a codification of the Second Circuit decision, 147 Cong.Rec. H7197 (daily ed. Oct. 23, 2001), the Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C. 3103a. Its sneak and peek authorization reaches all federal search and seizure warrants where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (e.g., risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (e.g., jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, i.e., in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation.130 The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

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129 “The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities,” DoJ at §353.

130 Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department’s initial proposal, the Department’s justification does not address the question.
The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

Neither Rule 41 nor any other provision of federal constitutional “reasonable,” that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

**Nationwide terrorism search warrants.** The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either “within or outside the district,” (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases. The provision may anticipate execution both in this country and overseas. The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage. Neither Rule 41 nor any other provision of federal

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132 The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

133 *United States v. Barona*, 56 F.3d 1087, 1092 (9th Cir. 1995)(“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994)(“if American law enforcement officials substantially participated in the search or if the

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” F.R.Crim.P. 41, *Advisory Committee Notes: 1990 Amendment*. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

**Terrorists’ DNA.** The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards *per se*. 135 Existing federal law allowed the Attorney General to collect samples from foreign officials conducting the search were actually acting as agents for their American counterparts’); *United States v. Maturo*, 982 F.2d 57, 61 (2d Cir. 1992)(“where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials” or “where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials”); *United States v. Mitro*, 880 F.2d 1480, 1482 (1st Cir. 1989)(“where American agents participated in the foreign search or the foreign officers acted as agents for their American counterparts”); *United States v. Mount*, 757 F.2d 1315, 1318 (D.C.Cir. 1985)(“if American officials or officers participated in some significant way”); *United States v. Marzano*, 537 F.2d 257, 270 (7th Cir. 1976)(declining to adopt the “joint venture” standards, but finding level of American participation in the case before it insignificant); *United States v. Morrow*, 537 F.2d 120, 139 (5th Cir. 1976)(“if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts”); each of the decisions also suggests that evidence secured in a manner which shocked the conscience of the court would be excluded.

134 The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, see, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), *reprinted*, 78 *Cong.Rec.* 4982-983 (1934)(“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.) (conferring judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples form convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes,” DoJ at §353.


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137 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

138 “This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

“This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in
The Act takes less dramatic action in section 809. It eliminates the statute of limitations for any crime of terrorism\textsuperscript{139} that risks or results in a death or serious bodily injury, 18 U.S.C. 3286. In the absence of such a risk or result, all other terrorism offenses become subject to the eight year statute of limitations unless already covered by the ten year statute for explosives and arson offenses, 18 U.S.C. 3286.

Application of the statute of limitations rarely provokes a constitutional inquiry. Nevertheless, due process precludes prosecution when it can be shown that pre-indictment delay “caused substantial prejudice to [a defendant’s] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.”\textsuperscript{140} Moreover, a judicial difference of opinion has appeared in those cases

connection with the September 11, 2001 terrorist attacks. The constitutionality of such retroactive applications of changes in statutes of limitations is well-settled, See, e.g., United States v. Grimes, 142 F.3d 1342, 1350-51 (11th Cir. 1998); People v. Frazer, 982 P.2d 180 (Cal. 1999).

“Existing federal law (18 U.S.C. §3282) bars prosecuting most offenses after five years. 18 U.S.C. §3286, as currently formulated, extends the limitation period for prosecution for certain offenses that may be committed by terrorists – but only to eight years. While this is a limited improvement over the five-year limitation period for most federal offenses, it is patently inadequate in relation to the catastrophic human and social costs that frequently follow from such crimes as destruction of aircraft (18 U.S.C. §32), aircraft hijackings ([49] U.S.C. §§46502, 46504-06, attempted political assassinations (18 U.S.C. §§351, 1116, 1751), or hostage taking (18 U.S.C. §1203). These are not minor acts of misconduct which can properly be forgiven or forgotten merely because the perpetrator has avoided apprehension for some period of time. Anomalously, existing law provides longer limitation periods for such offenses as bank frauds and certain artwork thefts (18 U.S.C.§3293-94) than it does for crimes characteristically committed by terrorists.

“In many American jurisdictions, the limitation periods for prosecution for serious offenses are more permissible than those found in federal law, including a number of states which have no limitation period for the prosecution of felonies generally. While this section does not go so far, it does eliminate the limitation period for prosecution of the major crimes that are most likely to be committed by terrorists (‘Federal terrorism offenses’), as specified in section 309 of this bill,” DoJ at 301.

\textsuperscript{139} As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arsen within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 (sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period.\footnote{United States v. De La Matta, 266 F.3d 1275, 1286 (11th Cir. 2001); United States v. Grimes, 142 F.3d 1342, 1351 (11th Cir. 1998); United States v. Morrow, 177 F.3d 272, 294 (5th Cir. 1999); Falter v. United States, 23 F.2d 420, 425-26 (2d Cir. 1928).} Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.\footnote{People v. Frazer, 24 Cal.4th 737, 759, 982 P.2d 180, 1294, 88 Cal.Rptr.2d 312, 327 (1999).}

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (\textit{Grimes}, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (\textit{Frazer}, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

\textbf{Extraterritoriality.} Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States or elsewhere. . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.\footnote{United States v. Layton, 855 F.2d 1388 (9th Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); United States v. Benitez, 741 F.2d 1312 (11th Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).}

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnapping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control. 144

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

Victims. Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11th Victim Compensation Fund legislation before it passed the Act. Consequently, the Act’s victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 et seq., and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 et seq.

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:

• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year)(42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d) (5)), section 621(d)

• waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

• eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
• makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

• prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

• allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

• reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

• makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

• allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

• establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

Increasing Institutional Capacity. A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

1. $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)

2. Necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)

3. $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)

4. $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816

5. $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701

6. $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)

7. $5 million for DEA police training in South and Central Asia, section 1007.

**Miscellaneous.** Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might to used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act, or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b), 807.

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145 *I.e.*, Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).

express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

Victims. The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

• permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421

• extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422

105 "The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

106 "The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks.

“The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application.

“Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

“Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 31.

“Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.


107 Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

“The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

“The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death),” H.R.Rep.No. 107-236, at 68 (2001).

108 Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien’s 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien’s 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
• a denial of benefits of the Act to terrorists and their families, section 427

• authority for the Attorney General to establish evidentiary standards to implement the alien victim provisions of the Act, section 426.

Other Crimes, Penalties, & Procedures

New Crimes. The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department,\(^{109}\) the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offenses for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents, 18 U.S.C. 175b.\(^{110}\) Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.\(^{111}\)

\(^{109}\) “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government's ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . . .” DoJ at §305.

\(^{110}\) The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

\(^{111}\) “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2) (“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.112

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D). The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

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112 U.S. Const. Art.III, §2, cl.3 (“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . . .”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . .”); United States v. Cabrales, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from Cabrales when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnaping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999)(“By way of comparison, last Term in [Cabrales] we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).
The Justice Department sought the expansion along with the enlargement of the predicate offense list, "18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of `material support or resources' is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill ("Federal terrorism offenses")."

Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.


113 The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of ‘material support or resources’ is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’),” DoJ at 306.


115 "The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill (‘Federal terrorism offenses’) is used in identifying the relevant crimes,” DoJ, at §304.

**New Penalties.** The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. §3571(b),(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense.\(^\text{117}\)

The proposal, however, failed to identify the critical elements that would trigger the alternative.\(^\text{118}\) Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

- for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

- for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

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\(^{117}\) “Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersede lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,” *DoJ*, at §302.

\(^{118}\) “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense;” *Draft* at §302.
• for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;

• for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;

• for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;

• for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and

• for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism.\(^\text{119}\) Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:

• arson committed within a federal enclave, 18 U.S.C. 81;
• killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);
• destruction of communications facilities, 18 U.S.C. 1362;
• destruction of property within a federal enclave, 18 U.S.C. 1363;
• causing a train wreck, 18 U.S.C. 1922;
• providing material support to a terrorist, 18 U.S.C. 2339A;
• torture committed overseas under color of law, 18 U.S.C. 2340A;
• sabotage of a nuclear facility, 42 U.S.C. 2284;

\(^\text{119}\) “The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §§846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

“This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.
• interfering with a flight crew within U.S. special aircraft jurisdiction, 49 U.S.C. 46504;
• carrying a weapon or explosive abroad an aircraft within U.S. special aircraft jurisdiction, 49 U.S.C. 46505; and
• sabotage of interstate gas pipeline facilities, 49 U.S.C. 60123.

When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years). 120 The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission), 121 a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

120 Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

121 “Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.

“This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders).\(^\text{122}\)

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

**Other Procedural Adjustments.** In other procedural adjustments designed to facilitate criminal investigations, the Act:

- increases the rewards for information in terrorism cases
- expands the Posse Comitatus Act exceptions
- authorizes “sneak and peek” search warrants
- permits nationwide and perhaps worldwide execution of warrants in terrorism cases
- eases government access to confidential information
- allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
- lengthens the statute of limitations applicable to crimes of terrorism
- clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
- adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B.\(^\text{123}\)

\(^{122}\) It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, e.g., damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

\(^{123}\) When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001) (remarks of Rep. Sensenbrenner); for general background, see, Doyle, McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys, CRS REP.NO. RL30060 (Dec. 14, 2001).
Rewards. The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L.105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism.124

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

Posse Comitatus. The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.125

Delayed notification of a search (sneak and peek). Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take

124 The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct threat assessments for federal agencies, and to reimburse federal agencies for the costs of detaining terrorist suspects overseas.

125 For a general discussion of the Posse Comitatus Act, see, Doyle, *The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law*, CRS REP.NO. 95-964 (June 1, 2000).
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, Richards v. Wisconsin, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, Wilson v. Arkansas, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, Dalia v. United States, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, cf., United States v. Miller, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, United States v. Freitas, 800 F.2d 1451, 1453 (9th Cir. 1986).  

126 The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in United States v. New York Telephone Co., 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth
Amendment, demands that surreptitious entries be closely circumscribed,” United States v. Freitas (Freitas I), 800 F.2d 1451, 1455-456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, United States v. Freitas (Freitas II), 856 F.2d 1425 (9th Cir. 1988).

“No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in Dalia v. United States, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in Dalia, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property. . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. See United States v. New York Telephone Co., 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . . Although the Freitas I court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in United States v. Villegas, 899 F.2d 1324 (1999). Although the Freitas I court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in Villegas. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the Freitas I court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” United States v. Pangburn, 983 F.2d 449, 453-55 (2d Cir. 1993).

In Simons, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
The Justice Department urged that the conflict be resolved with a uniform rule which permitted sneak and peek warrants under the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage.\textsuperscript{129}

The Act, in section 213, stops short of the Justice Department proposal. Characterized as a codification of the Second Circuit decision, 147 Cong. Rec. H7197 (daily ed. Oct. 23, 2001), the Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C. 3103a. Its sneak and peek authorization reaches all federal search and seizure warrants where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (e.g., risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (e.g., jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, i.e., in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation.\textsuperscript{130} The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

\textsuperscript{129} “The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities,” DoJ at §353.

\textsuperscript{130} Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department's initial proposal, the Department's justification does not address the question.
constitutionally “reasonable,” that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

**Nationwide terrorism search warrants.** The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either “within or outside the district,” (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases. The provision may anticipate execution both in this country and overseas. The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage. Neither Rule 41 nor any other provision of federal

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131 The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

132 The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

133 *United States v. Barona*, 56 F.3d 1087, 1092 (9th Cir. 1995)(“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994)(“if American law enforcement officials substantially participated in the search or if the
If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person” within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings.” F.R.Crim.P. 41, Advisory Committee Notes: 1990 Amendment. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

**Terrorists' DNA.** The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards *per se.* Existing federal law allowed the Attorney General to collect samples from foreign officials conducting the search were actually acting as agents for their American counterparts’); *United States v. Maturo,* 982 F.2d 57, 61 (2d Cir. 1992) (“where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials” or “where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials”); *United States v. Mitro,* 880 F.2d 1480, 1482 (1st Cir. 1989) (“where American agents participated in the foreign search or the foreign officers acted as agents for their American counterparts”); *United States v. Mount,* 757 F.2d 1315, 1318 (D.C.Cir. 1985) (“if American officials or officers participated in some significant way”); *United States v. Marzano,* 537 F.2d 257, 270 (7th Cir. 1976) (declining to adopt the “joint venture” standards, but finding level of American participation in the case before it insignificant); *United States v. Morrow,* 537 F.2d 139 (5th Cir. 1976) (“if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts”); each of the decisions also suggests that evidence secured in a manner which shocked the conscience of the court would be excluded.

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134 The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, see, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), reprinted, 78 Cong.Rec. 4982-983 (1934) (“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.) (conferring judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

135 *Roe v. Marcotte,* 193 F.3d 72 (2d Cir. 1999); *Shaffer v. Saffle,* 148 F.3d 1180 (10th Cir. 1998); *Rise v. Oregon,* 59 F.3d 1556 (9th Cir. 1995); *Jones v. Murray,* 962 F.2d 302 (4th Cir. 1992).
federal prisoners convicted of a variety of violent crimes, 42 U.S.C. 14135a. The Act enlarges the predicate offense list to include any crime of violence or any terrorism offense, section 503.136

**Access to Educational Records.** Finally, the Act calls for an ex parte court order procedure under which senior Justice Department officials may seek authorization to collect educational records relevant to an investigation or prosecution of a crime of terrorism, section 507 (as an exception to the confidentiality requirements of the General Education Provisions Act, 20 U.S.C. 1232g), section 508 (as an exception to the confidentiality requirements of the National Education Statistics Act, 20 U.S.C. 9007).

**Statute of Limitations.** Prosecution for murder in violation of federal law may be initiated at any time, 18 U.S.C. 3281. A five year statute of limitations applied for most other federal crimes before passage of the Act, with a few exceptions. Among the relevant exceptions were an eight year statute of limitations for several terrorist offenses, 18 U.S.C. 3286,137 and a ten year statute of limitations for a few arson and explosives offenses, 18 U.S.C. 3295. The Justice Department recommended the elimination of a statute of limitations in terrorism cases.138

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136 Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples form convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes,” DoJ at §353.

For a general discussion, see, Fischer, DNA Identification: Applications and Issues, CRS REP.NO. RL30717 (Jan. 12, 2001).

137 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

138 “This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

“This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in
The Act takes less dramatic action in section 809. It eliminates the statute of limitations for any crime of terrorism\(^{139}\) that risks or results in a death or serious bodily injury, 18 U.S.C. 3286. In the absence of such a risk or result, all other terrorism offenses become subject to the eight year statute of limitations unless already covered by the ten year statute for explosives and arson offenses, 18 U.S.C. 3286.

Application of the statute of limitations rarely provokes a constitutional inquiry. Nevertheless, due process precludes prosecution when it can be shown that pre-indictment delay “caused substantial prejudice to [a defendant’s] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.”\(^{140}\) Moreover, a judicial difference of opinion has appeared in those cases

connection with the September 11, 2001 terrorist attacks. The constitutionality of such retroactive applications of changes in statutes of limitations is well-settled, See, e.g., United States v. Grimes, 142 F.3d 1342, 1350-51 (11th Cir. 1998); People v. Frazer, 982 P.2d 180 (Cal. 1999).

“Existing federal law (18 U.S.C. §3282) bars prosecuting most offenses after five years. 18 U.S.C. §3286, as currently formulated, extends the limitation period for prosecution for certain offenses that may be committed by terrorists – but only to eight years. While this is a limited improvement over the five-year limitation period for most federal offenses, it is patently inadequate in relation to the catastrophic human and social costs that frequently follow from such crimes as destruction of aircraft (18 U.S.C. §32), aircraft hijackings ([49] U.S.C. §§46502, 46504-06, attempted political assassinations (18 U.S.C. §§351, 1116, 1751), or hostage taking (18 U.S.C. §1203). These are not minor acts of misconduct which can properly be forgiven or forgotten merely because the perpetrator has avoided apprehension for some period of time. Anomalously, existing law provides longer limitation periods for such offenses as bank frauds and certain artwork thefts (18 U.S.C. §§3293-94) than it does for crimes characteristically committed by terrorists.

“In many American jurisdictions, the limitation periods for prosecution for serious offenses are more permissible than those found in federal law, including a number of states which have no limitation period for the prosecution of felonies generally. While this section does not go so far, it does eliminate the limitation period for prosecution of the major crimes that are most likely to be committed by terrorists (‘Federal terrorism offenses’), as specified in section 309 of this bill,” DoJ at 301.

\(^{139}\) As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1715 (train wrecking); 1992 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 (sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period.\textsuperscript{141} Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.\textsuperscript{142}

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (\textit{Grimes}, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (\textit{Frazer}, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

\textbf{Extraterritoriality}. Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States or elsewhere . . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.\textsuperscript{143}

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnapping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.

\textsuperscript{141} \textit{United States v. De La Matta}, 266 F.3d 1275, 1286 (11\textsuperscript{th} Cir. 2001); \textit{United States v. Grimes}, 142 F.3d 1342, 1351 (11\textsuperscript{th} Cir. 1998); \textit{United States v. Morrow}, 177 F.3d 272, 294 (5\textsuperscript{th} Cir. 1999); \textit{Falter v. United States}, 23 F.2d 420, 425-26 (2d Cir. 1928).

\textsuperscript{142} \textit{People v. Frazer}, 24 Cal.4th 737, 759, 982 P.2d 180, 1294, 88 Cal.Rptr.2d 312, 327 (1999).

\textsuperscript{143} \textit{United States v. Layton}, 855 F.2d 1388 (9\textsuperscript{th} Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); \textit{United States v. Benitez}, 741 F.2d 1312 (11\textsuperscript{th} Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.  

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

Victims. Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11th Victim Compensation Fund legislation before it passed the Act. Consequently, the Act’s victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 et seq., and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 et seq.

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:

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• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year)(42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d)(5)), section 621(d)

• waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

• eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
• makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

• prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

• allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

• reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

• makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

• allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

• establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

**Increasing Institutional Capacity.** A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

- $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)

- necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)

- $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)

- $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816

- $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701

- $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)

- $5 million for DEA police training in South and Central Asia, section 1007.

**Miscellaneous.** Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might to used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act, or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b), 807.

145 *I.e.*, Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).

This invention appertains to toys and more particularly to a wheeled figured toy.

One of the primary objects of my invention is to provide a novel wheeled toy simulating the appearance of an animal, such as a rabbit, provided with automatic means for depositing candy eggs on the ground during the pulling of the toy over a surface.

Another salient object of my invention is to provide a novel wheeled toy figure so constructed that the same will not only deposit eggs as the same is being drawn over the ground, but it will also have a jumping animated appearance.

A further important object of my invention is to provide a wheeled toy embodying pivotally connected front and rear sections with means operatively connecting said sections together to produce the animated jumping effect.

A still further object of my invention is the formation of a hopper in the rear section of the figure for receiving the candy eggs with a ground wheel supporting said rear section having a dispensing notch in its periphery for receiving and carrying one of the candy eggs at a time from the hopper and for depositing such egg on the ground.

A still further important object of my invention is the provision of novel means for actuating the mechanism for giving the figure the jumping animated effect from said ground wheel.

A still further object of my invention is to provide a child's toy of the above character, which will be durable and efficient in use, one that will be simple and easy to manufacture and one which can be placed upon the market at a reasonable cost.

With these and other objects in view, the invention consists in the novel construction, arrangement and form of parts, as will be hereinafter more specifically described, claimed and illustrated in the accompanying drawings, in which:

Figure 1 is a side elevational view of my novel wheeled toy, parts of the view being shown broken away to illustrate structural detail.

Figure 2 is a top plan view of my toy.

Figure 3 is an enlarged, transverse, sectional view through the toy taken on the line 3--3 of Figure 1 looking in the direction of the arrows.

Figure 4 is a view similar to Figure 1, but taken on a smaller scale and showing a different position of the toy.

Figure 5 is a view similar to Figure 4, but showing a different position of the figure and immediately after a candy egg has been deposited on the ground.

Referring to the drawing in detail, wherein similar reference characters designate corresponding parts throughout the several views, the letter "T" generally indicates my novel toy and the same includes a front main section 10 and a rear section 11. These sections 10 and 11 are pivotally connected together by a pivot pin 12, for a purpose which will later appear.

The toy is formed to simulate the appearance of a known object such as a hen or some animal. In the drawings, for the purpose of illustration, I have shown the toy constructed to simulate the appearance of a rabbit. Hence, the front section 10 includes a body portion 13, a head 14 and forwardly projected front legs 15. An axle 16 is carried by the front legs and ground front wheels 17 are mounted on the axle. This front section 10, with the exception of the axle 16 and wheels 17, is preferably cut from a single block of wood.

The rear section 11 is shaped to simulate the hind quarters of the rabbit and hence, includes an upper main section 18 and depending rear legs 19.

In accordance with my invention, the rear section 11 includes side plates 20 secured to and held in spaced relation by a block 21. This block 21 is so formed as to provide, in conjunction with the side plates 20, a receptacle or hopper 22 for the reception of the candy eggs. The upper end of the hopper can be left partly open so as to permit the filling of the hopper with the eggs and, if desired, the opening can be closed by a suitable door. The lower end of the hopper is provided with an outlet opening 23 for the eggs.

The side plates 20 extend below the spacing block 21 and the side plates below the blocks rotatably support a rear axle 24. Keyed, or otherwise secured, to the rear axle is a rear ground wheel 25 and this wheel includes circular side wheel discs 26 and a central cylindrical body or spool 27. The spool or body 27 has formed in its periphery a dispensing notch 28. Normally the spool or body 27 closes the dispensing opening 23 of the hopper, but as the rear wheel 25 rotates and the dispensing notch 28 passes the hopper, a candy egg will drop into said notch and upon continued rotation of the wheel, and as the notch passes the ground, the egg will be deposited on the ground.

Also keyed, or otherwise secured, to the rear axle 24 is a crank 29 and the outer end of the crank has pivotally connected thereto a pitman or link 30. The forward end of this link is piv-
totally connected, as at 31, to the front section 10 of the figure forwardly of, and below, the pivot 19.

The toy is adapted to be pulled over the ground by a pull-cord and during the movement of the figure over the ground the wheel 25 will be rotated and each time the dispensing notch 28 passes the hopper an egg will be picked up from said hopper and deposited upon the ground. During the turning of the rear ground wheel the crank 29 will be turned which will actuate the link 30 causing the sections 10 and 11 of the figure to pivot one on the other which will give a jumping or running effect to the rabbit.

Thus it can be seen that I have provided a novel animated figure which will give a child a maximum amount of amusement and which will deposit eggs on the ground and thus create in the minds of children the laying of eggs by an Easter rabbit.

Attention is called to the fact that the side plates 20 of the rear section 11 project forwardly of the block 21 and that these side plates receive therebetween the rear section of the body portion 13 of the front part 10 of the figure.

Changes in details may be made without departing from the spirit or the scope of my invention, but what I claim as new is:

1. A wheeled toy comprising a front and a rear section pivotally connected together, front ground wheels carried by the front section and a main rear ground wheel carried by the rear section, means operatively connecting the rear ground wheel to the front section and swinging said sections on their pivot during the travel of the toy over the ground, a hopper formed in one of said sections for the reception of candy eggs and means controlled to operatively rotate a main rear ground wheel for depositing one candy egg at a time on the ground from said hopper.

2. A wheeled toy shaped to simulate the appearance of an animal, or the like, comprising a front and a rear section, means pivotally connecting said sections together, front ground wheels for supporting the front section, a main rear ground wheel supporting the rear section, a crank rotatable with the rear ground wheel, a link pivotally connected to the crank and to the front section, a hopper for the reception of candy eggs in said rear section and means controlled by said rear ground wheel for receiving one candy egg at a time from the hopper and for depositing the same on the ground during the travel of the toy over the ground.

3. A wheeled toy constructed to simulate the appearance of an animal, or the like, comprising a front section, a rear section, means pivotally connecting such sections together, a front ground wheel supporting the front section, a main rear ground wheel assembly supporting the rear section, a hopper for the reception of candy eggs in said rear section having an outlet opening, a portion of said rear ground wheel assembly normally closing said opening and having a dispensing notch for movement past said opening during the rotation of said wheel assembly and receiving one candy egg at a time from the hopper and for depositing the same on the ground, a crank rotatable with the rear ground wheel assembly, and a link pivotally connecting the crank to the front section.

4. A wheeled toy constructed to simulate the appearance of an animal, or the like, comprising a body, front wheels supporting the front of the body, a rear ground wheel assembly supporting the rear of the body so that the toy can be pulled over the ground, a hopper in said body having a bottom outlet opening, said wheel assembly including a cylindrical portion normally closing said opening and having a dispensing slot moveable past the opening for receiving candy eggs therefrom.

5. A wheeled toy constructed to simulate the appearance of an animal, or the like, comprising a front section formed from a single piece of material, front wheels rotatably carried by said front section, a rear section including spaced plates and a spacing block between said plates for securing the same together, said spacing block and plates forming a hopper for the reception of candy eggs, said hopper having an outlet opening, said plates extending forwardly of, and below, the block, the forward ends of the plates receiving the front section, a pivot pin connecting the forward ends of said plates to the front section, a rear ground wheel assembly rotatably mounted between the lower ends of the side plates having a cylindrical portion normally closing the opening in the hopper and provided with a dispensing notch moveable past the opening for receiving candy eggs from the hopper, a crank rotatable with the rear ground wheel assembly, and a link pivotally connected to the crank and to said front section.

DANIEL E. GUMB.
The USA PATRIOT Act: A Legal Analysis

April 15, 2002

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The USA PATRIOT Act: A Legal Analysis

Summary

The USA PATRIOT Act passed in the wake of the September 11 terrorist attacks. It flows from a consultation draft circulated by the Department of Justice, to which Congress made substantial modifications and additions. The stated purpose of the Act is to enable law enforcement officials to track down and punish those responsible for the attacks and to protect against any similar attacks.

The Act grants federal officials greater powers to trace and intercept terrorists’ communications both for law enforcement and foreign intelligence purposes. It reenforces federal anti-money laundering laws and regulations in an effort to deny terrorists the resources necessary for future attacks. It tightens our immigration laws to close our borders to foreign terrorists and to expel those among us. Finally, it creates a few new federal crimes, such as the one outlawing terrorists’ attacks on mass transit; increases the penalties for many others; and institutes several procedural changes, such as a longer statute of limitations for crimes of terrorism.

Critics have suggested that it may go too far. The authority to monitor e-mail traffic, to share grand jury information with intelligence and immigration officers, to confiscate property, and to impose new book-keeping requirements on financial institutions, are among the features troubling to some.

The Act itself responds to some of these reservations. Many of the wiretapping and foreign intelligence amendments sunset on December 31, 2005. The Act creates judicial safeguards for e-mail monitoring and grand jury disclosures; recognizes innocent owner defenses to forfeiture; and entrusts enhanced anti-money laundering powers to those regulatory authorities whose concerns include the well being of our financial institutions.

This report, stripped of its citations and footnotes, is available in an abbreviated form as The USA PATRIOT Act: A Sketch, CRS Rep.No. RS21203. In addition, much of the information contained here may also be found under a different arrangement in a report entitled, Terrorism: Section by Section Analysis of the USA PATRIOT Act, CRS Rep.No. RL31200 (Dec. 10, 2001). A wider array of terrorism-related analysis appears on the CRS terrorism electronic briefing book page.
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The USA PATRIOT Act: A Legal Analysis

Introduction

Congress passed the USA PATRIOT Act (the Act) in response to the terrorists’ attacks of September 11, 2001. The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to further close our borders to foreign terrorists and to detain and remove those within our borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it is not without safeguards, critics contend some of its provisions go too far. Although it grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough.


1 P.L. 107-56, 115 Stat. 272 (2001); its full title is the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT).”

2 H.R. 2975 was introduced by Representative Sensenbrenner for himself and Representatives Conyers, Hyde, Coble, Goodlatte, Jenkins, Jackson-Lee, Cannon, Meehan, Graham, Bachus, Wexler, Hostettler, Keller, Issa, Hart, Flake, Schiff, Thomas, Goss, Rangel, Berman and Lofgren; S.1510 by Senator Daschle for himself and Senators Lott, Leahy, Hatch, Graham, Shelby and Sarbanes.

3 H.R. 3004 was introduced by Representative Oxley for himself and Representatives LaFalce, Leach, Maloney, Roukema, Bentsen, Hooley, Bereuter, Baker, Bachus, King, Kelly, Gillmore, Cantor, Riley, Latourette, Green (of Wisconsin), and Grucci; and reported out of the House Financial Services Committee with amendments on October 15, 2001, H.R.Rep.No. 107-250. H.R. 3004, as reported out, included Internet gambling amendments that were not included in H.R. 2975/H.R.3108.
ed. Oct. 24, 2001), and H.R. 3162 was sent to the President who signed it on October 26, 2001.

Criminal Investigations: Tracking and Gathering Communications

A portion of the Act addresses issues suggested originally in a Department of Justice proposal circulated in mid-September. The first of its suggestions called for amendments to federal surveillance laws, laws which govern the capture and tracking of suspected terrorists’ communications within the United States. Federal law features a three tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications.

The tiers reflected the Supreme Court’s interpretation of the Fourth Amendment’s ban on unreasonable searches and seizures. The Amendment protects private conversations, Berger v. New York, 388 U.S. 41 (1967); Katz v. United States, 389 U.S. 347 (1967). It does not cloak information, even highly personal information, for which there is no individual justifiable expectation of privacy, such as telephone company records of calls made to and from an individual’s home, Smith v. Maryland, 442 U.S. 735 (1979), or bank records of an individual’s financial dealings, United States v. Miller, 425 U.S. 435 (1976).

Congress responded to Berger and Katz, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications, 18 U.S.C. 2511. At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious

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4 The Department’s proposal, dated September 20, 2001, came with a brief section by section analysis. Both the proposal (Draft) and analysis (DoJ) were printed as an appendix in Administration’s Draft Anti-Terrorism Act of 2001, Hearing Before the House Comm. on the Judiciary, 107th Cong., 1st Sess. 54 (2001).


6 “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,” U.S. Const. Amend. IV.

7 Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
criminal cases. When approved by senior Justice Department officials, law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.

8 “The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of” one or more predicate offense, 18 U.S.C. 2516.

9 The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement), 1751 (presidential and presidential staff assassination, kidnapping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnaping, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or naturalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations, 18 U.S.C. 2518. The court notifies the parties to any conversations seized under the order after the order expires, 18 U.S.C. 2518(8).

Below Title III, the next tier of privacy protection covers some of those matters which the Supreme Court has described as beyond the reach of the Fourth Amendment protection – telephone records, e-mail held in third party storage, and the like, 18 U.S.C. 2701-2709 (Chapter 121). Here, the law permits law enforcement access, ordinarily pursuant to a warrant or court order or under a subpoena in some cases, but in connection with any criminal investigation and without the extraordinary levels of approval or constraint that mark a Title III interception, 18 U.S.C. 2703.

Least demanding and perhaps least intrusive of all is the procedure that governs court orders approving the government’s use of trap and trace devices and pen registers, a kind of secret “caller id”, which identify the source and destination of calls made to and from a particular telephone, 18 U.S.C. 3121-3127 (Chapter 206). The orders are available based on the government's certification, rather than a finding of the court, that the use of the device is likely to produce information relevant to the investigation of a crime, any crime, 18 U.S.C. 3123. The devices record no more than the identity of the participants in a telephone conversation, but neither the orders nor the results they produce need ever be revealed to the participants.

The Act modifies the procedures at each of the three levels. It:

10 Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
• permits pen register and trap and trace orders for electronic communications (e.g., e-mail)
• authorizes nationwide execution of court orders for pen registers, trap and trace devices, and access to stored e-mail or communication records
• treats stored voice mail like stored e-mail (rather than like telephone conversations)
• permits authorities to intercept communications to and from a trespasser within a computer system (with the permission of the system’s owner)
• adds terrorist and computer crimes to Title III’s predicate offense list
• reenforces protection for those who help execute Title III, ch. 121, and ch. 206 orders
• encourages cooperation between law enforcement and foreign intelligence investigators
• establishes a claim against the U.S. for certain communications privacy violations by government personnel
• terminates the authority found in many of the these provisions and several of the foreign intelligence amendments with a sunset provision (Dec. 31, 2005).

Pen Registers and Trap and Trace Devices. In section 216, the Act allows court orders authorizing trap and trace devices and pen registers to be used to capture source and addressee information for computer conversations (e.g., e-mail) as well as telephone conversations, 18 U.S.C. 3121, 3123. In answer to objections that e-mail header information can be more revealing than a telephone number, it creates a detailed report to the court, 18 U.S.C. 3123(a)(3).

11 “Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public the agency shall ensure that a record will be maintained which will identify – (i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of the such device.”

“(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof),” section 216(b)(1).
The use of pen registers or trap and trace devices was limited at one time to the judicial district in which the order was issued, 18 U.S.C. 3123 (2000 ed.). Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States, 18 U.S.C. 3123(b)(1)(C), 3127(2).12

Communications Records and Stored E-Mail. With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber, 18 U.S.C. 2703(a),(b). A warrant will also suffice to seize records describing telephone and other communications transactions without customer notice, 18 U.S.C. 2703(c). In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation, officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records, 18 U.S.C. 2703(b),(c). They can obtain a limited amount of record information (subscribers’ names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena, 18 U.S.C. 2703(c)(1)(C). There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial, 18 U.S.C. 2705.

In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider’s customer records, 18 U.S.C. 2703(c)(1)(C).13

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.

12 The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” DoJ at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

13 Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user's true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” DoJ at §107.
Previously, only a federal court in the district in which the e-mail was stored could issue the order. Under section 220, federal courts in the district where an offense under investigation occurred may issue orders applicable “without geographic limitation,” 18 U.S.C. 2703.\(^\text{14}\)

The Act, in section 209, treats voice mail like e-mail, that is, subject to the warrant or court order procedure, rather than to the more demanding coverage of Title III once required, United States v. Smith, 155 F.3d 1050, 1055-56 (9th Cir. 1998).

Finally, the Act resolves a conflict between chapter 121 and the federal law governing cable companies. Government entities may have access to cable company customer records only under a court order following an adversary hearing if they can show that the records will evidence that the customer is or has engaged in criminal activity, 47 U.S.C. 511(h). When cable companies began offering telephone and other communications services the question arose whether the more demanding cable rules applied or whether law enforcement agencies were entitled to ex parte court orders under the no-notice procedures applicable to communications providers.\(^\text{15}\) The Act makes it clear that the cable rules apply when cable television viewing services are

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\(^{14}\) Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

\(^{15}\) See e.g., DoJ at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement’s access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

**Electronic Surveillance.** To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202. A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(i). Yet only the interloper's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.17

**Criminal Investigators' Access to Foreign Intelligence Information.**
The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism. It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that “the purpose for the surveillance is to obtain foreign intelligence information,” 50 U.S.C. 1804(a)(7)(B)(2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps “the purpose” might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation

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16 18 U.S.C. 229 (chemical weapons), 2332(terrorist acts of violence committed against Americans overseas), 2332a(use of weapons of mass destruction), 2332b(acts of terrorism transcending national boundaries), 2332d(financial transactions with countries which support terrorists), 2339A(providing material support to terrorists), and 2339B(providing material support to terrorist organizations).

17 “Because service providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves as permitted under current law, they often have no way to exercise their rights to protect themselves from unauthorized attackers. Moreover, such attackers can target critical infrastructures and engage in cyberterrorism,” DoJ at §106. Elsewhere the Act defines “electronic surveillance” for purposes of the Foreign Intelligence Surveillance Act (FISA) to emphasize that the law enforcement authority for this intruder surveillance does not confer similar authority for purposes of foreign intelligence gathering, section 1003 (50 U.S.C. 1801(f)(2)).

Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment's warrant clause. It is here that the “primary purpose” notion originated. In United States v. Truong Dinh Hung, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, “as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.” Subsequent case law, however, is not as clear as it might be: see e.g., United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984) (“FISA permits federal officials to obtain orders authorizing electronic surveillance ‘for the purpose of obtaining foreign intelligence information.’ The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying official’s belief that the information sought is the type of foreign intelligence information described”); United States v. Pelton, 835 F.2d 1067, 1075-76 (4th Cir. 1987) (“We also reject Pelton’s claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial”); United States v. Sarkissian, 841 F.2d 959, 907-8 (9th Cir. 1988) (“Defendants rely on the primary purpose test articulated in United States v. Truong Dinh Hung. . . . One other court has applied the primary purpose test. Another court has rejected it . . . distinguishing Truong. A third court has declined to decide the issue. We also decline to decide the issue”); United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1991) (“Appellants attack the government's surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance”).

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20 “Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” DoJ at §153.
demanding standard than the “a purpose” threshold proposed by the Justice Department, but a clear departure from the original “the purpose” entry point. FISA once described a singular foreign intelligence focus prerequisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k), 1825(k).

**Protective Measures.** The Act reenforces two kinds of safeguards, one set designed to prevent abuse and the other to protect those who assist the government. The sunset clause is perhaps the best known of the Act’s safeguards. Under the direction of section 224, many of the law enforcement and foreign intelligence authorities granted by the Act expire as of December 31, 2005. The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter

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21 “(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. (2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, infra, quoting, 50 U.S.C. 1801.

22 “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210[subpoenas for communications provider customer records], 211[access to cable company communication service records], 213[sneak and peek], 216[pen register and trap and trace device amendments], 221[trade sanctions], and 222[assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005. “(b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers’ communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices). Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees, but could not recover against the United States. Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice’s Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government’s request until a court order authorizing access can be obtained. Another allows providers to disclose customer records to protect the provider’s rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others. A third section,

26 Prior law already granted service providers immunity for disclosure of customer records in compliance with a court access order, 18 U.S.C. 2703(f).
27 “Existing law contains no provision that allows providers of electronic communications service to disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies that threaten death or serious bodily injury. This section amends 18 U.S.C. §2702 to authorize such disclosures if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.

“Current law also contains an odd disconnect: a provider may disclose the contents of the customer’s communications in order to protect its rights or property but the current statute does not expressly permit a provider to voluntarily disclose non-content records (such as a subscriber's login records). 18 U.S.C. 2702(b)(5). This problem substantially hinders the ability of providers to protect themselves from cyber-terrorists and criminals. Yet the right to disclose the contents of communications necessarily implies the less intrusive ability to disclose non-content records. In order to promote the protection of our nation's critical infrastructures, this section's amendments allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems,” DoJ at
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

Foreign Intelligence Investigations

Although both criminal investigations and foreign intelligence investigations are conducted in the United States, criminal investigations seek information about unlawful activity; foreign intelligence investigations seek information about other countries and their citizens. Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough.

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA), something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President's authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, United States v. United States District Court, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage

§110.

28 Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

29 Thus in the name of assisting in the execution of Title III, chapter 121, or chapter 206 order, the courts may not cite the Act as the basis for an order compelling a service provider to make system modifications or provide any other technical assistance not already required under 18 U.S.C. 2518(4), 2706, or 3124(c), see, H.R.Rep.No. 107-236, at 62-3 (2001) (emphasis added) ("This Act is not intended to affect obligations under Communications Assistance for Law Enforcement Act [which addresses law enforcement-beneficial system modifications and the compensation to be paid for the changes], nor does the act impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance").

30 E.g., As amended by section 902 of the Act, "foreign intelligence" means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities," 50 U.S.C. 401a(2)(language added by the Act in italics).

31 50 U.S.C. 1801 et seq.
In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs. There were and still are extra


33 “As used in this subchapter: (a) ‘Foreign power’ means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

“(b) ‘Agent of a foreign power’ means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (C) knowing engages in sabotage or international terrorism, or activities that are in preparation therefore, or on behalf of a foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C).

“(c) ‘International terrorism’ means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnaping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

“(d) ‘Sabotage’ means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

“(e) ‘Foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans (“United States persons,” i.e., citizens or permanent resident aliens). The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

• permits “roving” surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)

• increases the number of judges on the FISA court from 7 to 11

• allows application for a FISA surveillance or search order when gathering foreign intelligence is a significant reason for the application rather than the reason

• authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations

• sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses

• carries a sunset provision

• establishes a claim against the U.S. for certain communications privacy violations by government personnel

• expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to – (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States,” 50 U.S.C. 1801.

34 Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
**FISA.** FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases.³⁵ It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

**Search and Surveillance for Intelligence Purposes.** Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, Draft at §151.³⁶

Section 901 of the Act address a concern raised during the 106th Congress relating to the availability of the FISA orders and the effective use of information gleaned from the execution of a FISA order.³⁷ It vests the Director of Central

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³⁶ See also, DoJ at §151, “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order’s minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed (50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

³⁷ See e.g., S.Rep.No. 106-352, at 3, 6, 7 (2000)(“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application
Intelligence with the responsibility to formulate requirements and priorities for the use of FISA to collect foreign intelligence information. He is also charged with the responsibility of assisting the Attorney General in the efficient and effective dissemination of FISA generated information (50 U.S.C. 403-3(c)).

**Pen Registers and Trap and Trace Devices for Intelligence Gathering.** Section 214 grants the request of the Department of Justice by dropping requirements which limited FISA pen register and trap and trace device orders to facilities used by foreign agents or those engaged in international terrorist or clandestine intelligence activities, 50 U.S.C. 1842(c)(3)(2000 ed.). It is enough that the order is sought as part of an investigation to protect against international terrorism or clandestine intelligence activities and is not motivated solely by an American’s exercise of his or her First Amendment rights. Elsewhere (section 505), the Act drops a similar limitation for intelligence officials’ access to telephone records, 18 U.S.C.

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38 “When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevance, an additional factual showing that the communications device has been used to contact an ‘agent of a foreign power’ engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the ‘agent of a foreign power’ prong from the predication, and thus makes the FISA authority more closely track the criminal authority,” DoJ at §155.
Section 214 adjusts the language of the FISA pen register-trap and trace authority to permit its use to capture source and destination information relating to electronic communications (e.g., e-mail) as well as telephone communications, 50 U.S.C. 1842(d). The section makes it clear that requests for a FISA pen register-trap and trace order, like requests for other FISA orders, directed against Americans (U.S. persons) may not be based solely on activities protected by the First Amendment, 50 U.S.C. 1842, 1843.

Third Party Cooperation and Tangible Evidence. As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target's activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.  

Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise be entitled to confidentiality. Section 505, in response to the Justice Department's suggestion, allows FBI field offices to make the requests, see DoJ at §157 (“At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports”).
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian. The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities, in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B);
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a);
- the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a);
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v;

trained to thwart surveillance by rapidly changing hotel accommodations, cell phones, Internet accounts, etc., just prior to important meetings or communications. Under the current law, the government would have to return to the FISA Court for an order that named the new carrier, landlord, etc., before effecting surveillance. Under the proposed amendment, the FBI could simply present the newly discovered carrier, landlord, custodian or other person with a generic order issued by the Court and could then effect FISA coverage as soon as technically feasible,” DoJ at 152.


41 “The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigative contexts. The time and difficulty involved in getting such pleadings before the Court usually outweighs the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” DoJ at §156.

42 Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.\textsuperscript{43}

**Access to Law Enforcement Information.** Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community's access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, Draft at §103.\textsuperscript{44}

\textsuperscript{43} H.R.Rep.No. 107-205, at 60-1 (2001)(“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

“The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

“Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual's credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding--without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information”).

\textsuperscript{44} See also, DoJ at §103, “This section facilitates the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, Draft at §354.\textsuperscript{45}

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, Draft at §154.\textsuperscript{46}

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion.\textsuperscript{47} It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions.”

\textsuperscript{45} See also, DoJ at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.” Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officers

\textsuperscript{46} See also, DoJ at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”

\textsuperscript{47} Blair v. United States, 250 U.S. 273, 281 (1919)(the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
affairs are conducted in private and outside the presence of the court. Only the
attorney for the government, witnesses under examination, and a court reporter may
attend its proceedings, F.R.Crim.P. 6(d). Matters occurring before the grand jury are
secret and may be disclosed by the attending attorney for the government and those
assisting the grand jury only in the performance of their duties; in presentation to a
successor grand jury; or under court order for judicial proceedings, for inquiry into
misconduct before the grand jury, or for state criminal proceedings, F.R.Crim.P. 6(e).

The Act, in section 203(a), allows disclosure of matters occurring before the
grand jury to “any federal law enforcement, intelligence, protective, immigration,
national defense, or national security” officer to assist in the performance of his

Critics may protest that the change could lead to the use of the grand jury for
intelligence gathering purposes, or less euphemistically, to spy on Americans.49 The
proposal was never among those scheduled to sunset, but earlier versions of the
section followed the path used for most other disclosures of grand jury material: prior

48 These officers may receive: (1) “foreign intelligence information” that is, information
regardless whether it involves Americans or foreign nationals that “[a] relates to the ability
of the United States to protect against – (aa) actual or potential attack or other grave hostile
acts of a foreign power or an agent of a foreign power; (bb) sabotage or international
terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence
activities by an intelligence service or network of a foreign power;” or [b] “with respect to a
foreign power or foreign territory that relates to – (aa) the national defense or security of the
United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P.
6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that
is, [a] “information relating to the capabilities, intentions, or activities of foreign governments
or elements thereof, foreign organizations, or foreign persons, or international terrorist
activities” or [b] “information gathered and activities conducted, to protect against espionage,
other intelligence activities, sabotage, or assassinations conducted on behalf of foreign
governments or elements thereof, foreign organizations, or foreign persons, or international
terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in
italics).

49 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on
Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25
HARVARD JOURNAL OF LAW & PUBLIC POLICY 699, 719-20 (2002)(“There is a significant
danger that the rule permitting disclosure will be treated as the de facto authorization of an
expansion of the grand jury’s investigative role to encompass seeking material relevant only
to matters of national security, national defense, immigration, and so forth. The grand jury’s
awesome powers should not be unwittingly extended to a much wider range of issues. . .
Since the grand jury operates in secret, there are no public checks on the scope of its
investigations, and witnesses are not permitted to challenge its jurisdiction. Only the
supervising court is in a position to keep the grand jury’s investigation within proper bounds.
Requiring judicial approval of foreign intelligence and counterintelligence information
disclosures would provide a natural check against the temptation to manipulate the grand jury
to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist
Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6
(Nov. 2001)(“The grand jury secrecy rule is a rule of policy which has always had exceptions,
and it has been frequently modified. The secrecy rule has no credible claim to constitutional
stature”).
Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

Law enforcement officials may share Title III information with the intelligence community under the same conditions, section 203(b), although the grand jury and Title III sharing provisions differ in at least three important respects. The court need not be notified of Title III disclosures. On the other hand, the authority for sharing Title III information expires on December 31, 2005, section 224, and agencies and their personnel guilty of intentional improper disclosures may be subject to a claim for damages and disciplinary action, 18 U.S.C. 2520.

The third subsection of section 203 remains something of an enigma. It speaks in much the same language as its counterparts. It allows law enforcement officials to share information with the intelligence community, “notwithstanding any other provisions of law,” section 203(d). It either swallows the other subsections, or supplements them. Several factors argue for its classification as a supplement. Congress is unlikely to have crafted subsections (a), (b) and (c) only to completely

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50 Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

51 “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person’s official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification. By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

Increasing Institutional Capacity. As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a

52 Duncan v. Walker, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted) (“It is our duty to give effect, if possible, to every clause and word of a statute. United States v. Menasche, 348 U.S. 528, 538-539 (1955) (quoting Montclair v. Ramsdell, 107 U.S. 147, 152 (1883)); see also Williams v. Taylor, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); Market Co. v. Hoffman, 101 U.S. 112, 115 (1879)(As early as in Bacon's Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage.

It is not possible to conclude that Congress intended the universal subsection (d) to apply until sunset and the grand jury and Title III subsections (a), (b), and (c) to operate thereafter, because the Title III subsection expires at the same time as the universal subsection.

53 Draft at §154, “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”
computerized translation capability to be used in foreign intelligence gathering.\textsuperscript{54} Section 907 instructs the Director of the Central Intelligence, in consultation with the Director of the FBI, to report on the creation of a National Virtual Translation Center. The report is to include information concerning staffing, allocation of resources, compatibility with comparable systems to be used for law enforcement purposes, and features which permit its efficient and secure use by all of the intelligence agencies.

\textbf{Money Laundering}

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture.\textsuperscript{55} The Act bolsters federal efforts in each area.

\textbf{Regulation}. Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.\textsuperscript{56}

\begin{itemize}
\item \textsuperscript{54} “The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

“The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so,” S.Rep.No. 107-63, at 11 (2001).

\item \textsuperscript{55} For a brief overview, see, Murphy, \textit{Money Laundering: Current Law and Proposals}, CRS Rep.NO. RS21032 (Dec. 21, 2001).

\item \textsuperscript{56} See e.g., 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
\end{itemize}
**Records and Reports.** For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department's Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler's checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to files SARs as well, reflecting Congress’ view that the information provided the IRS may be valuable for other law enforcement purposes. This concern is likewise

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58 H.R.Rep.No. 107-250, at 38-9 (2001)("Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

"Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a ‘Safeguard Procedures Report’ which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

"While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement
reflected in section 357 which asks the Secretary of the Treasury to report on the Internal Revenue Service’s role in the administration of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311 et seq.), and what transfers of authority, if any, are appropriate.

Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action.\(^{59}\) Section 355 expands the immunity to cover disclosures in

authorities as the various reports mandated by the Bank Secrecy Act, which can typically be retrieved electronically from a database maintained by the Treasury Department. The differential access to the two kinds of reports is made anomalous by the fact that Form 8300 elicits much the same information that is required to be disclosed by the Bank Secrecy Act. For example, just as Form 8300 seeks the name, address, and social security number of a customer who engages in a cash transaction exceeding $10,000 with a trade or business, Currency Transaction Reports (CTRs) mandated by the Bank Secrecy Act require the same information to be reported on a cash transaction exceeding $10,000 between a financial institution and its customer”).

\(^{59}\) “Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

“First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor from civil liability applies in arbitration, as well as judicial, proceedings. Second, it amends section 5318(g)(3) to clarify the safe harbor’s coverage of voluntary disclosures (that is, those not covered by the SAR regulatory reporting requirement). The language in section 5318(g)(3)(A) providing that ‘any financial institution that *** makes a disclosure pursuant to *** any other authority *** shall not be liable to any person’ is not intended to avoid the application of the reporting and disclosure provisions of the Federal securities laws to any person, or to insulate any issuers from private rights of actions for disclosures made under the Federal securities laws.

“Subsection [351](b) amends section 5318(g)(2) of title 31—which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed—to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee’s official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
employment references to other insured depository financial institutions provided disclosure is not done with malicious intent.\textsuperscript{60}

The Financial Crimes Enforcement Network (FinCEN), a component within the Treasury Department long responsible for these anti-money laundering reporting and record-keeping requirements, 31 C.F.R. pt. 103, was administratively created in 1990 to provide other government agencies with an “intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes,” 55 Fed.Reg. 18433 (May 2, 1990).

The Act, in section 361, makes FinCEN a creature of statute, a bureau within the Treasury Department, 31 U.S.C. 310. Section 362 charges it with the responsibility of establishing a highly secure network to allow financial institutions to file required reports electronically and to permit FinCEN to provide those institutions with alerts and other information concerning money laundering protective measures, 31 U.S.C. 310 note.

\textbf{Special Measures.} In extraordinary circumstances involving international financial matters, the Act grants the Secretary of the Treasury, in consultation with other appropriate regulatory authorities, the power to issue regulations and orders involving additional required “special measures” and additional “due diligence” requirements to combat money laundering. The special measure authority, available under section 311, comes to life with the determination that particular institutions, jurisdictions, types of accounts, or types of transactions pose a primary money

\textsuperscript{60} 31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 66 (2001).
laundering concern. These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

61 31 U.S.C. 5318A. The circumstances considered in the case of a suspect jurisdiction are: evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction’s banking regulation; the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

62 The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’ including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

“Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate
business transactions.

“Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

“Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

“The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of the participant in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

“The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

“The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

“The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent’ account for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information that it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

“The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

“The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed
Due Diligence. Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.

63 See generally, H.R.Rep.No. 107-250, at 71-2 (“Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

“The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

“The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

“For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
detect and report transactions that may involve the proceeds of foreign corruption. A private bank account is defined as an account (or any combination of accounts) that requires a minimum aggregate deposit of funds or other assets of not less than $1 million; is established on behalf of one or more individuals who have a direct or beneficial ownership in the account; and is assigned to, or administered or managed by, an officer, employee or agent of a financial institution acting as a liaison between the institution and the direct or beneficial owner of the account.

“This section directs the Secretary of the Treasury, within 6 months of enactment of this bill and in consultation with appropriate Federal functional regulators, to further define and clarify, by regulation, the requirements imposed by this section”).

64 Or more exactly, a bank which has no physical presence in any country; a “physical presence” for a foreign bank is defined as “a place of business that – (i) is maintained by a foreign bank; (ii) is located at a fixed address (other than solely an electronic address) in a country in which the foreign bank is authorized to conduct banking activities, at which location the foreign bank – (I) employs 1 or more individuals on a full-time basis; and (II) maintains operating records relating to its banking activities; and (iii) is subject to inspection by the banking authority which licensed the foreign bank to conduct banking activities,” 31 U.S.C. 5318(j)(4).


66 The Act does not define “concentration accounts,” although the House Financial Services Committee report provides some incite into the section’s intent, H.R.Rep.No. 107-250, at 72-3 (2001)(“This section gives the Secretary of the Treasury discretionary authority to prescribe regulations governing the maintenance of concentration accounts by financial institutions, to ensure that these accounts are not used to prevent association of the identity of an individual customer with the movement of funds of which the customer is the direct or beneficial owner. If promulgated, the regulations are required to prohibit financial institutions from allowing clients to direct transactions into, out of, or through the concentration accounts of the institution; prohibit financial institutions and their employees from informing customers of the existence of, or means of identifying, the concentration accounts of the institution; and to establish written procedures governing the documentation of all transactions involving a concentration account.”)
Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a ‘street name’ or omnibus account in the broker-dealer's name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to ‘look through’ the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund’s customers. Thus, the fund would not be required to ‘look through’ the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

"Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature.

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

Reports to Congress. Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

“Paragraph (6) requires that Treasury's regulations prescribed under paragraph (1) become effective within one year after enactment of this bill”).

exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.  

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

International Cooperation. Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (i.e., the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.

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70 H.R.Rep.No. 107-250, at 67 (2001)(“This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury's progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

“The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime”).
**Crimes.** Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
Section 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

The definition of ‘financial institution’ in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of ‘commercial bank’ or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad—say to a Mexican bank—and laundering them through a series of financial transactions, the government conceivably could not rely on the definition of a ‘financial institution’ in 1956(c)(6) to establish that the transaction was a ‘financial transaction’ within the meaning of 1956(c)(4)(B) (defining a ‘financial transaction’ as a transaction involving the use of a ‘financial institution’), or that it was a ‘monetary transaction’ within the meaning of 1957(f) (defining ‘monetary transaction’ as, inter alia, a transaction that would be a ‘financial transaction’ under 1956(c)(4)(B)).

Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launderers the proceeds of one of the crimes set forth on a list of ‘specified unlawful activities.’ 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),” H.R.Rep.No. 107-250, at 38 (2000).

Violations of the special measures and special due diligence requirements of sections 311 and 312 are subject to both civil and criminal penalties by virtue of section 363’s amendments to 31 U.S.C. 5321(a) and 5322. The amendments authorize civil penalties and criminal fines of twice the amount of the transaction but not more than $1 million. Criminal offenders would be subject to a fine in the same amount.

71 “Section 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.\(^\text{73}\)

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents.\(^\text{74}\) They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

\(^{73}\) The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business.

“Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.

“Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive,” H.R.Rep.No. 107-250, at 54 (2001).

\(^{74}\) This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
• 18 U.S.C. 476 (taking impressions of tools used for obligations and securities) from 10 to 25 years;
• 18 U.S.C. 477 (possessing or selling impressions of tools used for obligations or securities) from 10 to 25 years;
• 18 U.S.C. 484 (connecting parts of different notes) from 5 to 10 years;
• 18 U.S.C. 493 (bonds and obligations of certain lending agencies) from 5 to 10 years;
• 18 U.S.C. 478 (foreign obligations or securities) from 5 to 20 years;
• 18 U.S.C. 479 (uttering counterfeit foreign obligations or securities) from 3 to 20 years;
• 18 U.S.C. 480 (possessing counterfeit foreign obligations or securities) from 1 to 20 years;
• 18 U.S.C. 481 (plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities) from 5 to 25 years;
• 18 U.S.C. 482 (foreign bank notes) from 2 to 20 years; and
• 18 U.S.C. 483 (uttering counterfeit foreign bank notes) from 1 to 20 years.

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

**Bulk Cash.** Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act’s bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting. 75

The section appears to be the product of reactions to the Supreme Court’s decision in United States v. Bajakian, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court’s

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75 “For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).
As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency – representing the proceeds of drug trafficking and other criminal offenses – is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad. . . .

Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United States without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute,” H.R.Rep.No. 107-250 at 36-7 (2001).
under *either* circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.\(^77\)

**Venue.** Section 1004 relies on *dicta* in *United States v. Cabrales*, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering,\(^78\) in the state and district in which the monetary transaction takes place. The Supreme Court in *Cabrales* held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in *dicta*, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.\(^79\)

**Forfeiture.** Forfeiture is the government confiscation of property as a consequence of crime.\(^80\) The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 *et seq.* (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

**Constitutional Considerations.** The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 *et seq.*, which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the

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\(^78\) “The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed,” *U.S.Const.* Art.III, §2, cl.3.

   “[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,” *U.S.Const.* Amend. VI.

\(^79\) See also, *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnaping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.

\(^80\) For general background information, see, Doyle, *Crime and Forfeiture*, CRS REP.NO. 97-139A (Oct. 11, 2000).
This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during times of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App.U.S.C. §5(b).

This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress's war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2),” DoJ at §159.

An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
excepted from the coverage of 18 U.S.C. 983. The challenge proceedings permit the court to admit evidence, such as hearsay evidence, that would not otherwise be admissible under the Federal Rules of Evidence if the evidence is reliable and if national security might be imperiled should dictates of the Federal Rules be followed, §316(b). The section recognizes the rights of claimants to proceed alternatively under the Constitution or the Administrative Procedure Act.

The Justice Department also recommended enactment of an overlapping provision which ultimately passed as section 806 of the Act without any real discussion of the relationship of the two sections. Section 806 authorizes confiscation of all property, regardless of where it is found, of any individual, entity, or organization engaged in domestic or international terrorism (as defined in 18 U.S.C. 2331), against the United States, Americans or their property, 18 U.S.C.

83 18 U.S.C. 983(i)(2)(D).

84 “The exclusion of certain provisions of Federal law from the definition of the term ‘civil forfeiture statute’ in section 983(i) of title 18, United States Code, shall not be construed to deny an owner of property the right to contest the confiscation of assets of suspected international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C) subchapter II of chapter 5 of title 5, United States Code (commonly known as the ‘Administrative Procedure Act’).” Sec. 316(c)(1).

85 “Current law does not contain any authority tailored specifically to the confiscation of terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available current forfeiture laws require detailed tracing that is quite difficult for accounts coming through the banks of countries used by many terrorists.

“This section increases the government’s ability to strike at terrorist organizations’ economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001,” DoJ, at §403. The House Report on H.R. 2975 which contained versions of both sections is no more explicit on the relation of the two sections.

86 “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
981(a)(1)(G). Section 806 as discussed below also calls for the more common confiscation of property derived from and or facilitating acts of domestic or international terrorism against the United States or its citizens. Confiscations under 806 may be challenged under the procedures of 18 U.S.C. 983, since they are not exempted there. To the extent that forfeiture under section 806 is based on international rather than domestic terrorism, claimants may also use the procedures of section 316.

Confiscation based solely on the fact that the property is owned by a criminal offender, rather than that it is derived from or facilitates some crime is fairly uncommon. It is the mark of common law forfeiture of estate. At common law, a felon forfeited all of his property. Most contemporary forfeiture statutes employ statutory forfeiture, a more familiar presence in American law, which consists of the confiscation of things whose possession is criminal, of the fruits of crime, and of the means of crime – untaxed whiskey, the drug dealer’s profits, and the rum runner’s ship.

Three characteristics set forfeiture of estate apart. The property is lost solely by reason of its ownership by a felon. All of a felon’s property is confiscated, not merely that which is related to the crime for which he is convicted. Finally, it occasions attainder which negates the felon’s right to hold property or for title to property to pass through him to his heirs. It was with this in mind, that the Framers declared that “no attainder of treason shall work corruption of blood or forfeiture exception during the life of the person attainted.” And for this reason, President Lincoln insisted that the confiscated real estate of Confederate supporters should revert their heirs at death.

of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5) (as amended by section 802 of the Act).

87 Austin v. United States, 509 U.S. 602, 611-12 (1993) (“Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture . . . . Of England’s three kinds of forfeiture, only the third took hold in the United States”).


89 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal in personam proceedings following criminal conviction as a means of accomplishing confiscation.
Neither section 106 nor 806 require conviction of the terrorist property owner. Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers. The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners. Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them. The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate

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90 Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c)(“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act”).

91 *Silesian American Corp. v. Clark*, 332 U.S. 469 (1947); *cf., Societe Internationale v. Rogers*, 357 U.S. 197, 211 (1958)(“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).

92 *Zittman v. McGrath*, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’”).

any presumption of remedial purposes. The same has been said of the applicability of the ex post facto clause.

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO. If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

Other Forfeiture Amendments. In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.

95 See e.g., United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.), 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994).
96 DoJ, at §403.
97 18 U.S.C. 1956(b). Cf., H.R.Rep.No. 107-250, at 54-5 (2001)(“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
American Bank, 191 F.3d 30 (1st Cir. 1999).

“The second provision, modeled on 18 U.S.C. 1345(b), gives the district court the power to restrain property, issue seizure warrants, or take other action necessary to ensure that a defendant in an action covered by the statute does not dissipate the assets that would be needed to satisfy a judgment.

“This section also authorizes a court, on the motion of the Government or a State or Federal regulator, to appoint a receiver to gather and protect assets needed to satisfy a judgment under sections 1956 and 957, and the forfeiture provisions in sections 981 and 982. This authority is intended to apply in three circumstances: (1) when there is a judgment in a criminal case, including an order of restitution, following a conviction for a violation of section 1956 or 1957; (2) when there is a judgment in a civil case under section 1956(b) assessing a penalty for a violation of either section 1956 or 1957; and (3) when there is a civil forfeiture judgment under section 981 or a criminal forfeiture judgment, including a personal money judgment, under section 982.

“The amendment also makes section 1956(b) applicable to violations of section 1957. It applies to conduct occurring before the effective date of the Act”).

98 18 U.S.C. 981(k). H.R.Rep.No. 107-250, at 57-8 (2001)(“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank's customers.

“Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank's correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

“The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”).
defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation.\(^99\)

Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here.\(^100\) Section 320 enlarges this provision to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements.\(^101\) This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.\(^102\)

\(^99\) Cf., H.R.Rep.No. 107-250, at 58-9 (2001) ("Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of 'substitute assets' when the defendant has placed the property otherwise subject to forfeiture 'beyond the jurisdiction of the court.' Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

"This section amends 21 U.S.C. 853 to make clear that a court in a criminal case may issue a repatriation order--either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. 853(e) to restrain property--so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both").

\(^100\) 18 U.S.C. 981(a)(1)(B).

\(^101\) H.R.Rep.No. 107-250, at 56 (2001)("This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act").

\(^102\) H.R.Rep.No. 107-250, at 59-60 (2001)("Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country.

"Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
A fugitive may not challenge a federal forfeiture.\textsuperscript{103} Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in “order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.”

to contest the restraining order could do so on the ground that 28 U.S.C. 2467 was not properly applied to the particular case, but could not oppose the restraining order on any ground that could also be raised in the proceedings pending in a foreign court. This provision prevents a litigant from taking ‘two bites at the apple’ by raising objections to the basis for the forfeiture in the Federal court that he also raised, or is entitled to raise, in the foreign court where the forfeiture action is pending. It complements the existing provision in section 2467(e) providing that the Federal court is bound by the findings of fact of the foreign court, and may not look behind such findings in determining whether to enter an order enforcing a foreign forfeiture judgment.

“This section also amends 28 U.S.C. 2467 to make clear that it is not necessary to prove that the person asserting an interest in the property received actual notice of the forfeiture proceedings. As is the case with respect to forfeitures under U.S. law, it is sufficient if the foreign nation takes steps to provide notice, in accordance with the principles of due process. See Gonzalez v. United States, 1997 WL 278123 (S.D.N.Y. 1997) (‘the [G]overnment is not required to ensure actual receipt of notice that is properly mailed’); Albajon v. Gugliotta, 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant’s identifications, and mailed after claimant released from jail, is sufficient to satisfy due process, even if claimant never received notice); United States v. Schiavo, 897 F. Supp. 644, 648 49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; due process satisfied even if he did not receive the notice).

“Finally, 28 U.S.C. 2467 is amended to authorize the enforcement of a forfeiture judgment based on any foreign offense that would constitute an offense giving rise to a civil or criminal forfeiture of the same property if the offense had been committed in the United States. This is one of two safeguards that the statute contains against the enforcement of judgments that the United States does not consider appropriate for enforcement: if the judgment is based on an act that would not constitute a crime in the United States, such as removing assets from the reach of a repressive regime, it could not be enforced. In addition, section 2467 already provides that a foreign judgment may only be enforced by a Federal court at the request of the United States, and only after the Attorney General has certified that the judgment was obtained in accordance with the principles of due process. Thus, neither a foreign Government nor a foreign private party could enforce a foreign judgment on its own under this provision.”). Note that the safeguard to which the report refers is the range of foreign offenses that will support an enforceable confiscation order, \textit{i.e.}, drug offenses and crimes on the money laundering predicate offense list, and that the amendment narrows that safeguard by adding additional foreign offenses, \textit{i.e.}, any foreign equivalent of a federal crime which would support a confiscation order.

\textsuperscript{103} 28 U.S.C. 2466.
Alien Terrorists and Victims

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

Border Protection. The border protection provisions:

• authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401

• authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402

• remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404

• authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405

• authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.

• instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007

• direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418

• express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414

• add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415

• call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416

• limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
• instruct the Attorney General to report on the feasibility of using biometric scanners to help prevent terrorists and other foreign criminals from entering the country, section 1008

• authorize appropriations of $250,000 for the FBI to determine the feasibility of providing airlines with computer access to the names of suspected terrorists, section 1009

• authorize reciprocal sharing of the State Department’s visa lookout data and related information with other nations in order to prevent terrorism, drug trafficking, slave marketing, and gun running, section 413

Detention and Removal. Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity, 8 U.S.C. 1227 (a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(iv). Aliens may be inadmissible for any number of terrorism-related reasons, 8 U.S.C. 1182(a)(3)(B). Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported.


Section 411 defines “terrorist organization” to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the Federal Register as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C.

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104 As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).
Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).

Prior law made representatives of terrorist organizations designated by the Secretary under section 219 (8 U.S.C. 1189) inadmissible, 8 U.S.C. 1182(a)(3)(B)(i)(IV)(2000 ed.). And so they remain. Section 411 makes representatives of political, social or similar groups, whose public endorsements of terrorist activities undermines U.S. efforts to reduce or eliminate terrorism, inadmissible as well, 8 U.S.C. 1882(a)(3) (B)(i)(IV).

An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in “premeditated, politically motivated violence perpetrated against noncombatant targets,” or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security or endanger some individual or the general public. The Attorney General's determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

**Victims.** The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

- permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421
- extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422

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105 “The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

106 “The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks.

“The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application.

“Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
• preservation of certain immigration benefits available to alien family members that would be otherwise lost as a consequence of the death of a victim of September 11, section 423

• limited easing of age restrictions on visas available to aliens under 21 years of age for those whose 21st birthday occurred immediately before or soon after September 11, section 424

• temporary administrative relief for alien family members of a victim of September 11 who are not otherwise entitled to relief under the Act, section 425

the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

“Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 31.

“Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.


• preservation of certain immigration benefits available to alien family members that would be otherwise lost as a consequence of the death of a victim of September 11, section 423

• limited easing of age restrictions on visas available to aliens under 21 years of age for those whose 21st birthday occurred immediately before or soon after September 11, section 424

• temporary administrative relief for alien family members of a victim of September 11 who are not otherwise entitled to relief under the Act, section 425

107 “Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

“The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

“The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death),” H.R.Rep.No. 107-236, at 68 (2001).

108 “Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien’s 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien’s 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
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• a denial of benefits of the Act to terrorists and their families, section 427

• authority for the Attorney General to establish evidentiary standards to implement the alien victim provisions of the Act, section 426.

Other Crimes, Penalties, & Procedures

New Crimes. The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department, the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offenses for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents, 18 U.S.C. 175b. Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.

109 “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . . .” DoJ at §305.

110 The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

111 “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2) (“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.112

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D). The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

112 U.S. Const. Art.III, §2, cl.3 (“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . .”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . .”); United States v. Cabrales, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from Cabrales when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnapping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999)(“By way of comparison, last Term in [Cabrales] we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).
The Justice Department sought the expansion along with the enlargement of the predicate offense list, "18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of 'material support or resources' is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill ('Federal terrorism offenses')," DoJ, at §304.

And it adds expert advice or assistance to the types of assistance that may not be provided under section 2339A. This last addition may encounter the same First Amendment vagueness problems some courts have found in assistance which takes the form of "training" and "personnel," Humanitarian Law Project v. Reno, 205 F.3d 1130, 1137-136 (9th Cir. 2000). Finally, the section announces that a prosecution for violation of section 2339A (support of terrorists) may be brought where the support is provided or where the predicate act of terrorism occurs. There may be some question whether the Constitution permits prosecution where the predicate act occurs.

Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.


113 The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of 'material support or resources' is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill ('Federal terrorism offenses'),” DoJ at 306.


115 “The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill ('Federal terrorism offenses') is used in identifying the relevant crimes,” DoJ, at §304.

New Penalties. The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. 3571(b),(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense.117

The proposal, however, failed to identify the critical elements that would trigger the alternative.118 Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

- for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;
- for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

117 “Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersede lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,” DoJ, at §302.

118 “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense,” Draft at §302.
• for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;

• for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;

• for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;

• for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and

• for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism. Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:

• arson committed within a federal enclave, 18 U.S.C. 81;

• killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);

• destruction of communications facilities, 18 U.S.C. 1362;

• destruction of property within a federal enclave, 18 U.S.C. 1363;

• causing a train wreck, 18 U.S.C. 1922;

• providing material support to a terrorist, 18 U.S.C. 2339A;

• torture committed overseas under color of law, 18 U.S.C. 2340A;

• sabotage of a nuclear facility, 42 U.S.C. 2284;

119 “The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §§846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

“This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.
• interfering with a flight crew within U.S. special aircraft jurisdiction, 49 U.S.C. 46504;
• carrying a weapon or explosive abroad an aircraft within U.S. special aircraft jurisdiction, 49 U.S.C. 46505; and
• sabotage of interstate gas pipeline facilities, 49 U.S.C. 60123.

When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years).¹²⁰ The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission),¹²¹ a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

¹²⁰ Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

¹²¹ “Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.

“This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders).\textsuperscript{122}

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

**Other Procedural Adjustments.** In other procedural adjustments designed to facilitate criminal investigations, the Act:

- increases the rewards for information in terrorism cases
- expands the Posse Comitatus Act exceptions
- authorizes “sneak and peek” search warrants
- permits nationwide and perhaps worldwide execution of warrants in terrorism cases
- eases government access to confidential information
- allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
- lengthens the statute of limitations applicable to crimes of terrorism
- clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
- adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B.\textsuperscript{123}

\textsuperscript{122} It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, e.g., damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

\textsuperscript{123} When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001)(remarks of Rep. Sensenbrenner); for general background, see, Doyle, McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys, CRS REP.NO. RL30060 (Dec. 14, 2001).
Rewards. The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L.105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism.124

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

Posse Comitatus. The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.125

Delayed notification of a search (sneak and peek). Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take

124 The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct threat assessments for federal agencies, and to reimburse federal agencies for the costs of detaining terrorist suspects overseas.

125 For a general discussion of the Posse Comitatus Act, see, Doyle, The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law, CRS REP.NO. 95-964 (June 1, 2000).
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, Richards v. Wisconsin, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, Wilson v. Arkansas, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, Dalia v. United States, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, cf., United States v. Miller, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, United States v. Freitas, 800 F.2d 1451, 1453 (9th Cir. 1986).126

126 The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in United States v. New York Telephone Co., 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41... Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause... The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41... we hold that there was no compliance with Rule 41 under the facts of this case... While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth
Amendment, demands that surreptitious entries be closely circumscribed,” United States v. Freitas (Freitas I), 800 F.2d 1451, 1455-456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, United States v. Freitas (Freitas II), 856 F.2d 1425 (9th Cir. 1988).

127 “No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in Dalia v. United States, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in Dalia, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property. . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. See United States v. New York Telephone Co., 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . . Although the Freitas I court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in United States v. Villegas, 899 F.2d 1324 (1999). Although the Freitas I court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in Villegas. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the Freitas I court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” United States v. Pangburn, 983 F.2d 449, 453-55 (2d Cir. 1993).

128 In Simons, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
The Justice Department urged that the conflict be resolved with a uniform rule which permitted sneak and peek warrants under the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage.129

The Act, in section 213, stops short of the Justice Department proposal. Characterized as a codification of the Second Circuit decision, 147 Cong. Rec. H7197 (daily ed. Oct. 23, 2001), the Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C. 3103a. Its sneak and peek authorization reaches all federal search and seizure warrants where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (e.g., risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (e.g., jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, i.e., in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation.130 The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

Fourth Amendment does not mention notice, and the Supreme Court has stated that the constitution does not categorically proscribe covert entries, which necessarily involve a delay in notice. And insofar as the August search satisfied the requirements of the Fourth Amendment, i.e., it was conducted pursuant to a warrant based on probable cause issued by a neutral and detached magistrate, we perceive no basis for concluding that the 45-day delay in notice rendered the search unconstitutional. Having concluded that the Rule 41(d) violation at issue here did not infringe on Simons’ constitutional rights, we must now evaluate his argument that the violation was deliberate. . . . The district court did not address the intent issue when it ruled on Simons’ motion to suppress. . . . We therefore remand for the district court to consider whether the Government intentionally and deliberately disregarded the notice provision of Rule 41(d) when it carried out the August 6, 1998 search,” 206 F.3d at 403.

129 "The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities," DoJ at §353.

130 Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department’s initial proposal, the Department’s justification does not address the question.
constitutionally “reasonable,” that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

**Nationwide terrorism search warrants.** The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either “within or outside the district,” (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases. The provision may anticipate execution both in this country and overseas. The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage. Neither Rule 41 nor any other provision of federal

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131 The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

132 The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

133 *United States v. Barona*, 56 F.3d 1087, 1092 (9th Cir. 1995)(“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994)(“if American law enforcement officials substantially participated in the search or if the
law apparently contemplated extraterritorial execution, cf., F.R.Crim.P.41, Advisory Committee Notes: 1990 Amendment (discussing a proposal for extraterritorial execution that the Supreme Court rejected).  

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” F.R.Crim.P. 41, Advisory Committee Notes: 1990 Amendment. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

**Terrorists’ DNA.** The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards per se.  

Existing federal law allowed the Attorney General to collect samples from foreign officials conducting the search were actually acting as agents for their American counterparts’); United States v. Maturo, 982 F.2d 57, 61 (2d Cir. 1992)(“where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials” or “where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials”); United States v. Mitro, 880 F.2d 1480, 1482 (1st Cir. 1989)(“where American agents participated in the foreign search or the foreign officers acted as agents for their American counterparts”); United States v. Mount, 757 F.2d 1315, 1318 (D.C.Cir. 1985)(“if American officials or officers participated in some significant way”); United States v. Marzano, 537 F.2d 257, 270 (7th Cir. 1976)(declining to adopt the “joint venture” standards, but finding level of American participation in the case before it insignificant); United States v. Morrow, 537 F.2d 120, 139 (5th Cir. 1976)(“if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts”); each of the decisions also suggests that evidence secured in a manner which shocked the conscience of the court would be excluded.

134 The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, see, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), reprinted, 78 Cong.Rec. 4982-983 (1934)(“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.)(conferring judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

135 Roe v. Marcotte, 193 F.3d 72 (2d Cir. 1999); Shaffer v. Saffle, 148 F.3d 1180 (10th Cir. 1998); Rise v. Oregon, 59 F.3d 1556 (9th Cir. 1995); Jones v. Murray, 962 F.2d 302 (4th Cir. 1992).
The USA PATRIOT Act: A Legal Analysis

April 15, 2002

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Summary

The USA PATRIOT Act passed in the wake of the September 11 terrorist attacks. It flows from a consultation draft circulated by the Department of Justice, to which Congress made substantial modifications and additions. The stated purpose of the Act is to enable law enforcement officials to track down and punish those responsible for the attacks and to protect against any similar attacks.

The Act grants federal officials greater powers to trace and intercept terrorists’ communications both for law enforcement and foreign intelligence purposes. It enforces federal anti-money laundering laws and regulations in an effort to deny terrorists the resources necessary for future attacks. It tightens our immigration laws to close our borders to foreign terrorists and to expel those among us. Finally, it creates a few new federal crimes, such as the one outlawing terrorists’ attacks on mass transit; increases the penalties for many others; and institutes several procedural changes, such as a longer statute of limitations for crimes of terrorism.

Critics have suggested that it may go too far. The authority to monitor e-mail traffic, to share grand jury information with intelligence and immigration officers, to confiscate property, and to impose new book-keeping requirements on financial institutions, are among the features troubling to some.

The Act itself responds to some of these reservations. Many of the wiretapping and foreign intelligence amendments sunset on December 31, 2005. The Act creates judicial safeguards for e-mail monitoring and grand jury disclosures; recognizes innocent owner defenses to forfeiture; and entrusts enhanced anti-money laundering powers to those regulatory authorities whose concerns include the well being of our financial institutions.

This report, stripped of its citations and footnotes, is available in an abbreviated form as The USA PATRIOT Act: A Sketch, CRS Rep.No. RS21203. In addition, much of the information contained here may also be found under a different arrangement in a report entitled, Terrorism: Section by Section Analysis of the USA PATRIOT Act, CRS Rep.No. RL31200 (Dec. 10, 2001). A wider array of terrorism-related analysis appears on the CRS terrorism electronic briefing book page.
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The USA PATRIOT Act: A Legal Analysis

Introduction

Congress passed the USA PATRIOT Act (the Act) in response to the terrorists’ attacks of September 11, 2001. The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to further close our borders to foreign terrorists and to detain and remove those within our borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it is not without safeguards, critics contend some of its provisions go too far. Although it grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough.


1 P.L. 107-56, 115 Stat. 272 (2001); its full title is the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT).”

2 H.R. 2975 was introduced by Representative Sensenbrenner for himself and Representatives Conyers, Hyde, Coble, Goodlatte, Jenkins, Jackson-Lee, Cannon, Meehan, Graham, Bachus, Wexler, Hostettler, Keller, Issa, Hart, Flake, Schiff, Thomas, Goss, Rangel, Berman and Lofgren; S.1510 by Senator Daschle for himself and Senators Lott, Leahy, Hatch, Graham, Shelby and Sarbanes.

3 H.R. 3004 was introduced by Representative Oxley for himself and Representatives LaFalce, Leach, Maloney, Roukema, Bentsen, Hooley, Bereuter, Baker, Bachus, King, Kelly, Gillmore, Cantor, Riley, Latourette, Green (of Wisconsin), and Grucci; and reported out of the House Financial Services Committee with amendments on October 15, 2001, H.Res.No. 107-250. H.R. 3004, as reported out, included Internet gambling amendments that were not included in H.R. 2975/H.R.3108.
Criminal Investigations: Tracking and Gathering Communications

A portion of the Act addresses issues suggested originally in a Department of Justice proposal circulated in mid-September. The first of its suggestions called for amendments to federal surveillance laws, laws which govern the capture and tracking of suspected terrorists’ communications within the United States. Federal law features a three tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications.

The tiers reflected the Supreme Court’s interpretation of the Fourth Amendment’s ban on unreasonable searches and seizures. The Amendment protects private conversations, 

*Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967). It does not cloak information, even highly personal information, for which there is no individual justifiable expectation of privacy, such as telephone company records of calls made to and from an individual's home, *Smith v. Maryland*, 442 U.S. 735 (1979), or bank records of an individual's financial dealings, *United States v. Miller*, 425 U.S. 435 (1976).

Congress responded to *Berger* and *Katz*, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications, 18 U.S.C. 2511. At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious investigations.

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4 The Department’s proposal, dated September 20, 2001, came with a brief section by section analysis. Both the proposal (Draft) and analysis (DoJ) were printed as an appendix in Administration’s Draft Anti-Terrorism Act of 2001, Hearing Before the House Comm. on the Judiciary, 107th Cong., 1st Sess. 54 (2001).


6 “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,” U.S. Const. Amend. IV.

7 Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of one or more predicate offense, 18 U.S.C. 2516.

The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement), 1751 (presidential and presidential staff assassination, kidnapping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnaping, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or naturalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations, 18 U.S.C. 2518. The court notifies the parties to any conversations seized under the order after the order expires, 18 U.S.C. 2518(8).

Below Title III, the next tier of privacy protection covers some of those matters which the Supreme Court has described as beyond the reach of the Fourth Amendment protection – telephone records, e-mail held in third party storage, and the like, 18 U.S.C. 2701-2709 (Chapter 121). Here, the law permits law enforcement access, ordinarily pursuant to a warrant or court order or under a subpoena in some cases, but in connection with any criminal investigation and without the extraordinary levels of approval or constraint that mark a Title III interception, 18 U.S.C. 2703.

Least demanding and perhaps least intrusive of all is the procedure that governs court orders approving the government's use of trap and trace devices and pen registers, a kind of secret “caller id”, which identify the source and destination of calls made to and from a particular telephone, 18 U.S.C. 3121-3127 (Chapter 206). The orders are available based on the government's certification, rather than a finding of the court, that the use of the device is likely to produce information relevant to the investigation of a crime, any crime, 18 U.S.C. 3123. The devices record no more than the identity of the participants in a telephone conversation, but neither the orders nor the results they produce need ever be revealed to the participants.

The Act modifies the procedures at each of the three levels. It:

offense involving counterfeiting punishable under 18 U.S.C. 471, 472, or 473; (e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States; (f) any offense including extortionate credit transactions under 18 U.S.C. 892, 893, or 894; (g) a violation of 31 U.S.C. 5322 (dealing with the reporting of currency transactions); (h) any felony violation of 18 U.S.C. 2511 and 2512 (interception and disclosure of certain communications and to certain intercepting devices); (i) any felony violation of 18 U.S.C. ch. 71 (obscenity); (j) 49 U.S.C. 60123(b) (destruction of a natural gas pipeline), 46502 (aircraft piracy); (k) 22 U.S.C. 2778 (Arms Export Control Act); (l) the location of any fugitive from justice from an offense described in this section; (m) a violation of 8 U.S.C. 1324, 1327, or 1328; (n) any felony violation of 18 U.S.C. 922, 924 (firearms); (o) any violation of 26 U.S.C. 5861 (firearms); (p) a felony violation of 18 U.S.C. 1028 (production of false identification documents), 1542 (false statements in passport applications), 1546 (fraud and misuse of visas, permits, and other documents) or a violation of 8 U.S.C. 1324, 1327, or 1328 (smuggling of aliens); (p) 229 (chemical weapons), 2332 (terrorist violence against Americans overseas), 2332a (weapons of mass destruction), 2332b (multinational terrorism), 2332d (financial transactions with countries supporting terrorism), 2339A (support of terrorist), 2332B (support of terrorist organizations); (r) any conspiracy to commit any of these, 18 U.S.C. 2516(1)(crimes added by the Act in italics). Other than telephone face to face conversations (i.e., electronic communications), the approval of senior Justice Department officials is not required and an order may be sought in any felony investigation, 18 U.S.C. 2516(3).

10 Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
• permits pen register and trap and trace orders for electronic communications (e.g., e-mail)

• authorizes nationwide execution of court orders for pen registers, trap and trace devices, and access to stored e-mail or communication records

• treats stored voice mail like stored e-mail (rather than like telephone conversations)

• permits authorities to intercept communications to and from a trespasser within a computer system (with the permission of the system’s owner)

• adds terrorist and computer crimes to Title III’s predicate offense list

• reenforces protection for those who help execute Title III, ch. 121, and ch. 206 orders

• encourages cooperation between law enforcement and foreign intelligence investigators

• establishes a claim against the U.S. for certain communications privacy violations by government personnel

• terminates the authority found in many of the these provisions and several of the foreign intelligence amendments with a sunset provision (Dec. 31, 2005).

Pen Registers and Trap and Trace Devices. In section 216, the Act allows court orders authorizing trap and trace devices and pen registers to be used to capture source and addressee information for computer conversations (e.g., e-mail) as well as telephone conversations, 18 U.S.C. 3121, 3123. In answer to objections that e-mail header information can be more revealing than a telephone number, it creates a detailed report to the court, 18 U.S.C. 3123(a)(3).

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11 “Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public the agency shall ensure that a record will be maintained which will identify – (i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of the such device.

“(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof),” section 216(b)(1).
The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” DoJ at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

Communications Records and Stored E-Mail. With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber, 18 U.S.C. 2703(a),(b). A warrant will also suffice to seize records describing telephone and other communications transactions without customer notice, 18 U.S.C. 2703(c). In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation, officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records, 18 U.S.C. 2703(b),(c). They can obtain a limited amount of record information (subscribers’ names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena, 18 U.S.C. 2703(c)(1)(C). There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial, 18 U.S.C. 2705.

In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider’s customer records, 18 U.S.C. 2703(c)(1)(C).13

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.

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13 Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user’s true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” DoJ at §107.
Previously, only a federal court in the district in which the e-mail was stored could issue the order. Under section 220, federal courts in the district where an offense under investigation occurred may issue orders applicable “without geographic limitation,” 18 U.S.C. 2703.14

The Act, in section 209, treats voice mail like e-mail, that is, subject to the warrant or court order procedure, rather than to the more demanding coverage of Title III once required, United States v. Smith, 155 F.3d 1050, 1055-56 (9th Cir. 1998).

Finally, the Act resolves a conflict between chapter 121 and the federal law governing cable companies. Government entities may have access to cable company customer records only under a court order following an adversary hearing if they can show that the records will evidence that the customer is or has engaged in criminal activity, 47 U.S.C. 511(h). When cable companies began offering telephone and other communications services the question arose whether the more demanding cable rules applied or whether law enforcement agencies were entitled to ex parte court orders under the no-notice procedures applicable to communications providers.15 The Act makes it clear that the cable rules apply when cable television viewing services are

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14 Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

15 See e.g., DoJ at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement’s access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

**Electronic Surveillance.** To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202.16 A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(i). Yet only the interloper’s intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.17

**Criminal Investigators’ Access to Foreign Intelligence Information.**
The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism.18 It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that “the purpose for the surveillance is to obtain foreign intelligence information,” 50 U.S.C. 1804(a)(7)(B) (2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps “the purpose” might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation

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16 18 U.S.C. 229 (chemical weapons), 2332 (terrorist acts of violence committed against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2332d (financial transactions with countries which support terrorists), 2339A (providing material support to terrorists), and 2339B (providing material support to terrorist organizations).

17 “Because service providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves as permitted under current law, they often have no way to exercise their rights to protect themselves from unauthorized attackers. Moreover, such attackers can target critical infrastructures and engage in cyberterrorism,” DoJ at §106. Elsewhere the Act defines “electronic surveillance” for purposes of the Foreign Intelligence Surveillance Act (FISA) to emphasize that the law enforcement authority for this intruder surveillance does not confer similar authority for purposes of foreign intelligence gathering, section 1003 (50 U.S.C. 1801(f)(2)).

18 For a general discussion of federal intelligence and law enforcement cooperation, see, Best, Intelligence and Law Enforcement: Countering Transnational Threats to the U.S., CRS REP. NO. RL30252 (Dec. 3, 2001).
Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment's warrant clause. It is here that the “primary purpose” notion originated. In *United States v. Truong Dinh Hung*, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, “as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.”

Subsequent case law, however, is not as clear as it might be: see e.g., *United States v. Duggan*, 743 F.2d 59, 77 (2d Cir. 1984) (“FISA permits federal officials to obtain orders authorizing electronic surveillance ‘for the purpose of obtaining foreign intelligence information.’ The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying official’s belief that the information sought is the type of foreign intelligence information described”); *United States v. Pelton*, 835 F.2d 1067, 1075-76 (4th Cir. 1987) (“We also reject Pelton’s claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial”); *United States v. Sarkissian*, 841 F.2d 959, 907-8 (9th Cir. 1988) (“Defendants rely on the primary purpose test articulated in *United States v. Truong Dinh Hung*. . . . One other court has applied the primary purpose test. Another court has rejected it. . . . distinguishing *Truong*. A third court has declined to decide the issue. We also decline to decide the issue”); *United States v. Johnson*, 952 F.2d 565, 572 (1st Cir. 1991) (“Appellants attack the government's surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance”).

20 “Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” DoJ at §153.
demanding standard than the “a purpose” threshold proposed by the Justice Department, but a clear departure from the original “the purpose” entry point. FISA once described a singular foreign intelligence focus prerequisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k), 1825(k).

**Protective Measures.** The Act reenforces two kinds of safeguards, one set designed to prevent abuse and the other to protect those who assist the government. The sunset clause is perhaps the best known of the Act’s safeguards. Under the direction of section 224, many of the law enforcement and foreign intelligence authorities granted by the Act expire as of December 31, 2005. The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter

21 “(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. (2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, infra, quoting, 50 U.S.C. 1801.

22 “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210[subpoenas for communications provider customer records], 211[access to cable company communication service records], 213[sneak and peek], 216[pen register and trap and trace device amendments], 217[trade sanctions], and 222[assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005. (b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers' communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices).\(^{23}\) Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees,\(^{24}\) but could not recover against the United States.\(^{25}\) Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice's Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government's request until a court order authorizing access can be obtained.\(^{26}\) Another allows providers to disclose customer records to protect the provider's rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others.\(^{27}\) A third section,


\(^{24}\) 18 U.S.C. 2520 and 2707 (2000 ed.).


\(^{26}\) Prior law already granted service providers immunity for disclosure of customer records in compliance with a court access order, 18 U.S.C. 2703(f).

\(^{27}\) “Existing law contains no provision that allows providers of electronic communications service to disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies that threaten death or serious bodily injury. This section amends 18 U.S.C. §2702 to authorize such disclosures if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.

“Current law also contains an odd disconnect: a provider may disclose the contents of the customer's communications in order to protect its rights or property but the current statute does not expressly permit a provider to voluntarily disclose non-content records (such as a subscriber's login records). 18 U.S.C. 2702(b)(5). This problem substantially hinders the ability of providers to protect themselves from cyber-terrorists and criminals. Yet the right to disclose the contents of communications necessarily implies the less intrusive ability to disclose non-content records. In order to promote the protection of our nation's critical infrastructures, this section's amendments allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems,” DoJ at
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

**Foreign Intelligence Investigations**

Although both criminal investigations and foreign intelligence investigations are conducted in the United States, criminal investigations seek information about unlawful activity; foreign intelligence investigations seek information about other countries and their citizens. Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough.

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA), something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President's authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, United States v. United States District Court, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage.

§110.

28 Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

29 Thus in the name of assisting in the execution of Title III, chapter 121, or chapter 206 order, the courts may not cite the Act as the basis for an order compelling a service provider to make system modifications or provide any other technical assistance not already required under 18 U.S.C. 2518(4), 2706, or 3124(c), see, H.R.Rep.No. 107-236, at 62-3 (2001) (emphasis added) (“This Act is not intended to affect obligations under Communications Assistance for Law Enforcement Act [which addresses law enforcement-beneficial system modifications and the compensation to be paid for the changes], nor does the act impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance”).

30 E.g., As amended by section 902 of the Act, “‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2)(language added by the Act in italics).

31 50 U.S.C. 1801 et seq.
In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs. There were and still are extra


33 “As used in this subchapter: (a) ‘Foreign power’ means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

(b) ‘Agent of a foreign power’ means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C).

(c) ‘International terrorism’ means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnapping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

(d) ‘Sabotage’ means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

(e) ‘Foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans (“United States persons,” i.e., citizens or permanent resident aliens).\textsuperscript{34} The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

- permits “roving” surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)
- increases the number of judges on the FISA court from 7 to 11
- allows application for a FISA surveillance or search order when gathering foreign intelligence is \textit{a significant} reason for the application rather than \textit{the} reason
- authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations
- sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses
- carries a sunset provision
- establishes a claim against the U.S. for certain communications privacy violations by government personnel
- expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to – (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States,” 50 U.S.C. 1801.

\textsuperscript{34} Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
**FISA.** FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases.\(^{35}\) It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

**Search and Surveillance for Intelligence Purposes.** Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, *Draft at §151.*\(^{36}\)

Section 901 of the Act address a concern raised during the 106th Congress relating to the availability of the FISA orders and the effective use of information gleaned from the execution of a FISA order.\(^{37}\) It vests the Director of Central

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\(^{35}\) For a general discussion of FISA prior to enactment of the Act, see, *Bazan, The Foreign Intelligence Surveillance Act: An Overview of the Statutory Framework for Electronic Surveillance, CRS REP.NO. RL30465 (Sept. 18, 2001).*

\(^{36}\) See also, DoJ at §151, “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order’s minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed (50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

\(^{37}\) See e.g., S.Rep.No. 106-352, at 3, 6, 7 (2000) (“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application
process, as interpreted by the OIPR is administratively burdensome and, at times, extremely slow. Many applications undergo months of scrutiny before submission to the court because the OIPR prescribes standards and restrictions not imposed by the statute. . . . In particular, the OIPR has been criticized for an overly restrictive interpretation of the FISA 'currency' requirement. This is the issue of how recent a subject's activities must be to support a finding of probable cause that the subject is engaged in clandestine intelligence gathering activities. . . . While existing law does not specifically address "past activities," it does not preclude, and legislative history supports, the conclusion that past activities may be part of the totality of circumstances considered by the FISC in making a probable cause determination. . . . By definition, information collected pursuant to a court order issued under the Foreign Intelligence Surveillance Act is foreign intelligence not law enforcement information. Accordingly, the Committee wants to clarify that the FISA 'take' can and must be shared by the Federal Bureau of Investigation with appropriate intelligence agencies. For the intelligence mission of the United States to be successful, there must be a cooperative and concerted effort among intelligence agencies. Any information collected by one agency under foreign intelligence authorities that could assist another agency in executing its lawful mission should be shared fully and promptly. Only then can the United States Government pursue aggressively important national security targets including, for example, counterterrorist and counternarcotics targets”); see also, 147 Cong.Rec. S799-803 (daily ed. Feb. 24, 2000)(remarks of Sens. Specter, Torricelli and Biden).

Pen Registers and Trap and Trace Devices for Intelligence Gathering. Section 214 grants the request of the Department of Justice by dropping requirements which limited FISA pen register and trap and trace device orders to facilities used by foreign agents or those engaged in international terrorist or clandestine intelligence activities, 50 U.S.C. 1842(c)(3)(2000 ed.). 38 It is enough that the order is sought as part of an investigation to protect against international terrorism or clandestine intelligence activities and is not motivated solely by an American’s exercise of his or her First Amendment rights. Elsewhere (section 505), the Act drops a similar limitation for intelligence officials’ access to telephone records, 18 U.S.C.

38 "When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevance, an additional factual showing that the communications device has been used to contact an "agent of a foreign power" engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the "agent of a foreign power" prong from the predication, and thus makes the FISA authority more closely track the criminal authority," DoJ at §155.
39 Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise be entitled to confidentiality. Section 505, in response to the Justice Department's suggestion, allows FBI field offices to make the requests, see DoJ at §157 ("At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports").

40 When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court's order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.’ This would enhance the FBI's ability to monitor international terrorists and intelligence officers who are...
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian. The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities, in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

• purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
• suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B);
• availability of records section of that Act (31 U.S.C. 5319);
• purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a);
• the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a);
• access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
• access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v;

41 "The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigative contexts. The time and difficulty involved in getting such pleadings before the Court usually outweighs the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” DoJ at §156.

42 Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.43

**Access to Law Enforcement Information.** Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community's access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, Draft at §103.44

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43 H.R.Rep.No. 107-205, at 60-1 (2001)(“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

“We the provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

“Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual’s credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding--without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information”).

44 See also, DoJ at §103, “This section facilities the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, Draft at §354.45

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, Draft at §154.46

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion.47 It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions.”

45 See also, DoJ at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.” Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officers

46 See also, DoJ at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”

47 Blair v. United States, 250 U.S. 273, 281 (1919) (the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
affairs are conducted in private and outside the presence of the court. Only the
attorney for the government, witnesses under examination, and a court reporter may
attend its proceedings, F.R.Crim.P. 6(d). Matters occurring before the grand jury are
secret and may be disclosed by the attending attorney for the government and those
assisting the grand jury only in the performance of their duties; in presentation to a
successor grand jury; or under court order for judicial proceedings, for inquiry into
misconduct before the grand jury, or for state criminal proceedings, F.R.Crim.P. 6(e).

The Act, in section 203(a), allows disclosure of matters occurring before the
grand jury to “any federal law enforcement, intelligence, protective, immigration,
national defense, or national security” officer to assist in the performance of his

Critics may protest that the change could lead to the use of the grand jury for
intelligence gathering purposes, or less euphemistically, to spy on Americans.49 The
proposal was never among those scheduled to sunset, but earlier versions of the
section followed the path used for most other disclosures of grand jury material: prior

48 These officers may receive: (1) “foreign intelligence information” that is, information
regardless whether it involves Americans or foreign nationals that “[a] relates to the ability
of the United States to protect against – (aa) actual or potential attack or other grave hostile
acts of a foreign power or an agent of a foreign power; (bb) sabotage or international
terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence
activities by an intelligence service or network of a foreign power;” or [b] “with respect to a
foreign power or foreign territory that relates to – (aa) the national defense or security of the
United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P.
6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that
is, [a] “information relating to the capabilities, intentions, or activities of foreign governments
or elements thereof, foreign organizations, or foreign persons, or international terrorist
activities” or [b] “information gathered and activities conducted, to protect against espionage,
other intelligence activities, sabotage, or assassinations conducted on behalf of foreign
governments or elements thereof, foreign organizations, or foreign persons, or international
terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in
italics).

49 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on
Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25
HARVARD JOURNAL OF LAW & PUBLIC POLICY 699, 719-20 (2002) (“There is a significant
danger that the rule permitting disclosure will be treated as the de facto authorization of an
expansion of the grand jury’s investigative role to encompass seeking material relevant only
to matters of national security, national defense, immigration, and so forth. The grand jury’s
awesome powers should not be unwittingly extended to a much wider range of issues. . .
Since the grand jury operates in secret, there are no public checks on the scope of its
investigations, and witnesses are not permitted to challenge its jurisdiction. Only the
supervising court is in a position to keep the grand jury’s investigation within proper bounds.
Requiring judicial approval of foreign intelligence and counterintelligence information
disclosures would provide a natural check against the temptation to manipulate the grand jury
to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist
Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6
(Nov. 2001) (“The grand jury secrecy rule is a rule of policy which has always had exceptions,
and it has been frequently modified. The secrecy rule has no credible claim to constitutional
stature”).
Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

“Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).

Law enforcement officials may share Title III information with the intelligence community under the same conditions, section 203(b), although the grand jury and Title III sharing provisions differ in at least three important respects. The court need not be notified of Title III disclosures. On the other hand, the authority for sharing Title III information expires on December 31, 2005, section 224, and agencies and their personnel guilty of intentional improper disclosures may be subject to a claim for damages and disciplinary action, 18 U.S.C. 2520.

The third subsection of section 203 remains something of an enigma. It speaks in much the same language as its counterparts. It allows law enforcement officials to share information with the intelligence community, “notwithstanding any other provisions of law,” section 203(d). It either swallows the other subsections, or supplements them. Several factors argue for its classification as a supplement. Congress is unlikely to have crafted subsections (a), (b) and (c) only to completely

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50 Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

51 “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification.\textsuperscript{52} By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.\textsuperscript{53}

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

**Increasing Institutional Capacity.** As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a

\textsuperscript{52} *Duncan v. Walker*, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted) (“It is our duty to give effect, if possible, to every clause and word of a statute. *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)); see also *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879) (As early as in Bacon's Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage in any setting. *Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687, 698 (1995); see also *Ratzlaf v. United States*, 510 U.S. 135, 140 (1994)).

It is not possible to conclude that Congress intended the universal subsection (d) to apply until sunset and the grand jury and Title III subsections (a), (b), and (c) to operate thereafter, because the Title III subsection expires at the same time as the universal subsection.

\textsuperscript{53} Draft at §154, “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”
computerized translation capability to be used in foreign intelligence gathering.\textsuperscript{54} Section 907 instructs the Director of the Central Intelligence, in consultation with the Director of the FBI, to report on the creation of a National Virtual Translation Center. The report is to include information concerning staffing, allocation of resources, compatibility with comparable systems to be used for law enforcement purposes, and features which permit its efficient and secure use by all of the intelligence agencies.

**Money Laundering**

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture.\textsuperscript{55} The Act bolsters federal efforts in each area.

**Regulation.** Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.\textsuperscript{56}

\textsuperscript{54} “The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

“The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so,” S.Rep.No. 107-63, at 11 (2001).


\textsuperscript{56} See e.g., 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
Records and Reports. For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler’s checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to files SARs as well, reflecting Congress’ view that the information provided the IRS may be valuable for other law enforcement purposes. This concern is likewise


58 H.R.Rep.No. 107-250, at 38-9 (2001)(“Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

“Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a ‘Safeguard Procedures Report’ which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

“While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement
reflected in section 357 which asks the Secretary of the Treasury to report on the Internal Revenue Service’s role in the administration of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311 et seq.), and what transfers of authority, if any, are appropriate.

Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action. 59 Section 355 expands the immunity to cover disclosures in

59 “Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

“First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor from civil liability applies in arbitration, as well as judicial, proceedings. Second, it amends section 5318(g)(3) to clarify the safe harbor’s coverage of voluntary disclosures (that is, those not covered by the SAR regulatory reporting requirement). The language in section 5318(g)(3)(A) providing that ‘any financial institution that *** makes a disclosure pursuant to *** any other authority *** shall not be liable to any person’ is not intended to avoid the application of the reporting and disclosure provisions of the Federal securities laws to any person, or to insulate any issuers from private rights of actions for disclosures made under the Federal securities laws.

“Subsection [351](b) amends section 5318(g)(2) of title 31--which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed--to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee’s official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
employment references to other insured depository financial institutions provided
disclosure is not done with malicious intent.\textsuperscript{60}

The Financial Crimes Enforcement Network (FinCEN), a component within the
Treasury Department long responsible for these anti-money laundering reporting and
record-keeping requirements, 31 C.F.R. pt. 103, was administratively created in 1990
to provide other government agencies with an “intelligence and analytical network in
support of the detection, investigation, and prosecution of domestic and international

The Act, in section 361, makes FinCEN a creature of statute, a bureau within
the Treasury Department, 31 U.S.C. 310. Section 362 charges it with the
responsibility of establishing a highly secure network to allow financial institutions to
file required reports electronically and to permit FinCEN to provide those institutions
with alerts and other information concerning money laundering protective measures,

\textbf{Special Measures.} In extraordinary circumstances involving international
financial matters, the Act grants the Secretary of the Treasury, in consultation with
other appropriate regulatory authorities, the power to issue regulations and orders
involving additional required “special measures” and additional “due diligence”
requirements to combat money laundering. The special measure authority, available
under section 311, comes to life with the determination that particular institutions,
jurisdictions, types of accounts, or types of transactions pose a primary money

\textsuperscript{60} 31 U.S.C. 1828(w). “This section deals with the same employment reference issue
addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions
that a bank officer or employee has engaged in potentially unlawful activity. These suspicions
typically result in the bank filing a SAR. Under present law, however, the ability of banks to
share these suspicions in written employment references with other banks when such an officer
or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to
permit a bank, upon request by another bank, to share information in a written employment
reference concerning the possible involvement of a current or former officer or employee in
potentially unlawful activity without fear of civil liability for sharing the information, but only
to the extent that the disclosure does not contain information which the bank knows to be
false, and the bank has not acted with malice or with reckless disregard for the truth in making
These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

61 31 U.S.C. 5318A. The circumstances considered in the case of a suspect jurisdiction are: evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction’s banking regulation; the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

62 The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’ including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

“Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate
business transactions.

“Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

“Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

“The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

“The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

“The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

“The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information that it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

“The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

“The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed...
**Due Diligence.** Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.\(^{63}\)

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63 See generally, H.R.Rep. No. 107-250, at 71-2 (“Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

“The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

“The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

“For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
General Regulatory Matters. The Act establishes several other regulatory mechanisms directed at the activities involving U.S. financial institutions and foreign individuals or institutions. Section 313, for instance, in another restriction on correspondent accounts for foreign financial institutions, prohibits U.S. financial institutions from maintaining correspondent accounts either directly or indirectly for foreign shell banks (banks with no physical place of business) which have no affiliation with any financial institution through which their banking activities are subject to regulatory supervision.

The Act, in section 325, empowers the Secretary of the Treasury to promulgate regulations to prevent financial institutions from allowing their customers to conceal their financial activities by taking advantage of the institutions’ concentration account practices.

The Secretary of the Treasury is instructed in section 326 to issue regulations for financial institutions’ minimum new customer identification standards and record-
keeping and to recommend a means to effectively verify the identification of foreign customers.  

31 U.S.C. 5318(l); H.R.Rep.No. 107-250, at 62-3 (2001)(“Section [326](a) amends 31 U.S.C. 5318 by adding a new subsection governing the identification of account holders. Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a ‘street name’ or omnibus account in the broker-dealer's name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to ‘look through’ the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund's customers. Thus, the fund would not be required to ‘look through’ the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature. 68

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

**Reports to Congress.** Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

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"Paragraph (6) requires that Treasury's regulations prescribed under paragraph (1) become effective within one year after enactment of this bill").

exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.  

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

International Cooperation. Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (i.e., the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.


70 H.R. Rep.No. 107-250, at 67 (2001) (“This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury's progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

“The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime.”
Crimes. Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, smuggling, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
expands 18 U.S.C. 1956 to cover financial transactions conducted in foreign financial institutions.\textsuperscript{71}

Section 329 makes it a federal crime to corruptly administer the money laundering regulatory scheme. Offenders are punishable by imprisonment for not more than 15 years and a fine of not more than three times the amount of the bribe.

Section 5326 of title 31 authorizes the Secretary of the Treasury to impose temporary, enhanced reporting requirements upon financial institutions in areas victimized by substantial money laundering activity (geographic targeting regulations and orders). Section 353 makes it clear that the civil sanctions, criminal penalties, and prohibitions on smurfing (structuring transactions to evade reporting requirements) apply to violations of the regulations and orders issued under 31 U.S.C. 5326.\textsuperscript{72} It also extends the permissible length of the temporary geographical orders from 60 to 180 days.

Violations of the special measures and special due diligence requirements of sections 311 and 312 are subject to both civil and criminal penalties by virtue of section 363's amendments to 31 U.S.C. 5321(a) and 5322. The amendments authorize civil penalties and criminal fines of twice the amount of the transaction but not more than $1 million. Criminal offenders would be subject to a fine in the same amount.

\textsuperscript{71} “[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

“The definition of ‘financial institution’ in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of ‘commercial bank’ or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad--say to a Mexican bank--and launderers them through a series of financial transactions, the government conceivably could not rely on the definition of a ‘financial institution’ in 1956(c)(6) to establish that the transaction was a ‘financial transaction’ within the meaning of 1956(c)(4)(B) (defining a ‘financial transaction’ as a transaction involving the use of a ‘financial institution’), or that it was a ‘monetary transaction’ within the meaning of 1957(f) (defining ‘monetary transaction’ as, inter alia, a transaction that would be a ‘financial transaction’ under 1956(c)(4)(B)).

“Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launderers the proceeds of one of the crimes set forth on a list of ‘specified unlawful activities.’ 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),” H.R.Rep.No. 107-250, at 38 (2000).

Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.73

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents.74 They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

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73 “The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business.

Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.

Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive,” H.R.Rep.No. 107-250, at 54 (2001).

74 “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual, 31 U.S.C. 5332(a)(2).

- 18 U.S.C. 476 (taking impressions of tools used for obligations and securities) from 10 to 25 years;
- 18 U.S.C. 477 (possessing or selling impressions of tools used for obligations or securities) from 10 to 25 years;
- 18 U.S.C. 484 (connecting parts of different notes) from 5 to 10 years;
- 18 U.S.C. 493 (bonds and obligations of certain lending agencies) from 5 to 10 years;
- 18 U.S.C. 478 (foreign obligations or securities) from 5 to 20 years;
- 18 U.S.C. 479 (uttering counterfeit foreign obligations or securities) from 3 to 20 years;
- 18 U.S.C. 480 (possessing counterfeit foreign obligations or securities) from 1 to 20 years;
- 18 U.S.C. 481 (plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities) from 5 to 25 years;
- 18 U.S.C. 482 (foreign bank notes) from 2 to 20 years; and
- 18 U.S.C. 483 (uttering counterfeit foreign bank notes) from 1 to 20 years.

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

**Bulk Cash.** Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act's bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting. 75

The section appears to be the product of reactions to the Supreme Court’s decision in United States v. Bajakian, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court’s

75 “For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).
As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency – representing the proceeds of drug trafficking and other criminal offenses – is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad.

Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United States without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

Extraterritorial Jurisdiction. The Act makes 18 U.S.C. 1029, the federal statute condemning various crimes involving credit cards, PIN numbers and other access devices, applicable overseas if the card or device is issued by or controlled by an American bank or other entity and some article is held in or transported to or through the United States during the course of the offense, section 377. The change was part of the original Justice Department proposals. Justice explained that, “[financial crime[] admits of no border, utilizing the integrated global financial network for ill purposes. This provision would apply the financial crimes prohibitions to conduct committed abroad, so long as the tools or proceeds of the crimes pass through or are in the United States,” DoJ at §408. The section, however, appears to limit the otherwise applicable extraterritorial jurisdiction implicit in section 1029, since federal courts would likely recognize extraterritorial jurisdiction over a violation of title 31 without the provision.

Section 5317 of title 31 once called for civil forfeiture of property traceable to a violation of 31 U.S.C. 5316 (reports on exporting or importing money instruments worth $10,000 or more). Section 372 of the Act recasts section 5317 to provide for civil and criminal forfeitures for violations of 31 U.S.C. 5316, of 31 U.S.C. 5313 (reports on domestic coins and currency transactions involving $10,000 or more) and of 31 U.S.C. 5324 (structuring transactions to evade reporting requirements (smurfing)).

76 “As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency – representing the proceeds of drug trafficking and other criminal offenses – is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad. . . .

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Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute,” H.R.Rep.No. 107-250 at 36-7 (2001).
under either circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.\footnote{77 United States v. Bowman, 260 U.S. 94, 97-8 (1922); Ford v. United States, 273 U.S. 593, 623 (1927). For a general discussion of the extraterritorial application of federal criminal law, see, Doyle, Extraterritorial Application of American Criminal Law, CRS REP.NO. 94-166A (Mar. 13, 1999).}

**Venue.** Section 1004 relies on dicta in United States v. Cabrales, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering,\footnote{78 “The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed,” U.S.Const. Art.III, §2, cl.3. “[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,” U.S.Const. Amend. VI.} in the state and district in which the monetary transaction takes place. The Supreme Court in Cabrales held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in dicta, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.\footnote{79 See also, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnapping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.}

**Forfeiture.** Forfeiture is the government confiscation of property as a consequence of crime.\footnote{80 For general background information, see, Doyle, Crime and Forfeiture, CRS REP:NO. 97-139A (Oct. 11, 2000).} The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 et seq. (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

**Constitutional Considerations.** The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 et seq., which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the
jurisdiction of the United States, belonging to any foreign individual, foreign entity, or foreign country whom they determine to have planned, authorized, aided or engaged in an attack on the United States by a foreign country or foreign nationals. The section also permits the government to present secretly (ex parte and in camera) any classified information upon which the forfeiture was based should the decision be subject to judicial review. The Justice Department requested the section as a revival of the President's powers in times of unconventional wars. By virtue of section 316, property owners may initiate a challenge to a confiscation by filing a claim under the rules applicable in maritime confiscations. The section permits two defenses to forfeiture – that the property is not subject to confiscation under section 106 or that the claimant is entitled to the innocent owner defense of 18 U.S.C. 983(d). The characterization of the defenses as “affirmative defense” indicates that the claimant bears the burden of proof. The innocent owner defenses of 18 U.S.C. 983(d) are probably not available in cases under section 106, since that section is explicitly

81 “This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only 'during the time of war.' 50 App.U.S.C. §5(b).

“This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress's war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

“The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2),” DoJ at §159.

82 “An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
excepted from the coverage of 18 U.S.C. 983. The challenge proceedings permit the court to admit evidence, such as hearsay evidence, that would not otherwise be admissible under the Federal Rules of Evidence if the evidence is reliable and if national security might be imperiled should dictates of the Federal Rules be followed, §316(b). The section recognizes the rights of claimants to proceed alternatively under the Constitution or the Administrative Procedure Act.

The Justice Department also recommended enactment of an overlapping provision which ultimately passed as section 806 of the Act without any real discussion of the relationship of the two sections. Section 806 authorizes confiscation of all property, regardless of where it is found, of any individual, entity, or organization engaged in domestic or international terrorism (as defined in 18 U.S.C. 2331), against the United States, Americans or their property, 18 U.S.C. 983(i)(2)(D).


“The exclusion of certain provisions of Federal law from the definition of the term ‘civil forfeiture statute’ in section 983(i) of title 18, United States Code, shall not be construed to deny an owner of property the right to contest the confiscation of assets of suspected international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C) subchapter II of chapter 5 of title 5, United States Code (commonly known as the ‘Administrative Procedure Act’).” Sec. 316(c)(1).

“Current law does not contain any authority tailored specifically to the confiscation of terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available current forfeiture laws require detailed tracing that is quite difficult for accounts coming through the banks of countries used by many terrorists.

“This section increases the government’s ability to strike at terrorist organizations’ economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001,” DoJ, at §403. The House Report on H.R. 2975 which contained versions of both sections is no more explicit on the relation of the two sections.

“(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
981(a)(1)(G). Section 806 as discussed below also calls for the more common confiscation of property derived from and or facilitating acts of domestic or international terrorism against the United States or its citizens. Confiscations under 806 may be challenged under the procedures of 18 U.S.C. 983, since they are not exempted there. To the extent that forfeiture under section 806 is based on international rather than domestic terrorism, claimants may also use the procedures of section 316.

Confiscation based solely on the fact that the property is owned by a criminal offender, rather than that it is derived from or facilitates some crime is fairly uncommon. It is the mark of common law forfeiture of estate. At common law, a felon forfeited all of his property. Most contemporary forfeiture statutes employ statutory forfeiture, a more familiar presence in American law, which consists of the confiscation of things whose possession is criminal, of the fruits of crime, and of the means of crime – untaxed whiskey, the drug dealer’s profits, and the rum runner’s ship.

Three characteristics set forfeiture of estate apart. The property is lost solely by reason of its ownership by a felon. All of a felon’s property is confiscated, not merely that which is related to the crime for which he is convicted. Finally, it occasions attainder which negates the felon’s right to hold property or for title to property to pass through him to his heirs. It was with this in mind, that the Framers declared that “no attainder of treason shall work corruption of blood or forfeiture exception during the life of the person attainted.” And for this reason, President Lincoln insisted that the confiscated real estate of Confederate supporters should revert their heirs at death.

87 Austin v. United States, 509 U.S. 602, 611-12 (1993)(“Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture . . . . Of England’s three kinds of forfeiture, only the third took hold in the United States”).


89 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal in personam proceedings following criminal conviction as a means of accomplishing confiscation.
Neither section 106 nor 806 require conviction of the terrorist property owner.\footnote{Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c) (“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act”).} Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers.\footnote{Silesian American Corp. v. Clark, 332 U.S. 469 (1947); cf., Societe Internationale v. Rogers, 357 U.S. 197, 211 (1958) (“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).} The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners.\footnote{Zittman v. McGrath, 341 U.S. 471, 473-74 (1951) (citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’”).} Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them.\footnote{United States v. Bajakajian, 524 U.S. 321, 337 (1998); Austin v. United States, 509 U.S. 602, 622 (1993).} The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate
any presumption of remedial purposes. The same has been said of the applicability of the ex post facto clause.

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO. If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

Other Forfeiture Amendments. In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.

95 See e.g., United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.), 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994).
96 DoJ, at §403.
97 18 U.S.C. 1956(b). Cf., H.R.Rep.No. 107-250, at 54-5 (2001)(“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas.\(^9\) Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted

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\(^9\) American Bank, 191 F.3d 30 (1st Cir. 1999).

“The second provision, modeled on 18 U.S.C. 1345(b), gives the district court the power to restrain property, issue seizure warrants, or take other action necessary to ensure that a defendant in an action covered by the statute does not dissipate the assets that would be needed to satisfy a judgment.

“This section also authorizes a court, on the motion of the Government or a State or Federal regulator, to appoint a receiver to gather and protect assets needed to satisfy a judgment under sections 1956 and 957, and the forfeiture provisions in sections 981 and 982. This authority is intended to apply in three circumstances: (1) when there is a judgment in a criminal case, including an order of restitution, following a conviction for a violation of section 1956 or 1957; (2) when there is a judgment in a civil case under section 1956(b) assessing a penalty for a violation of either section 1956 or 1957; and (3) when there is a civil forfeiture judgment under section 981 or a criminal forfeiture judgment, including a personal money judgment, under section 982.

“The amendment also makes section 1956(b) applicable to violations of section 1957. It applies to conduct occurring before the effective date of the Act”).

\(^9\) 18 U.S.C. 981(k). H.R.Rep. No. 107-250, at 57-8 (2001)(“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank's customers.

“Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank's correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

“The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”).
defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation.\textsuperscript{99}

Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here.\textsuperscript{100} Section 320 enlarges this provisions to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements.\textsuperscript{101} This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.\textsuperscript{102}

\textsuperscript{99} Cf., H.R.Rep. No. 107-250, at 58-9 (2001) ("Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of ‘substitute assets’ when the defendant has placed the property otherwise subject to forfeiture ‘beyond the jurisdiction of the court.’ Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

“This section amends 21 U.S.C. 853 to make clear that a court in a criminal case may issue a repatriation order--either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. 853(e) to restrain property--so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both").

\textsuperscript{100} 18 U.S.C. 981(a)(1)(B).

\textsuperscript{101} H.R.Rep. No. 107-250, at 56 (2001)("This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act").

\textsuperscript{102} H.R.Rep. No. 107-250, at 59-60 (2001)("Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country.

“Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
A fugitive may not challenge a federal forfeiture. Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in “order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.”

to contest the restraining order could do so on the ground that 28 U.S.C. 2467 was not properly applied to the particular case, but could not oppose the restraining order on any ground that could also be raised in the proceedings pending in a foreign court. This provision prevents a litigant from taking ‘two bites at the apple’ by raising objections to the basis for the forfeiture in the Federal court that he also raised, or is entitled to raise, in the foreign court where the forfeiture action is pending. It complements the existing provision in section 2467(e) providing that the Federal court is bound by the findings of fact of the foreign court, and may not look behind such findings in determining whether to enter an order enforcing a foreign forfeiture judgment.

“This section also amends 28 U.S.C. 2467 to make clear that it is not necessary to prove that the person asserting an interest in the property received actual notice of the forfeiture proceedings. As is the case with respect to forfeitures under U.S. law, it is sufficient if the foreign nation takes steps to provide notice, in accordance with the principles of due process. See Gonzalez v. United States, 1997 WL 278123 (S.D.N.Y. 1997) (‘the [G]overnment is not required to ensure actual receipt of notice that is properly mailed’); Albajon v. Gugliotta, 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant’s identifications, and mailed after claimant released from jail, is sufficient to satisfy due process, even if claimant never received notice); United States v. Schiavo, 897 F. Supp. 644, 648 49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; due process satisfied even if he did not receive the notice).

“Finally, 28 U.S.C. 2467 is amended to authorize the enforcement of a forfeiture judgment based on any foreign offense that would constitute an offense giving rise to a civil or criminal forfeiture of the same property if the offense had been committed in the United States. This is one of two safeguards that the statute contains against the enforcement of judgments that the United States does not consider appropriate for enforcement: if the judgment is based on an act that would not constitute a crime in the United States, such as removing assets from the reach of a repressive regime, it could not be enforced. In addition, section 2467 already provides that a foreign judgment may only be enforced by a Federal court at the request of the United States, and only after the Attorney General has certified that the judgment was obtained in accordance with the principles of due process. Thus, neither a foreign Government nor a foreign private party could enforce a foreign judgment on its own under this provision.”). Note that the safeguard to which the report refers is the range of foreign offenses that will support an enforceable confiscation order, i.e., drug offenses and crimes on the money laundering predicate offense list, and that the amendment narrows that safeguard by adding additional foreign offenses, i.e., any foreign equivalent of a federal crime which would support a confiscation order.

Alien Terrorists and Victims

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

Border Protection. The border protection provisions:

- authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401

- authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402

- remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404

- authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405

- authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.

- instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007

- direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418

- express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414

- add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415

- call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416

- limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
• instruct the Attorney General to report on the feasibility of using biometric scanners to help prevent terrorists and other foreign criminals from entering the country, section 1008\textsuperscript{104}

• authorize appropriations of $250,000 for the FBI to determine the feasibility of providing airlines with computer access to the names of suspected terrorists, section 1009

• authorize reciprocal sharing of the State Department’s visa lookout data and related information with other nations in order to prevent terrorism, drug trafficking, slave marketing, and gun running, section 413

Detention and Removal. Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity, 8 U.S.C. 1227 (a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(iv). Aliens may be inadmissible for any number of terrorism-related reasons, 8 U.S.C. 1182 (a)(3)(B). Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported.


Section 411 defines “terrorist organization” to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the Federal Register as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C. 1182(a)(3)(B)(v) – section 411.

\textsuperscript{104} As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).
1182(a)(3)(B)(iv). Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).


An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in “premeditated, politically motivated violence perpetrated against noncombatant targets,” or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security or endanger some individual or the general public. The Attorney General's determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

Victims. The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

• permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421
• extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422

105 “The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

106 “The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks.

“The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application.

“Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
• preservation of certain immigration benefits available to alien family members that would be otherwise lost as a consequence of the death of a victim of September 11, section 423\(^{107}\)

• limited easing of age restrictions on visas available to aliens under 21 years of age for those whose 21\(^{st}\) birthday occurred immediately before or soon after September 11, section 424\(^{108}\)

• temporary administrative relief for alien family members of a victim of September 11 who are not otherwise entitled to relief under the Act, section 425

the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

“Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 31.

“Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.


107 “Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

“The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

“The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death),” H.R.Rep.No. 107-236, at 68 (2001).

108 “Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien’s 21\(^{st}\) birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien’s 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
• a denial of benefits of the Act to terrorists and their families, section 427

• authority for the Attorney General to establish evidentiary standards to implement the alien victim provisions of the Act, section 426.

Other Crimes, Penalties, & Procedures

New Crimes. The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department, the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offenses for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents, 18 U.S.C. 175b. Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.

109 “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . . .” DoJ at §305.

110 The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

111 “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2)(“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.112

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D) The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

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112 U.S. Const. Art.III, §2, cl.3 (“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . . .”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . . .”); United States v. Cabrales, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from Cabrales when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnaping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999)(“By way of comparison, last Term in [Cabrales] we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).
The Justice Department sought the expansion along with the enlargement of the predicate offense list, "18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of `material support or resources' is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill ('Federal terrorism offenses')," DoJ at 306.

Finally, the section announces that a prosecution for violation of section 2339A (support of terrorists) may be brought where the support is provided or where the predicate act of terrorism occurs. There may be some question whether the Constitution permits prosecution where the predicate act occurs.

Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.


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115 “The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill (‘Federal terrorism offenses’) is used in identifying the relevant crimes,” DoJ, at §304.

**New Penalties.** The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. 3571(b),(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense.\(^{117}\)

The proposal, however, failed to identify the critical elements that would trigger the alternative.\(^{118}\) Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

- for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

- for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

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\(^{117}\) “Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersede lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,” *DoJ*, at §302.

\(^{118}\) “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense,” *Draft* at §302.
• for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;

• for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;

• for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;

• for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and

• for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism.1\textsuperscript{19} Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:

• arson committed within a federal enclave, 18 U.S.C. 81;
• killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);
• destruction of communications facilities, 18 U.S.C. 1362;
• destruction of property within a federal enclave, 18 U.S.C. 1363;
• causing a train wreck, 18 U.S.C. 1922;
• providing material support to a terrorist, 18 U.S.C. 2339A;
• torture committed overseas under color of law, 18 U.S.C. 2340A;
• sabotage of a nuclear facility, 42 U.S.C. 2284;

\textsuperscript{19} “The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §§846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

“This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.
• interfering with a flight crew within U.S. special aircraft jurisdiction, 49 U.S.C. 46504;
• carrying a weapon or explosive abroad an aircraft within U.S. special aircraft jurisdiction, 49 U.S.C. 46505; and
• sabotage of interstate gas pipeline facilities, 49 U.S.C. 60123.

When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years). The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission), a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

120 Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

121 “Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.

“This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders).\(^{122}\)

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

**Other Procedural Adjustments.** In other procedural adjustments designed to facilitate criminal investigations, the Act:

- increases the rewards for information in terrorism cases
- expands the Posse Comitatus Act exceptions
- authorizes “sneak and peek” search warrants
- permits nationwide and perhaps worldwide execution of warrants in terrorism cases
- eases government access to confidential information
- allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
- lengthens the statute of limitations applicable to crimes of terrorism
- clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
- adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B.\(^{123}\)

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\(^{122}\) It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, e.g., damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

\(^{123}\) When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001)(remarks of Rep. Sensenbrenner); for general background, see, Doyle, *McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys*, CRS REP. NO. RL30060 (Dec. 14, 2001).
Rewards. The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L.105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism.\textsuperscript{124}

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

Posse Comitatus. The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.\textsuperscript{125}

Delayed notification of a search (sneak and peek). Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take

\textsuperscript{124} The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct threat assessments for federal agencies, and to reimburse federal agencies for the costs of detaining terrorist suspects overseas.

\textsuperscript{125} For a general discussion of the Posse Comitatus Act, see, Doyle, \textit{The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law}, CRS REP.NO. 95-964 (June 1, 2000).
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, Richards v. Wisconsin, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, Wilson v. Arkansas, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, Dalia v. United States, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, cf., United States v. Miller, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, United States v. Freitas, 800 F.2d 1451, 1453 (9th Cir. 1986).126

126 “The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in United States v. New York Telephone Co., 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth
Amendment, demands that surreptitious entries be closely circumscribed,” United States v. Freitas (Freitas I), 800 F.2d 1451, 1455-456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, United States v. Freitas (Freitas II), 856 F.2d 1425 (9th Cir. 1988).

“...No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in Dalia v. United States, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in Dalia, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property. . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. See United States v. New York Telephone Co., 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . . Although the Freitas I court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in United States v. Villegas, 899 F.2d 1324 (1999). Although the Freitas I court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in Villegas. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the Freitas I court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” United States v. Pangburn, 983 F.2d 449, 453-55 (2d Cir. 1993).

In Simons, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
The Justice Department urged that the conflict be resolved with a uniform rule which permitted sneak and peek warrants under the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage.\textsuperscript{129}

The Act, in section 213, stops short of the Justice Department proposal. Characterized as a codification of the Second Circuit decision, \textit{147 Cong.Rec. H7197} (daily ed. Oct. 23, 2001), the Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C. 3103a. Its sneak and peek authorization reaches all federal search and seizure warrants where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (\textit{e.g.}, risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (\textit{e.g.}, jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, \textit{i.e.}, in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation.\textsuperscript{130} The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean.

\footnote{129} The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities,” \textit{DoJ at §353.}

\footnote{130} Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department’s initial proposal, the Department’s justification does not address the question.
The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

Neither Rule 41 nor any other provision of federal

131 The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

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133 United States v. Barona, 56 F.3d 1087, 1092 (9th Cir. 1995)(“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); United States v. Behety, 32 F.3d 503, 510 (11th Cir. 1994)(“if American law enforcement officials substantially participated in the search or if the

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” F.R.Crim.P. 41, *Advisory Committee Notes: 1990 Amendment*. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

**Terrorists' DNA.** The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards *per se*.  

Existing federal law allowed the Attorney General to collect samples from foreign officials conducting the search were actually acting as agents for their American counterparts’); *United States v. Maturo*, 982 F.2d 57, 61 (2d Cir. 1992)(“where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials” or “where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials”); *United States v. Mitro*, 880 F.2d 1480, 1482 (1st Cir. 1989)(“where American agents participated in the foreign search or the foreign officers acted as agents for their American counterparts”); *United States v. Mount*, 757 F.2d 1315, 1318 (D.C.Cir. 1985)(“if American officials or officers participated in some significant way”); *United States v. Marzano*, 537 F.2d 275, 270 (7th Cir. 1976)(declining to adopt the “joint venture” standards, but finding level of American participation in the case before it insignificant); *United States v. Morrow*, 537 F.2d 120, 139 (5th Cir. 1976)(“if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts”); each of the decisions also suggests that evidence secured in a manner which shocked the conscience of the court would be excluded.

134 The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, *see*, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), *reprinted*, 78 Cong.Rec. 4982-983 (1934)(“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco’’); 22 U.S.C. 141 (1926 ed.)(conferring judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

federal prisoners convicted of a variety of violent crimes, 42 U.S.C. 14135a. The Act enlarges the predicate offense list to include any crime of violence or any terrorism offense, section 503.136

**Access to Educational Records.** Finally, the Act calls for an ex parte court order procedure under which senior Justice Department officials may seek authorization to collect educational records relevant to an investigation or prosecution of a crime of terrorism, section 507 (as an exception to the confidentiality requirements of the General Education Provisions Act, 20 U.S.C. 1232g), section 508 (as an exception to the confidentiality requirements of the National Education Statistics Act, 20 U.S.C. 9007).

**Statute of Limitations.** Prosecution for murder in violation of federal law may be initiated at any time, 18 U.S.C. 3281. A five year statute of limitations applied for most other federal crimes before passage of the Act, with a few exceptions. Among the relevant exceptions were an eight year statute of limitations for several terrorist offenses, 18 U.S.C. 3286,137 and a ten year statute of limitations for a few arson and explosives offenses, 18 U.S.C. 3295. The Justice Department recommended the elimination of a statute of limitations in terrorism cases.138

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136 Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples form convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes,” DoJ at §353.

For a general discussion, see, Fischer, DNA Identification: Applications and Issues, CRS REP.NO. RL30717 (Jan. 12, 2001).

137 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

138 “This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

“This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in
The Act takes less dramatic action in section 809. It eliminates the statute of limitations for any crime of terrorism\(^{139}\) that risks or results in a death or serious bodily injury, 18 U.S.C. 3286. In the absence of such a risk or result, all other terrorism offenses become subject to the eight year statute of limitations unless already covered by the ten year statute for explosives and arson offenses, 18 U.S.C. 3286.

Application of the statute of limitations rarely provokes a constitutional inquiry. Nevertheless, due process precludes prosecution when it can be shown that pre-indictment delay “caused substantial prejudice to [a defendant’s] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.”\(^{140}\) Moreover, a judicial difference of opinion has appeared in those cases connection with the September 11, 2001 terrorist attacks. The constitutionality of such retroactive applications of changes in statutes of limitations is well-settled, See, e.g., United States v. Grimes, 142 F.3d 1342, 1350-51 (11th Cir. 1998); People v. Frazer, 982 P.2d 180 (Cal. 1999).

“Existing federal law (18 U.S.C. §3282) bars prosecuting most offenses after five years. 18 U.S.C. §3286, as currently formulated, extends the limitation period for prosecution for certain offenses that may be committed by terrorists – but only to eight years. While this is a limited improvement over the five-year limitation period for most federal offenses, it is patently inadequate in relation to the catastrophic human and social costs that frequently follow from such crimes as destruction of aircraft (18 U.S.C. §32), aircraft hijackings (149) U.S.C. §§46502, 46504-06, attempted political assassinations (18 U.S.C. §§351, 1116, 1751), or hostage taking (18 U.S.C. §1203). These are not minor acts of misconduct which can properly be forgiven or forgotten merely because the perpetrator has avoided apprehension for some period of time. Anomalously, existing law provides longer limitation periods for such offenses as bank frauds and certain artwork thefts (18 U.S.C.§§3293-94) than it does for crimes characteristically committed by terrorists.

“In many American jurisdictions, the limitation periods for prosecution for serious offenses are more permissible than those found in federal law, including a number of states which have no limitation period for the prosecution of felonies generally. While this section does not go so far, it does eliminate the limitation period for prosecution of the major crimes that are most likely to be committed by terrorists (‘Federal terrorism offenses’), as specified in section 309 of this bill,” DoJ at 301.

\(^{139}\) As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 (sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period.\footnote{United States v. De La Matta, 266 F.3d 1275, 1286 (11th Cir. 2001); United States v. Grimes, 142 F.3d 1342, 1351 (11th Cir. 1998); United States v. Morrow, 177 F.3d 272, 294 (5th Cir. 1999); Falter v. United States, 23 F.2d 420, 425-26 (2d Cir. 1928).} Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.\footnote{People v. Frazer, 24 Cal.4th 737, 759, 982 P.2d 180, 1294, 88 Cal.Rptr.2d 312, 327 (1999).}

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (Grimes, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (Frazer, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

**Extraterritoriality.** Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States or elsewhere. . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.\footnote{United States v. Layton, 855 F.2d 1388 (9th Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); United States v. Benítez, 741 F.2d 1312 (11th Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).}

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnaping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

Victims. Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11th Victim Compensation Fund legislation before it passed the Act. Consequently, the Act’s victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 et seq., and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 et seq.

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:

• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year)(42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d)(5)), section 621(d)

• waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

• eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
• makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

• prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

• allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

• reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

• makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

• allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

• establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

**Increasing Institutional Capacity.** A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

- $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)

- necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)

- $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)

- $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816

- $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701

- $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)

- $5 million for DEA police training in South and Central Asia, section 1007.

Miscellaneous. Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might to used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act,145 or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b), 807.146

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145 *I.e.*, Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).

Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples form convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes,” DoJ at §353.

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connection with the September 11, 2001 terrorist attacks. The constitutionality of such retroactive applications of changes in statutes of limitations is well-settled, See, e.g., *United States v. Grimes*, 142 F.3d 1342, 1350-51 (11th Cir. 1998); *People v. Frazer*, 982 P.2d 180 (Cal. 1999).

“Existing federal law (18 U.S.C. §3282) bars prosecuting most offenses after five years. 18 U.S.C. §3286, as currently formulated, extends the limitation period for prosecution for certain offenses that may be committed by terrorists – but only to eight years. While this is a limited improvement over the five-year limitation period for most federal offenses, it is patently inadequate in relation to the catastrophic human and social costs that frequently follow from such crimes as destruction of aircraft (18 U.S.C. §32), aircraft hijackings (§49) U.S.C. §§46502, 46504-06, attempted political assassinations (18 U.S.C. §§351, 1116, 1751), or hostage taking (18 U.S.C. §1203). These are not minor acts of misconduct which can properly be forgiven or forgotten merely because the perpetrator has avoided apprehension for some period of time. Anomalously, existing law provides longer limitation periods for such offenses as bank frauds and certain artwork thefts (18 U.S.C. §§3293-94) than it does for crimes characteristically committed by terrorists.

“In many American jurisdictions, the limitation periods for prosecution for serious offenses are more permissible than those found in federal law, including a number of states which have no limitation period for the prosecution of felonies generally. While this section does not go so far, it does eliminate the limitation period for prosecution of the major crimes that are most likely to be committed by terrorists (‘Federal terrorism offenses’), as specified in section 309 of this bill,” DoJ at 301.

\(^{139}\) As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 (sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period.141 Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.142

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (Grimes, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (Frazer, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

**Extraterritoriality.** Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States or elsewhere. . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.143

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnaping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.

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141 United States v. De La Matta, 266 F.3d 1275, 1286 (11th Cir. 2001); United States v. Grimes, 142 F.3d 1342, 1351 (11th Cir. 1998); United States v. Morrow, 177 F.3d 272, 294 (5th Cir. 1999); Falter v. United States, 23 F.2d 420, 425-26 (2d Cir. 1928).


143 United States v. Layton, 855 F.2d 1388 (9th Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); United States v. Benítez, 741 F.2d 1312 (11th Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.\(^{144}\)

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

**Victims.** Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11\(^{th}\) Victim Compensation Fund legislation before it passed the Act. Consequently, the Act’s victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 *et seq.*, and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 *et seq*.

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:

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\(^{144}\) *Compare, United States v. Gatlin*, 216 F.3d 207 (2d Cir. 2000); *United States v. Laden*, 92 F.Supp.2d 189 (S.D.N.Y. 2000); *with, United States v. Corey*, 232 F.3d 1166 (9th Cir. 2000); *United States v. Erdos*, 474 F.2d 157 (4\(^{th}\) Cir. 1973).*
• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year)(42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d) (5)), section 621(d)

• waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

• eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
• makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

• prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

• allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

• reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

• makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

• allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

• establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

**Increasing Institutional Capacity.** A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

- $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)

- necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)

- $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)

- $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816

- $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701

- $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)

- $5 million for DEA police training in South and Central Asia, section 1007.

**Miscellaneous.** Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might to used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act, or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b), 807.146

145 *I.e.*, Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).

FIG. 5a

I. Antitrust Law
II. Patent Law

A. Infringement
B. Invalidity
C. Laches
D. Ownership
E. Marking
F. Intervening Rights
G. Inequitable Conduct
H. Unenforceability
FIG. 5d
FIG. 5e
It appears that even the engineering manager, Mr. Johnson, was fully aware of the initial failure to mark at least three full months before any correction was made.

To: Mr. Johnson
From: Mr. Smith
Date: January 15, 1995

Dear Mr. Johnson, I notice that our Alpha product doesn't display any patient information. Did you consider marking the box?
FIG. 9

Mr. Jones: Objection your Honor, this document clearly constitutes hearsay.

Judge Off: Objection sustained.

Mr. Smith: Your Honor, I'd like to now move to have Defendant's Exhibit 22 entered into evidence.

DIE22: 06/19/91 (9:54AM) Admitted: Hearsay
DIE220: 06/18/91 (4:23PM) Admitted: Limited Purpose
DIE23: 06/17/91 (4:10PM) Admitted: Relevance
DIE23: 06/17/91 (3:51PM) Denied: Relevance
ATTORNEY TERMINAL HAVING OUTLINE PREPARATION CAPABILITIES FOR MANAGING TRIAL PROCEEDING

CROSS-REFERENCE TO RELATED APPLICATIONS (Claim Of Benefit Under 35 U.S.C. 120)

This application is a continuation of U.S. Ser. No. 08/073,805, filed on Jun. 7, 1993, now abandoned by Bennett et al., which is a continuation-in-part application of U.S. application Ser. No. 08/036,488, filed Mar. 24, 1993, by Bennett et al., now U.S. Pat. No. 5,369,704.

INCORPORATION BY REFERENCE

The descriptive matter of the above-referred to parent U.S. application Ser. No. 08/036,488, filed Mar. 24, 1993, by Bennett et al., is incorporated herein by reference in its entirety, and is made part of this application. Also incorporated herein by reference in their entirety and made part of this application are pending U.S. applications by Bennett et al.: 1) Ser. No. 08/066,948, filed May 24, 1993, entitled “Audio and Video Transcription System for Manipulating Real-Time Testimony”; and 2) Ser. No. 08/065,132, filed May 20, 1993, entitled “Down-Line Transcription System Having Context Sensitive Searching Capability”.

BACKGROUND OF THE INVENTION

This invention relates to a down-line transcription system used by attorneys for reviewing real-time transcription during a proceeding such as a trial or deposition; and, more particularly, it relates to a method and apparatus for interactively preparing an outline for use during such a proceeding based on case evidence and case law which may be locally or remotely located.

As is well known, legal proceedings such as a deposition or trial involve the participation of, among others, an examining attorney who asks questions and a witness who must answer (“testify”) while under oath. To prepare for such proceedings, the examining attorney must review the applicable case law and the related case evidence. The attorney also consults experts, clients and other associate attorneys regarding specific issues of law and fact as proves necessary. During his investigation process the attorney takes notes, and makes copies of documents and legal cases regarding everything at issue. Based on these materials, the attorney attempts to develop a strategy, constructs an outline of possible lines of inquiry, drafts potential questions for the witness and organizes relevant documentary evidence for use as exhibits for the proceeding. During the entire process, the examining attorney attempts to anticipate all of the legal issues that might arise.

The entire preparation process often proves to be very time consuming and cyclical in nature. Every important fact uncovered leads to a new case law search. Similarly, every new legal issue leads to a need for additional facts that are found by conducting a case evidence search or are found by directly examining a witness. Because of this, lead attorneys on a case must be organized and skilled at memory recall.

The defending attorney must also attempt to understand the factual and legal issues in the case via case law and case evidence searching and through conversations with the client, expert witnesses, other attorneys and, most importantly, the witness to be deposed. During the entire process, the defending attorney's goal is to anticipate the strengths and weaknesses of the case and the factual evidence which may arise in the proceeding. The defending attorney must be well versed in all categories of the facts and law which might arise so as to be able to properly defend the witness. The defending attorney takes notes during his pre-investigation process to prepare the witness for the proceeding.

However, neither the examining attorney nor the defending attorney can anticipate everything. Typically, in the midst of a proceeding, the witness reveals something unexpected to one or both attorneys. The revelation could involve a new area of law which the attorneys know little if anything about. More often, the revelation suggests an unknown variant in a known category of law. The revelation also creates a need for additional documents for use during the proceeding to pursue the new issue. In all such situations, additional searching is needed. However, during the proceeding, because the attorneys do not have the luxury of time, outlining, legal researching, and factual evidence retrieval prove to be an impossibility.

Additionally, the examining attorney generally takes notes (1) on a legal pad of paper, (2) directly on copies of potentially relevant documents identified for use in the deposition, and (3) on Post-it® brand notes which are associated with the documents and other materials. During the proceeding, the attorney attempts to recreate the association of the notes, the identified documents and draft questions with legal inquiries into the different categories of law. Because of disorganization, the attorney is often unable to use a great deal of the prepared information.

In complex litigation, the problems facing the attorneys are compounded. Because the preparation process becomes a very time consuming task, the lead examining (and defending) attorney delegates the task to an associate attorney on the case. The associate attorney, who often has lesser knowledge of the facts and law at issue, is faced with the task of retrieving the important case law and evidence which will be relevant in the upcoming proceeding. Because of lesser knowledge and inexperience, the associate attorney either over prepares or else complicates the matter by not culling out the appropriate law or facts. In addition, because the associate attorney must brief the lead attorney during a relatively short time period before the proceeding, the lead attorney cannot grasp all of what is attempted to be conveyed. Similarly, the associate attorney may convey a misconstrued understanding of the law and the evidence because of inexperience. Either way, the lead attorney often does not find out all he needs until the proceeding is underway.

In the midst of the proceeding, the examining attorney is also confronted with the problem of recalling the testimony of former witnesses regarding the same subject matter now being addressed. If recalled, the examining attorney may use the prior testimony to his advantage. Also, after the deposition, the attorney is faced with the problem of reorganizing the materials in some type of saveable form for later use when a similar witness is deposed.

Hence, it would be highly desirable to solve the foregoing variety of problems enumerated in preparing for legal proceedings such as a deposition or trial by guiding the attorney in the preparation process while associating all notes, documents and law into a workable
format which requires minimal attorney interaction during the proceeding.

It is therefore an object of the present invention to provide a method and apparatus having interactive outlining capabilities based on tailorable, default outlines that provide immediate access to current case law, pre-typed tailorable and default questions while providing for association of case and witness specific notes, testimony, and other case evidence.

It is another object of the present invention to provide a method and apparatus for selecting a pre-typed outline based on categories or subcategories of law, by providing for interactive queries based on specific facts and law at issue in a given lawsuit. It is another object of the present invention to provide a method and apparatus for interactively selecting a pre-typed outline based on categories of law which contains tailored potential questions that may be further tailored for managing depositions, trial and case evidence, law and attorney work product.

SUMMARY OF THE INVENTION

These and other objects of the present invention are achieved in a transcription network having an outline used by attorney terminals for managing a lawsuit. The outline contains a plurality of categorization entries related to issues in a specific lawsuit. At least one of the plurality of categorization entries relates to a first data item of case law information. Similarly, the outline comprises a second data item of case evidence information relating to at least one of the plurality of categorization entries. Other objects are also achieved with the outline provides for the association of the first and second data items.

Objects are also achieved in a method for preparing to take the testimony of a witness including the steps of storing case evidence in a database, associating the evidence in the computer database with a deposition question or witness answer, and viewing this association. In another embodiment, associating the evidence includes associating the evidence in real time. In a further embodiment, case evidence includes testimony, pleadings, or documents, and the database includes either a local or remote database.

Other objects are achieved in a method used by an attorney terminal for a given lawsuit which comprises the steps of accessing an outline library that includes a number of outline areas related to witness testimony, and selectively using at least one of the outline areas for use in a given lawsuit.

In one embodiment, the method includes associating a plurality of preset examination questions with at least one outline area and storing preset examination questions in a database. In a further embodiment, the method further includes the step of tailoring the stored examination question so as to direct questions to a specific witness to be deposed. In yet a further embodiment, the method includes retrieving the stored examination questions during the examination of the witness in real time by addressing the stored outline areas to automatically retrieve associated questions.

Other objects and further aspects of the present invention will become apparent in view of the following detailed description and claims with reference to the accompanying drawings.

BRIEF DESCRIPTION OF THE DRAWINGS

FIG. 1 is perspective view which illustrates an overall system configuration in which attorney terminals operate in Outline, Pretrial and Timeline Modes to manage a lawsuit according to the present invention. FIG. 2 is perspective view which illustrates an overall system configuration in which attorney terminals operate in Deposition and Trial Modes to manage a lawsuit according to the present invention.

FIG. 3 is a detailed perspective view illustrating an attorney terminal in an Outline Mode configuration as used by an attorney to prepare for a deposition or trial proceeding according to the present invention.

FIG. 4a is a diagram illustrating the hierarchical structure of the outline library according to the present invention which is interactively used by the attorney terminals to create a tailored outline for a given lawsuit. FIG. 4b is a detailed diagram illustrating the types and groupings of information contained within each hierarchical category, subcategory, etc., of the outline library according to the present invention. FIG. 4c is a diagram illustrating an exemplary pointer structure under the groupings in the tailored outline according to the present invention which provides access to and association information for each data item of the tailored outline.

FIG. 5a is a detailed perspective view illustrating an attorney terminal which provides a Roman numeric outline display of the categories and subcategories contained in a tailored outline according to the present invention.

FIGS. 5b-5f are detailed perspective views of the attorney terminal of FIG. 5a which further illustrate how an attorney may move through, create, modify or otherwise use the hierarchical structure of the tailored outline according to the present invention.

FIG. 6a is a detailed perspective view of an attorney terminal which graphically displays specific groupings of case law information under certain subcategories of the outline library.

FIG. 6b is a detailed perspective view of the attorney terminal of FIG. 6a which illustrates the use of an edit window to fully display, modify, or create case law grouping information such as a heading which is directly associated with a subcategory of the outline library.

FIGS. 7a-7c are detailed perspective views of an attorney terminal operating in the outline mode which graphically displays groupings of draft questions under a marking subcategory in the outline library, wherein the draft questions are selected, modified or added for use in a deposition or trial proceeding.

FIG. 7d is a detailed perspective view of an attorney terminal operating in the deposition mode which illustrates the use of a draft question as the basis for an actual question asked during a deposition or trial proceeding.

FIG. 8 is a perspective view illustrating the selection of categories, subcategories, etc., to be used during an upcoming deposition or trial, wherein, in view of the witness's anticipated knowledge, only those areas of the tailored outline considered pertinent are selected for later access during the proceeding.

FIG. 9 is perspective view providing further detail of the system configuration of attorney terminals operating in the evidence mode according to the present invention.
DESCRIPTION OF THE PREFERRED EMBODIMENT

FIGS. 1 and 2 are perspective views which illustrate overall system configurations in which attorney terminals operate in various modes to manage a lawsuit according to the present invention. In particular, Fig. 1 is a perspective view of a system configuration in which a second chair attorney prepares for a deposition or trial proceeding using an attorney terminal 21 which operates in an Outline Mode, Pretrial Mode, Timeline Mode and other modes.

Upon initiation of a new lawsuit, an attorney (generally the second chair attorney on the case) uses the attorney terminal 21 in its Outline Mode to prepare for conducting the new lawsuit. First, the attorney gains access to an outline library 43, and interactively responds to a query regarding: 1) the issues of law from the Complaint of the new lawsuit; 2) the State and/or Federal laws at issue; 3) the specific court involved; 4) the names of the parties; 5) the party represented; and 5) other specific factual information relevant given the law at issue. Thereafter, a second query interactively extracts information as to the Answer in the lawsuit, including all defenses and counterclaims at issue. A third query captures information regarding defenses to any counterclaims raised.

As an added advantage to the querying process, a plaintiff's attorney may access the outline library 43 to interactively construct the Complaint. The information provided to construct the Complaint provides all of the lawsuit information needed in the first query, and, therefore, does not need to be asked again.

Similarly, a defending attorney might access the outline library 43 and, after responding to the first query using the Complaint, the defending attorney might interactively construct the Answer in lieu of the second query. During the interaction, all possible legal defenses to the charges in the Complaint aid the defending attorney in drafting the Answer. To complete the Answer, the defending attorney may then add counterclaims, if any, and selectively choose those defenses which are appropriate for the current lawsuit. Similarly, a Reply to the counterclaims may be interactively prepared by the plaintiff's attorney. Moreover, headnotes, seminal cases, pre-typed searches, and comments regarding each charge raised and all potential defenses thereto aid the attorneys in preparing the Complaint, Answer, or Reply.

From the queried information, the outline library 43 provides a tailored outline corresponding to the issue in the case for conducting and managing the lawsuit. Basically, the tailored outline provides a hierarchical structure for associating the law at issue, case evidence, and attorney work product so that the attorney can easily access information retrieved from a variety of sources. At the root of the hierarchical structure, the outline provides all of the major categories of law and fact at issue in the lawsuit. Branches of the hierarchical structure, i.e., subcategories, sub-subcategories, etc., provide further and further levels of legal/factual detail regarding the major categories or subcategories.

Through the hierarchical structure of the outline, the attorney can rapidly access a desired grouping of evidence, law and work product pertaining to a solitary legal or factual issue. However, access is not the only benefit. Additional benefits include ease of closing off an area of inquiry. By closing off a subcategory, all of the further levels below that subcategory (sub-subcategories, etc.) are closed off, rapidly minimizing the size of the working outline. Moreover, the mere listing of all the potential areas of law provides the attorney with a hierarchical checklist, reminding the attorney of what law might be at issue. Other benefits enhance the attorney's ability to prepare for a legal proceeding by providing: 1) virtually instant legal overviews (headnotes) of the suggested categories and subcategories of law without having to conduct a search; 3) immediate access to the burdens of proof required; 4) pre-typed legal search formulations for further legal inquiry via a case law library 63; 5) instant access to the seminal case regarding the categories or subcategories; 6) pre-typed potential questions to be asked based on the current case and witness; 7) pre-typed potential interrogatories and document requests relating to the categories or subcategories; 8) the ability to associate case evidence, work product (notes, pleadings, or portions thereof), or related communications with the categories or subcategories; 9) sequential and interactive guidance of the attorney through the hierarchical categorizations of law based on the attorney's response; and 10) where beneficial, suggestions of evidentiary searches and other discovery tips such as, for example, pertinent local court discovery rules.

On an ongoing basis, while in the Outline Mode, the attorney terminal 21, such as might be used by a second chair attorney, utilizes the retrieved tailored outline to begin a second level of case specific tailoring governed by the discovery process. As further evidence is obtained through discovery, the attorney continues to pursue deeper levels of some categories at issue, while closing off others.

To aid in the discovery process, the Outline Mode helps formulate interrogatories, document requests, and questions for upcoming depositions. To formulate document requests and interrogatories, the attorney first analyzes the categories, subcategories, sub-subcategories, etc., to become familiar with the potential issues in the lawsuit through the headnotes provided, and begins to construct document requests and interrogatories from sample, partially-tailored interrogatories available at each level of hierarchy. Partial-tailoring automatically occurs upon retrieval of the tailored outline from the outline library 43 via the initial stage of querying by substituting specific lawsuit information where appropriate into the text of the sample document requests and interrogatories. Such tailoring minimizes the attorney's need for further modification. Upon completing the tailoring process within the hierarchical structure, the attorney terminal 21 extracts or "copies" all of the newly created document requests and interrogatories from the hierarchical structure and places them into draft discovery requests. After minimal further modification, the attorney is able to serve the requests on the opposing side.

The answers to the interrogatories are first placed into a case evidence library 91. From there, the attorney terminal 21, if so directed, automatically compares and updates the draft interrogatories in the tailored outline with those actually served, and then directly associates the received answers into the outline. In particular, the terminal 21 parses a text file of the served interrogatories into units of single interrogatories. Each of the served interrogatories are then compared to each draft interrogatory on an ordered word by word basis. The draft interrogatory providing the best match is dis-
played by the attorney terminal 21 along with the corre-
sponding served interrogatory and a matching percent-
age (based on the number of matching words). The reac-
tion, the attorney terminal 21 prompts the attorney for
verification. If the attorney verifies the match, the ter-

5    minal 21 replaces the draft interrogatory with the
served interrogatory, and associates the answer ther-
with. If the attorney does not detect a match, the attor-

10    ney terminal 21 can be directed to display the draft
interrogatory offering next best match. This process can
continue until verification is received. If at any point
during the verification process, however, the attorney
detects that the served interrogatory has been newly
added outside of the tailored outline, the attorney termi-

15    nal 21 can be used to categorize that interrogatory
within the appropriate hierarchical area(s) in the tai-
lored outline. Once a draft interrogatory has been up-
dated (or replaced) by a served interrogatory, it is taken
out of consideration for further correspondence match-
ing. Thus, the served interrogatories can be interac-
tively imported back into the hierarchical structure of
the tailored outline. If, however, the attorney makes all
modifications to the draft interrogatories directly
within the tailored outline, the importation process is
terminated accurately to locate and associate the
answers received.

20    After the importing process, the attorney is directed
back through the hierarchical structure by the attorney
terminal 21 to review the newly received interrogato-
ries. By doing so, the attorney may choose to close off
additional categories or subcategories of inquiry, or
pursue others. In many circumstances, supplemental
interrogatories may be in order after reviewing the
responses. In such circumstances, the attorney may
draft additional requests and, at some later time, extract
the newly drafted requests for service. Moreover, any
type of discovery request can be periodically drafted
whenever the need arises. At any time, the attorney
may extract a collection of the draft discovery requests
for review, modification and service or use during a
deposition or trial proceeding.

25    The attorney terminal 21 also automatically prepares
draft document requests during a deposition or trial
proceeding. For example, if during a deposition the ex-

30    pert, to an oral asks opposing counsel to produce the
documents which the witness has identified, the attor-

35    ney terminal 21, monitoring the transcribed text, detects
the question to the opposing counsel, detects the use of
the word "produce", concludes that a formal request
needs to be made, and prepares a draft document re-
quest based on the interchange between the attorney
and the opposing counsel.

40    If during the process of reviewing responses the at-
torney recognizes that an unanticipated area of law
might be at issue, the attorney merely gains access to the
outline library 43, enters the unanticipated area of law,
and the attorney's tailored outline is updated to include
all of the categories and subcategories and related in-
formation regarding the unanticipated area of law for re-
view.

45    Depending on the lawsuit budget and the number of
items anticipated, the documents and things produced
may be entered into the case evidence library in a vari-
ety of ways. Where possible, all documents received are
immediately scanned and converted to text via an optical
character recognition ("OCR") process. The scanned
documents and the corresponding text are stored in the case evidence library 91. Summaries de-
scribing the "things" produced are also added to the
library 91. In alternate situations, only summaries for all
of the documents and things received are loaded into
the case evidence library 91. In yet other situations,
only summaries or scanning is used for documents and
things identified as being significant.

50    The attorney interacts with the documents and things
received for annotation and association into the hierar-
chical structure of the tailored outline. If the documents
have been scanned, the attorney terminal 21 can be used
to display all documents by Bates number for review by
the attorney. If the corresponding text of the documents
has been extracted, the attorney may search the corre-
sponding text to identify all documents with the term,
key words or names, for example, Doing so minimizes
the quantity of documents that an attorney needs to
review for a specific purpose. Although all documents
may be scanned and converted, in many lawsuits, only
specific documents may be scanned and/or converted.
Summaries might also be used either as an annotation to
scanned documents, or as a stand-alone index to the
actual documents via the Bates numbers.

55    As each document is reviewed, the attorney may
choose to add textual annotations thereto, and also
can choose to associate documents with a specific catego-
ration entry in the tailored outline. Furthermore, the
attorney may choose to directly associate the document
with a pre-typed or actual deposition question, a spe-
cific case law headnote, a treatise selection, or any other
data stored within a given categorization entry.

60    To better automate the process of association, the
attorney terminal 21 directs the attorney through the
draft document requests in the hierarchical structure of
the tailored outline. From the draft document requests
extracted, the attorney modifies and serves the docu-
ment requests. In a process identical to that available
for interrogatories, the attorney terminal 21 provides for
interactive importation of the served document requests
into the tailored outline. Thereafter, on a document
request by document request basis, each Bates stamped
document produced can be scanned and immediately
associated with the corresponding served document
request in the hierarchical structure of the tailored out-
line. Thus, to review all documents relating, for exam-
ple, to a contract, the attorney terminal 21 can be used to
access the categorization entry corresponding to oral
contracts within the tailored outline. Upon ac-

65    cessing the entry, all of the documents stored therein (or
associated therewith) can be directly accessed. Docu-
ments and things can also receive multiple associations
under multiple categorization entries as proves neces-
sary. This is accomplished using an associate/copy
command sequence via the command line 33. Similarly,
associate/move or associate/delete command sequen-
ces can be used to modify associations.

65    During the reviewing process, the attorney marks all
significant documents, and may annotate the documents
as needed with text or voice. In addition, during the
process, additional discovery requests or unanticipated
areas of law may come to light. The discovery requests
may be drafted and associated with specific documents
and/or annotations for later extraction for formal ser-
vice. Any unanticipated areas of law can be retrieved
from the outline library 43 to supplement the tailored
outline.

65    The tailored outline also provides sample draft depo-
sition questions within each category or subcategory
(i.e., each categorization entry) of its hierarchical struc-
ture. The attorney can mark those which might prove advantageous for potential modification and use during an upcoming deposition or trial. If so desired, additional questions might also be drafted within the hierarchical structure. To aid in this process and because of the diversity of the backgrounds of potential witnesses, different subcategory groupings of questions are provided for the different types of witnesses. For example, technical questions might be grouped for technical witnesses being deposed which might be ignored for a non-technical witness. Similarly, questions for expert witness extracting opinions might be appropriately grouped.

In addition, as described in more detail below, during a deposition while operating in the Deposition Mode, questions and answers are automatically associated with the appropriate categories and subcategories in the hierarchical structure, providing further groupings of potential questions. Specific questions used during prior depositions can thereafter be selected and possibly refined for use in an upcoming deposition with a different witness.

Where appropriate, each category and subcategory of tailored outline provides instant access to headnotes, associated full text of seminal cases, and pre-typed search requests to supplement the attorney's understanding of the specific law at issue. The outline library 43 draws and updates such legal information via a case law library 63. At any time during the lawsuit, the attorney may update the related legal information contained in the tailored outline via a comparison process with the outline library 43 which is maintained as legally "current". Any differences detected are flagged and sequentially presented to the attorney via the terminal 21 for immediate consideration of possible impacts on the ongoing lawsuit. The tailored outline is thereafter updated to reflect the current state of the law.

Using the attorney terminal 21, the attorney can directly tap into further legal and evidentiary information of expert witnesses, associate attorneys and clients via communication over the link 23 with corresponding terminals 3, 4 and 5. For example, while contemplating a specific subcategory in the tailored outline, the attorney realizes that the client might possess needed factual information at issue. Instead of calling the client, the attorney types in a message, and associates therewith any information grouped within that subcategory as deemed necessary to clarify the request. Such information might include the specific discovery requests, documents, answers, etc., which raised the need for the information. The message and associated information is then forwarded to the client via the communication link 23 to the terminal 5. After reading the communication, the client responds via the link 23. Upon receipt of the response, the tailored outline automatically stores the client's response within the hierarchical category from which the request originated. In this way, further evidence or law can be collected to further tailor the outline.

Once discovery has been completed, the attorney uses the tailored outline to aid in the preparation of the pretrial order in a Pretrial Mode. First, in the Pretrial Mode, the terminal 21 automatically generates a list of all Exhibits and other documents or things which have been marked as significant. This list provides the attorney with a starting point for identifying a list of Exhibits for trial. Using the terminal 21, the attorney can immediately access all annotations and the subcategory or subcategories in which a potential Exhibit was associated. With such access, the attorney can readily determine whether the potential Exhibit should be removed from the list.

Similarly, designated deposition testimony may be easily identified while in the Pretrial Mode. Upon request, the terminal 21 automatically extracts all question and answer interchanges deemed during the deposition proceeding to be important, i.e., through marking. The terminal 21 displays all such important interchanges for review by the attorney to determine whether they might be useful at trial. All of the associated annotations to the interchanges are also available to aid in the determination.

The Pretrial Mode also provides for a draft set of jury instructions for the Pretrial Order. Specifically, operating from the tailored outline, the attorney terminal 21 automatically generates a set of draft jury instructions based on the categories and subcategories of law still at issue upon completion of the discovery process. Although the draft jury instructions are preferably stored within the hierarchical structure of the tailored outline, they may be interactively retrieved using the outline library 43.

The attorney terminal 21 also provides potential witness and expert witness lists while in the Pretrial Mode. All parties which have been deposed are immediately listed as potential candidates. Any party having been deposed which is removed from a list, automatically cues the terminal 21 to designate the deposition in a list of depositions, or portions thereof, to be read in at the trial. To further aid the attorney, the terminal 21 identifies those portions of the designated deposition transcripts which have been previously marked as significant as being the portions to be read into the record during the trial. The witness lists and designations, along with the other pretrial information generated, provide the attorney with a reasonable starting point when preparing the Pretrial Order.

At any time during the discovery process or thereafter, the attorney terminal 21 may also be used in a Timeline Mode. In the Timeline Mode, the terminal 21 automatically searches through the evidence referenced in the tailored outline to identify dates and times, and then places the references in a chronological order for attorney review. As a default, only the documents and things and portions of the depositions that have been marked as significant are considered for the search. However, the scope of the search can be broadened or narrowed to encompass other documents and the full transcripts of the proceedings.

The terminal 21 also provides for designation of a specific time frame searching restriction to limit the search to the time period of an important event, for example. Similarly, to limit the scope of a search, only a single subcategory or group of subcategories can be chosen so as to confine the search to the evidence associated with those subcategories. Lexical searching can be combined with time line searching to help focus the information retrieved.

Once a chronologically ordered time-line listing has been retrieved, the attorney terminal 21 provides for an interactive review of the evidence associated with each entry so that entries may be deleted or else summarized. Thereafter, the terminal 21 provides for the display and printout of the summarized remaining entries in a graphical time-line format.
FIG. 2 is perspective view of a system configuration in which first and second chair attorneys utilize the information obtained from the tailored outline in the Outline Mode to conduct a deposition or trial proceeding, while operating attorney terminals 19 and 21 in a Deposition or Trial Mode. In the illustrated configuration, a computer aided transcription ("CAT") system 11 provides real-time, down-line transcription for down-line review by the attorney terminals 19 and 21. As questioning is conducted, the attorney terminals 19 and 21 operate within the hierarchical structure of the tailored outline so as to retrieve the transcript (the Q & A's), storing it into the hierarchical structure as the proceeding is taking place. Operation within the hierarchical structure occurs naturally because the attorneys use the hierarchical structure of the tailored outline as the basis for conducting the questioning. Moving through the structure may either be managed by the first or second chair attorneys.

As will suggest itself, the Deposition Mode need not be used to automatically retrieve the transcript into the tailored outline. Instead, an attorney (or paralegal) may categorize the Q & A's ("questions and answers") after the deposition has ended. The attorney may also choose to only categorize those Q & A's believed to be significant. This post-proceeding categorization process takes place directly via interactive review of the transcript while moving through the hierarchical structure of the tailored outline. As an intermediate step, the attorney may manually mark-up the transcript, and have a paralegal perform the interactive post-proceeding categorization.

In one embodiment, deposition transcripts, annotations, scanned documents, etc., and other case evidence is stored in the case evidence library 91. The supplemental library 92 stores draft discovery, jury instructions, etc. Similarly, all case law, treatise selections, etc., are stored in the case law library 63. The outline library 43 only stores the hierarchical structure of the tailored outline which provides pointers to and associations between the case law, case evidence and supplemental information stored in respective libraries 63, 91 and 92. These libraries may be in entirely separate databases, or in allocated portions of a single database. In an alternate embodiment, the tailored outline stores all of the case evidence, case law, and supplemental information directly into the hierarchical structure of the tailored outline.

Upon interacting with outline library 43, the attorney terminal 21 may extract and store the tailored outline locally. However, the tailored outline may be fully stored and maintained by the outline library 43, alleviating the need for local maintenance.

Specifically, at a trial or deposition, a stenographic recorder 13 converts key-strokes entered by a court reporter via a keyboard 15 into digital codes. The digital codes are intended to correspond to the words spoken at the deposition or trial. The stenographic recorder 13 communicates the key-stroke codes to the CAT system 11 via a link 17. Upon receipt, the CAT system 11 attempts to transcribe the key-stroke codes into the exact text of the words which were spoken to provide for a real-time textual display of the transcript. To do so, the CAT system 11 communicates with a number of libraries, dictionary, index and tables stored in a database 25. The CAT system 11 transmits the exact and, where necessary, phoneme text down-line to the attorney terminals 19 and 21 via a communication link 23 for real-time review. Further detail regarding code-to-text conversion process and the down-line attorney terminals can be found in the pending parent U.S. application Ser. No. 08/036,488, filed Mar. 24, 1993, which is incorporated herein by reference.

In addition to the textual transcript which is generated, the CAT system 11 also provides access to audio and video transcripts which may also be fully or selectively associated into the hierarchical structure of the tailored outline. The CAT system 11 utilizes a tape recorder 8 and a video camera 7 as a basis for creating the audio and video transcripts. Further detail regarding the creation and association of the audio and video transcripts can be found in pending U.S. application Ser. No. 08/066,948, filed May 24, 1993, entitled "Audio and Video Transcription System for Manipulating Real-Time Testimony", by Bennett et al., which is incorporated herein by reference.

If unanticipated areas of law arise at a deposition when terminals 19, 21 are in a Deposition Mode, the attorney terminals 19 or 21 may choose to update the tailored outline and access the law via the outline library 43, or may choose a direct search via the case law library 63. The advantages of the former option include the associated retrieval of not only headnotes and seminal cases, but also the pre-typed questions for immediate use during the proceeding. Similarly, the case evidence library 91 can be further searched during the proceeding as the need arises. Further detail regarding searching of the current transcript, case law library 63, and case evidence library 91 can be found in pending U.S. application Ser. No. 08/065,132, filed May 20, 1993, entitled "Down-Line Transcription System Having Context Sensitive Searching Capability", by Bennett et al., which is incorporated herein by reference.

While in the Deposition or Trial Mode, experts, other attorneys and clients may receive the transcripts down-line and/or may communicate to the attorney terminals 19 and 21 via the terminals 3, 4, and 5 via the link 23. During the proceeding while in the Deposition or Trial Modes, all such communications are directly associated into the hierarchical structure of the tailored outline as similarly occurs in the Outline Mode.

Referring to FIG. 3, in the Outline Mode, an outline window 41 is created which covers a substantial portion of a screen 27 of attorney terminals such as the terminal 21. The attorney may build an outline 39 entirely from scratch using a keyboard 29, a mouse 31, and a command line 33. Basically, the building process involves listing each legal (and sometimes factual) category at issue and subcategories thereof into a typical Roman numeric format of the outline 39. Thereafter, associated within the hierarchical structure of the categories, pre-typed questions can be added to prepare for a deposition or trial, legal research might be obtained from the case law library 63, specific documents might be scanned or summarized and associated therewith, etc., as described above.

Instead of starting completely from scratch, however, the attorney might begin the process by copying an outline or portions thereof from a similar lawsuit. By copying, the attorney can quickly and easily make modifications for the current lawsuit, while taking advantage of all of the legal information and work product contained therein.

In addition, the attorney can build the outline 39 as described above through interactive session(s) with the
The outline library 43 may be stored either remotely or locally. Referring to FIG. 4a, the outline library 43 is hierarchically structured by category 45, subcategory 47, sub-subcategory 49, and so on. Broad areas of law provide the category 45 entries. Each category 45 entry may be broken down into one or more subcategory 47 entries, each of which in turn are broken down into one or more sub-subcategory 49 entries, and so on. For example, the category 45 includes a patent law entry 51. The patent law entry 51 is further broken down to subcategory 47 entries of infringement 53, invalidity 55, laches 57, etc. The subcategory "invalidity" 55 is broken down into sub-subcategory 49 entries of "best mode" 59 and enablement 60. Under each sub-subcategory area may be one or more sub-sub-subcategories, and so on. In some cases, the categories used in the outline may be a reference to an area of evidentiary inquiry which is not an area of law. For example, the category 45 could contain an entry "Background" having subcategory 47 entries for each witness or companies involved. Sub-subcategory 49 entries could include "Educational History", "Employment History", "Company Origin", etc.

Through the querying process between the attorney and the outline library 43, the attorney terminal 21 extracts a tailored outline for only those category, subcategory, etc., entries with indicated relevance in the particular lawsuit at issue. For example, in a lawsuit involving a patent count and an antitrust counterclaim, only the patent 51 and antitrust 50 entries in the category 45 would be included in the tailored outline. Moreover, in addition to selecting appropriate category 45 entries, the early query process also provides for automatic selection of the subcategory 47, sub-subcategory 49, etc., entries where possible.

Referring to FIG. 4b, each entry in the outline library 43 contains a hierarchical framework of groupings of information for use by the attorney to manage a lawsuit. In particular, each category, subcategory, etc., entry, such as an entry 101, in the outline library 43 is hierarchically and directly associated with a relevance query grouping 103, a case law grouping 105, a discovery grouping 107, and a case evidence grouping 109. Where appropriate, the relevance query grouping 103 contains library pointers to a variety of textual queries stored in the supplemental library 92 that are used to determine whether a specific entry, the entry 101, is relevant in the case at issue.

The case law grouping 105 provides the attorney with a concise overview of the law at issue (i.e., the law listed in the entry 101). The case law grouping 105 consists of: 1) a headnote pointer structure 121, i.e., pointers to headnotes stored within the supplemental library 92 which provide an overview of the law at issue and identifying the associated burdens of proof; 2) a seminal case pointer structure 123, i.e., pointers to a seminal case or cases regarding the entry 101 which are stored within the case law library 63; 3) a selected treaties pointer structure 125, i.e., pointers to selections from respected treaties regarding the entry 101 which are stored in the supplemental library 92; 4) a preset search structure 127, i.e., pointers to a list of search requests stored in the supplemental library 92 which are designed, for example, to retrieve the most recent relevant cases from the case law library 63 which relate to the entry 101; 5) a search context structure 129, i.e., a pointer or pointers to search context information stored within the supplemental library 92 which, for example, provides default log-in and library information for the case law library 63 to accelerate any searching conducted within the entry 101. If, however, the entry 101 happens to be an evidentiary entry, the entire case law grouping 105 may be empty. Where appropriate, prior to extracting the tailored outline from the outline library 43, the case law information provided by the case law grouping 105 receives specific tailoring to remove unnecessary details of case law which through the querying process prove to have no relevance in the specific lawsuit at issue.

Similarly, the discovery grouping 107 provides the attorney with a draft interrogatory pointer structure 141, a draft document requests pointer structure 143, and a draft question pointer structure 145 to access data items from the supplemental library 92 which the attorney may use to assist in the discovery process relating to the entry 101. Prior to extracting the tailored outline from the outline library 43, the draft discovery of the discovery grouping 107 receives specific tailoring by weaving the lawsuit specific information obtained through the querying process into draft discovery, and by removing discovery determined by the querying process to be irrelevant in the current lawsuit. Where beneficial, all of the draft discovery listings include tips and tactics regarding the discovery process of the entry 101.

The case evidence grouping 109 provides empty pointer structures to data items which the attorney adds to the case evidence library 91 over the entire duration of the lawsuit. Specifically, for served interrogatories and responses thereto which relate to the entry 101, an interrogatory pointer structure 161 is provided. For the questions and corresponding answers recorded during a deposition or trial relating to the entry 101, a Q&A pointer structure 163 is provided. Similarly, a document and items pointer structure 165 is provided for storing pointers to the produced documents and things relating to the entry 101. In addition, other pointer structures might also be included such as, for example, a work product pointer structure 167 (for pointing to annotations, notes, pleadings, etc.) and miscellaneous communications pointer structure 169 (for pointing to communications received from experts, other attorneys, clients and the so called Artificial Intelligence routines of the attorney terminals).

Additional groupings such as a pretrial grouping 171 (which contains pointers to a set of jury instructions 173) may also be provided by the outline library 43. Moreover, other groupings might be added by the attorney manually. Groupings that the attorney decides are unnecessary may be easily removed from the tailored outline upon extraction from the outline library 43 or at any time thereafter. If the attorney later determines that an unextracted or deleted grouping is needed, the tailored outline can be appropriately updated by interactively revisiting the outline library 43. Because many lawsuits span a several year period, the attorney may also periodically revisit the outline library 43 to update the groupings and data items thereunder. Of particular significance here involves updating the case law grouping 105. All of the specifics regarding the changes or additions made to the tailored outline can be reviewed interactively by the attorney as the update takes place, or after the update has been completed. The update review allows the attorney to consider the impact of the update changes and additions.
The outline library 43 also contains preset associations between the groupings of the various categorization entries where appropriate to assist the attorney in evaluating the tailored outline which has been extracted. For example, a specific draft interrogatory under one categorization entry might have preset associations with a headnote from the same entry, and with a treatise selection from a different categorization entry. In this way, the attorney can quickly display the legal basis behind the draft interrogatory. With the preset association framework provided by the outline library 43, the attorney need only create supplemental associations with specific case evidence, work product, etc., which comes to light during the lawsuit.

As previously articulated, although in the embodiment described in relation to FIG. 4b only structures of pointers to information are associated with a given categorization entry, in an alternate embodiment, instead of pointer structures, the actual information is stored within the hierarchical structure of the tailored outline. In addition, the pointer structures are merely linked-lists of pointers; however, various other data structures for associating pointers might also be used.

Once a tailored outline with its associated information groupings is extracted from the outline library 43, the attorney might further tailor the outline by: 1) manually adding a new category, subcategory, etc., entries; 2) adding to or modifying the contents of any of the groupings provided thereunder; 3) combining groupings or portions thereof; and 4) adding new groupings. Moreover, as previously stated, at anytime thereafter, the attorney may gain access to the outline library 43 to update or extract additional entries from the outline library 43 into the attorney's tailored outline.

Specifically, if the tailored outline is to be stored and maintained within the outline library 43, the extraction process involves the copying of the selected hierarchy of the categorization entries (along with associated information groupings), i.e., the tailored outline, into a working file stored within the outline library 43. Although not necessary, at any time thereafter, the attorney may choose to down-load the tailored outline, or portions thereof, for separate storage and maintenance. Alternatively, the extraction process might involve the direct down-loading of those portions of the outline library 43 selected as being part of the tailored outline. In that circumstance, permission for the intermediate storage and maintenance of the tailored outline within the outline library 43 would not be needed.

The attorney utilizes the tailored outline to begin filling the case evidence grouping 109 of each entry 101 in the tailored outline. For example, scanned documents are first directly stored into the case evidence library 91. Upon reviewing a given document, the attorney may identify an appropriate categorization entry 101, and store a pointer to that document in the document and things pointer structure 165.

Concurrent with the filling process, the attorney marks evidence entered as significant, annotates, and makes specific associations where beneficial. For example, during a deposition, the attorney may annotate a given answer, or, while reviewing documents, the attorney might annotate a specific document. Annotations are stored in the case evidence library 91 and pointed to via the set of work product pointers 167.

Annotations are directly associated for example with a seminal case, an interrogatory, or any other data within the entry 101 groupings. Associations may also be made between any such elements of information provided by the various groupings under the entry 101. For example, an association might be created between a document pointed to by the pointer structure 165 and a headnote from the pointers structure 121, or between a Q&A in one deposition with a Q&A from another deposition via the pointer structure 163.

FIG. 4c is a diagram providing an exemplary illustration of the pointer structures identified in FIG. 4b. Specifically, a pointer structure 175 (which is representative of any of the pointer structures of FIG. 4b) provides direct indexing of all data items within a specific grouping area, and indirect indexing of all associated data items. A pointer table 177 provides the basis for the indexing. The pointer table 177 contains entries for every data item contained within the specific grouping. For example, if the pointer structure 175 happened to be the headnote pointer structure 121 (FIG. 4b), each entry into the table 177 would correspond to a particular headnote associated with the categorization entry 101 (FIG. 4b).

Each entry in the table 177 consists of two fields: 1) a data item pointers field 179—each field entry for storing a pointer to a single data item, such as a data item 185, associated with the specific grouping; and 2) an association stack pointers field 181—each field entry storing a pointer to an association stack, such as an association stack 189. For example, if the pointer structure 175 happened to be the headnote pointer structure 121 (FIG. 4b), pointers to the text of each headnote would be stored in the data item pointers fields 179. A data item 185, i.e., in this example a single headnote, can be easily located via a pointer stored in an entry 183 of the fields 179. Similarly, to identify all associations made with the data item 185, a corresponding entry 187 provides a pointer to the association stack 189 which, in turn, provides a list of pointers each of which points to an associated data item. For example a pointer entry 191 stores a pointer which points to a data item 193 which has been associated with the data item 185.

When a new data item is added under a given grouping, a new entry is added to the table 177. If no associations exist to the data item, the newly added association stack pointers field 181 contains no pointer to an association stack. When an association is made, a new association stack is created with a single entry which contains a pointer to the association, and the pointer to the association stack is placed in the newly added association stack pointers field 181. In addition, the same process occurs for the data item being associated. For example, although not shown, wherever the data item 193 is directly referenced, an association stack will be created (or added to) to include an association to the data item 185.

FIG. 5a is a detailed perspective view illustrating an attorney terminal which provides a Roman numeric outline display of the categories and subcategories contained in a tailored outline according to the present invention. As previously described, the tailored outline 39 might have: 1) originated in whole or in part from the outline library 43; 2) been copied from another lawsuit; or 3) created manually in whole or in part.

To move through the tailored outline 39 using the Roman numeric display, a single click (button selection) of the mouse 31 of a "Patent Law" category entry 201 causes a deeper level of the hierarchical structure, i.e., the subcategories A–H, to either appear if they are not currently being displayed, or disappear if they are being
displayed. In other words, the single clicking of the mouse 31 acts to expand or collapse a branch in the hierarchical structure of the tailored outline 39. Similarly, the attorney may expand or collapse any categorization level in the tailored outline 39. For example, referring to FIG. 5b, the attorney single clicks on the "Invalidity" subcategory entry 203, and the sub-subcategories 1-2 appear. Single clicking on the entry 203 a second time would likewise collapse the tailored outline back to the level shown in FIG. 5a.

While using the Roman numeric display, the information contained within any category, subcategory, etc., in the tailored outline 39 can be accessed by "double clicking" the mouse 31, i.e., two sequential button selections of the desired category, subcategory, etc. After double clicking, the screen 23 displays the underlying groupings of the selection as illustrated in FIG. 5c. FIG. 5c also illustrates the use of the single mouse clicking to expand the Case Law grouping to reveal the types of data A-E contained therein. By double clicking on any of the types of data A-E, a stack window 211, for summarily (one line per entry) displaying all of the items of the selected type of data, and an edit window 213, for fully displaying a selected item and providing full editing capability therefor, are opened as is illustrated in FIG. 5d. In particular, upon selecting the "Headnote" type of data 205 (FIG. 5c), the stack window 211 displays a stacked listing of single sentence summaries of each headnote (HN), such as headnotes 221, 223, 225, and 227 in FIG. 5d, pointed to within the specifically selected categorization entry (i.e., category, subcategory, sub-subcategory, etc.).

Upon double clicking the mouse 31 a given entry in the stack window 211, the edit window 213 opens to display (and editing) of the full text of the headnote (FIG. 5d). Additional headnotes may be added via the command line 33 and the edit window 213. Headnotes might also be modified or deleted via the edit window 213. Headnotes determined to have particular significance might also be marked, annotated, or associated with any other data item or items within the tailored outline. All associations between data items stored in the libraries 63, 91 and 92 are actual associations between pointers to those data items. The tailored outline contains the pointer associations within the hierarchy of the pointer structures.

In downloading the tailored outline (or portions thereof) to the attorney terminals, the attorney has several choices. The attorney may choose to download only the pointers and structure of the tailored outline without the actual data items within the libraries 63, 91 and 92. Specific access to the actual data items stored in the libraries 63, 91 or 92 would be managed via the link 23. Alternatively, the attorney may choose to also download all of the case evidence library 91, and all of the related case law and supplemental data items from the libraries 63 and 92. Instead of down-loading all data items, however, the attorney might only down-load the data items currently considered relevant, for example, in an upcoming deposition.

In order to delete from the hierarchical structure of the tailored outline 39, the attorney need only single click the mouse 31 to identify the categorization entry to be deleted, and then select a delete command from the command line 33. Deleting the categorization entry also causes all deeper levels in the hierarchical structure to be deleted. In other words, deleting a category results in the deletion of corresponding subcategories, sub-subcategories, sub-sub-subcategories, and so on. In this way, the attorney can quickly and easily close off all branches in the hierarchy of the tailored outline 39.

Instead of deleting an entire branch, however, the attorney might choose to only delete a specific grouping or one type of data contained therein. Following the same process as before, the attorney merely selects a group or a type of data and the delete command from the command line 33.

As previously described, at any time, the attorney may revisit the outline library 43 to add to the tailored outline 39. Manual additions might also be made. To do so, the attorney enters an outline edit mode via the command line 33, and then manually edits the displayed tailored outline as desired. By double clicking on a newly added categorization entry, a display such as is shown in FIG. 5c appears which provides access to the edit window 213 illustrated in FIG. 5d for adding specific data items under the types of data provided.

To aid the attorney in identifying whether a sub-level in the hierarchy exists for a given categorization entry, italics are used to illustrate a dead-end. For example, referring back to FIG. 5b, if the "Laches" entry labelled "CC" had no further sub-levels of categorization thereunder, the entry would appear as "Laches", i.e., in italics. Similarly, to indicate that a categorization entry has no groupings of data thereunder, an underline is provided. Italics are also used to indicate that a grouping of data (FIG. 5c) has no data items thereunder, i.e., the pointer structures contain no entries. Both the italics and underline aid the attorney in parsing through, modifying or otherwise constructing the tailored outline 39.

Instead of using the interactive process, the attorney might request a printout of the entire outline or portion thereof, and redline the printout to eliminate or add to the tailored outline. The redlined version can be given to a paralegal or secretary who makes the modifications in the manner discussed above. Once the tailored outline has been completed, the entire contents of the tailored outline 39 can also be printed out in outline form for record keeping or to provide for manual access.

FIGS. 5e and 5f more clearly illustrate the association and annotation process. FIG. 5e provides a perspective view of an exemplary situation under which an attorney might desire to associate data items within the hierarchical structure of the tailored outline. Specifically, for example, during the review of scanned documents via the window 214, the attorney identifies a document 232 which tips off the attorney that the legal issue of marking might be involved. The attorney directs the attorney terminal 21 to display the marking headnotes, such as the headnote 221, in the window 211. This direction may occur through the Roman numeric outline as described above, or via a more graphical display mode illustrated and described in detail below.

After reviewing the headnotes, the attorney decides to generally associate the document 232 into the evidence grouping of the marking categorization entry, and to specifically associate the document 232 with the headnote 221. To accomplish this, the attorney merely selects an associate command 34 from the command line 33. Upon selecting the associate command 34, the association is indicated visually with an "[@ character 222 placed in front of both the document 232 and the headnote 221. A pointer to the document is stored into the tailored outline (i.e., into the document and things pointer structure 165), and an association is made (as
described in relation to FIG. 4(c) with both the document 232 and the headnote 221.

After associating two data items, if only one of the data items is currently being displayed, the other can easily be accessed and displayed. For example, when the attorney terminal 21 displays only the headnote 221, the attorney need only select a display association command (not shown) from the command line 33 to cause the associated document, in this situation the document 232, to be located and displayed. To view multiple associations, the window 211 displays a stack of all associated data items pointed to by a particular association stack, such as the association stack 189 (FIG. 4c). Through the window 211, the attorney may pick and choose those associated data items for full display by double clicking the mouse 31 on a selection.

FIG. 8 provides a perspective view of an exemplary situation under which an attorney might desire to annotate data items within the hierarchical structure of the tailored outline. As in the previous example, while reviewing scanned documents, the attorney encounters the document 232, and decides that a textual annotation is needed. The attorney adds the textual annotation via the window 234 by selecting an annotate command 36 from the command line 33. The window 234 appears and allows the attorney to type, store and directly associate the illustrated annotation. An annotation is merely a note that is directly associated with a data item. Therefore, once created, all annotations are treated as any other data item having an association. In addition to textual data items, audio and video data items are also supported.

Although the Roman numeric display provided by the attorney terminals provides relatively simple access to all items of all of the types of data contained within the tailored outline 39, in many situations, a more selective graphical approach is preferred. FIGS. 6a, 6b, 7a and 7b illustrate the basic functionality of the graphical display of the tailored outline 39, which proves useful in situations where repeated access to specific groupings of data is common. FIG. 8 illustrates the use of selective marking of the outline library 43 of categorization entries and data contained therein. Selective marking provides for corresponding selective display of the outline library 43. Combining the graphical display with selective marking provides the attorney with easier access to only the pertinent information within the tailored outline 43.

Specifically, FIG. 6a is a detailed perspective view of an attorney terminal which graphically displays specific groupings of case law information under certain subcategories of the outline library. In a graphical display mode, the attorney terminal screen is sectioned into three areas: 1) the command line 33; 2) a graphical display window 253; and 3) a stack window 254. The graphical display window 253 provides two levels of hierarchical display of categorization entries. For example, on an upper level 255, the category "Patent Law" is displayed. Below the Patent Law category, on a lower level 257, the subcategories "Invalidity", "Laches", "Ownership" and "Marking" are displayed.

To select other categorizations on the same level not currently displayed, slide bars 259 and 261 are provided. For example, to change to the Antitrust category (not shown), the attorney uses the slide bar 259 to step or scan through all of the categories available in the tailored outline 39 to identify the Antitrust category entry. As the slide bar 259 is moved, the block at the level 255 displays the name of each newly selected category. The categories are arranged in alphabetical order, aiding the attorney in locating the desired category. In addition, via double clicking on a slide bar button 260, a direct textual search for the desired categorization entry might also be made.

Similarly, the attorney moves the slide bar 261 to step or parse through an alphabetical listing of available subcategories at the lower level 257 (although an alphabetized subcategory display is not shown to aid in the labeling process of a Marking subcategory 263). A slide bar button 262 also provides direct textual categorization searching, via a double clicking of the left button of the mouse 31.

To move up and down through the hierarchical structure, the attorney merely selects and drags a block from one of the levels 255 or 257 to the other. The graphical display window 253 responds by stepping up or down through the hierarchy as directed. For example, if the attorney selects and drags the Invalidity subcategory to the upper level 255, the graphical window 253 would only display: 1) the Invalidity subcategory in place of the Patent Law category at the upper level 255; and 2) at the lower level 257, the sub-subcategories of "Best Mode", "Enablement", etc.

To display the groupings, types of data, or specific items contained by any categorization entry, as with the Roman numeric display, the attorney merely double clicks the mouse 31 on the desired block at either of the levels 255 or 257. Doing so causes that block to be displayed at the upper level 255, while the lower level 257 displays the groupings of data. Double clicking on a specific grouping causes that grouping to move to the upper level 255 while displaying the types of data at the lower level 257. Thereafter, double clicking on a specific type of data causes the stack window 254 to display the data items listed (i.e., pointed to) thereunder.

Alternately, to display groupings and items thereunder, a default configuration can be pre-selected via a display command 265 of the command line 33. Upon selecting the display command 265, a pull-down menu appears which provides for the pre-selection of the various groupings for display. Checking a grouping causes a side pull-down menu 267 to appear for pre-selection of the specific type of data to be displayed. Multiple groupings may be checked (pre-selected), and multiple types of data may also be checked from each checked grouping. Once pre-selection has been completed, upon clicking the right button of the mouse 31 to identify a particular categorization entry, the items of all of the pre-selected types of data from each pre-selected grouping of the categorization entry are displayed in the stack window 254.

For example, if an attorney pre-selects only the case law grouping and headnotes ("notes"), seminal cases ("cases"), treatise selections ("treatise") and preset searches and search context ("searches"), and then selects the marking subcategory 263 with the right button of the mouse 31, the stack window 254 displays headnotes 269 and 271, a treatise selection 273, and a seminal case 275.

Any of the entries in the stack window 254 can be selected, via a double click of the mouse 31, for full display in the edit window illustrated in FIG. 6a. As shown, the edit window 269 overlaps the stack window 254, but might instead overlap the graphical window 253 or both, depending on the circumstances, to provide for the display of other information. Similarly,
after a categorization selection has been made, the attorney will generally close or hide the graphical display window 253 to provide room for the display of other information.

The categorization entries available for display within the graphical display window 253 can be limited to only those entries marked as pertinent, as detailed below in reference to FIG. 8. Similarly, those groupings, types of data, and corresponding items which have been marked as pertinent can also be selectively displayed.

The pre-selection settings and the selective pertinence marking not only provides for selective display of the tailored outline 39, but can also be used individually or in combination for limiting searching. In particular, upon selecting a search command from the command line 33, a default configuration may be made or modified which limits searching within the tailored outline 39 to areas which have been pre-selected. Similarly, a separate default configuration may also limit searching to those categorization entries, groupings, types of data, and items which have been marked as pertinent.

FIG. 7a is a detailed perspective view of an attorney terminal which graphically displays groupings of draft questions in the stack window 254 from the marking subcategory 263, for use in a deposition or trial proceeding. In preparing for a deposition or trial, although the Roman numeric display might be used, the attorney uses the graphical display window 253, stack window 254, and edit window 283 (FIG. 7b) to gather questions 321 for use during an upcoming deposition.

The attorney first uses the graphical window 253 to locate the desired areas to be used based on the characteristics of the witness. An expert witness, for example, might be able to testify regarding the technical details of specific law or fact, while an eye witness might only offer a present sense impression regarding other factual issues relating to possibly other areas of law. FIG. 8, described below, further illustrates the process of limiting the categorization entries for a specific witness.

Once a categorization entry has been selected such as, for example, the marking subcategory 263, the attorney clicks the right button of the mouse 31, to display the default settings of the display command 265. In response, the stack window 254 displays the draft questions 281, 283, 285 and 287 associated with the subcategory marking 263 for potential use during the deposition or trial proceeding. As with all stack window 254 displays, additional entries in the stack (i.e., additional draft questions) can be accessed by a scrolling process.

By double clicking on a specific draft question such as the draft question 281, referring to FIG. 7b, an edit window appears for displaying the full text of the draft question. In this form, the attorney may modify the question if so desired via a variety of typical editing commands available through the command line 33. The command line 33 also provides for opening a clear edit window so that the attorney may draft a question from scratch. In addition, specific documents, case law, etc., may be directly associated with draft questions for reference during the deposition. Thus, the attorney utilizes the attorney terminal 21 in the outline mode to prepare for an upcoming deposition or trial proceeding.

Referring to FIG. 7c, during the deposition or trial proceeding, the attorney terminals are used in the deposition mode to recall the draft questions to aid the questioning process. To begin, the examining attorney merely selects a categorization entry for conducting questioning as previously described by locating and double clicking the mouse 31. For example, double clicking on the marking entry 263 causes the stack of draft questions to appear in the window 254. Thereafter, the attorney may use the draft questions and associations thereto in the questioning process.

Upon completing all of the questioning under a given categorization entry, the attorney merely locates and selects via the window 253 another categorization entry to display other draft questions related thereto. This process continues until all questioning regarding all categorization entries has been exhausted.

In addition to providing access to the corresponding draft questions, associations, case law and case evidence, the process of moving through the tailored outline while in the deposition mode also serves to automatically categorize all actual questions and answers asked during the proceeding. For example, all Q&A's transcribed while under the marking categorization entry 263 are automatically appended to the Q&A pointer structure 163 (FIGS. 4b and 4c).

The second chair attorney using the terminal 21 can also control the display of the terminal 19 used by the first chair attorney. For example, the second chair (associate) examining attorney can step through the hierarchical structure of the tailored outline instead of the first chair examining attorney while in the deposition mode. As categorization entries are selected, the draft Q&A's can be displayed on both attorney terminals 19 and 21 under the control of the second chair attorney. Moreover, without controlling the first chair attorney's display, the second chair attorney can also transmit specific draft Q&A's as messages to the first chair examining attorney during the proceeding.

The examining attorney may also choose to only use the tailored outline for specific areas of the tailored outline, or for unanticipated areas of law that are uncovered and retrieved during the proceeding. As a result, in such circumstances, automatic categorization is not used. After the proceeding, the attorneys (or their paralegals) may then manually categorize all of the Q&A's or only those Q&A's considered significant.

FIG. 7d is a perspective diagram of the attorney terminal 19 operating in the deposition mode on a draft question retrieved from the tailored outline as illustrated in FIG. 7a. By double clicking on a retrieved draft question, the question 281, the edit window 282 enters an edit mode to display the full text of the question 281 as shown. In a transcription window 295, the terminal 19 displays a question 291 and a corresponding answer 293 which constitute real-time transcription received from the CAT system 11 (FIG. 2). As can be appreciated from the illustration, the examining attorney may use draft questions, such as the question 281, to directly formulate actual questions, such as the question 291, during the proceeding.

An attorney switches from the real-time transcription display (FIG. 7d) to the tailored outline display (FIG. 7d) as necessary to seek out and use draft questions during a deposition. The command line 33 provides for such switching between displays.

In addition, within the draft question, parenthesis are used to provide instructions to help the attorney understand a draft question. Brackets are used to indicate that further tailoring (modification) of the bracketed words might be in order. In addition, specific instructions or "tips" may be provided to instruct the user as to the formulation of a line of questioning.
Although not shown, the graphical display window also uses italics and underlining convention established with the Roman numeric display. Italics are used to indicate categorization dead-ends, while underlining indicates that underlying grouping items do not exist. In addition, when providing only a selective display of the information marked as pertinent, the italics and underlining convention applies only to the marked information in the tailored outline 39. For example, if items exist but none are marked as pertinent under a given subcategory, the subcategory will be displayed with an underlining.

FIG. 8 is a perspective view illustrating the selection of categories, subcategories, etc., to be used during an upcoming deposition or trial, wherein, in view of the witness's anticipated knowledge, only those areas of the tailored outline considered pertinent are selected for later access during the proceeding. To select a section of the tailored outline 39 for inclusion in the deposition or trial proceeding, the attorney selects a pertinent mode from the command line 33, and scrolls through categorization entries to mark the desired entries via a single clicking of the mouse 31. Single clicking also causes the sub-categorization levels to appear if they exist for a more specific selection. Moreover, single clicking the categorization entry a second time causes the sub-categorization levels to disappear from the display, and causes the categorization entry to be unmarked as not being pertinent if no sub-categorization entry thereunder has been marked.

Double clicking of the mouse 31 acts to provide access to the underlying groupings as described in relation to FIGS. 5c above. These too may be marked as pertinent, as can the underlying types of data and actual data items. However, if the groupings, types of data, and data items listed contain no pertinence marking, all will be considered marked as pertinent if the corresponding categorization entry is marked.

For example, the attorney may believe that because the deponent was not working at the plaintiff's company until a date after the assignment document was executed, the deponent will probably have no knowledge of an assignment. The attorney may then choose not to select "ownership" for selective display in the tailored outline for this particular witness. It also may be that the attorney has elected not to challenge ownership and therefore the ownership area is not included.

After selection, a bar background of a contrast color is placed around the selected categorization entry such as entries 301, 303, 305 and 307. If the attorney changes his mind, a selection may be un-selected by placing the cursor over the selection and again clicking the mouse 31.

In an identical process, all of the information contained within any selected category, subcategory, etc., can be further screened to simplify the use of the tailored outline for a given witness during the deposition or trial proceeding. For example, specific draft questions can be selected, while the other discovery groupings might be ignored.

Thus, only those categorization entries and underlying data items anticipated to be relevant for a given witness are marked as pertinent for selective display and possibly selective searching during the deposition or trial proceeding. The pertinence marking is saved in a configuration file under the witnesses last name for later loading during the deposition.

The pertinence marking process is also automatically applied while in the Pretrial Mode to enumerate the documents and things, and the deposition designations to be used at trial. In particular, concurrent with the generation of the draft Exhibit and deposition designation lists, a pretrial configuration is generated which provides for selective display and searching of only those items selected in the Pretrial Mode. The pretrial configuration may be directly used at trial or might be loaded as a starting point in the continued narrowing of the tailored outline 39 for trial. Similarly, an attorney might desire to have specific pertinence selections stored for personal use outside of the trial or deposition context.

After the attorney has generated a witness specific pertinence marking configuration, the attorney can begin (or continue) to review and associate the pertinent evidence and pertinent case law with the pertinent draft questions. Questions might also have been selected as pertinent from previous depositions for reuse. Conflicting answers to reused questions can then immediately be pointed out by the attorney on the transcript record, forcing the witness to change his testimony or say that the previous witness was wrong. In either case, the veracity of one of the witnesses becomes a beneficial issue.

Typically, the attorney will have a paralegal prepare a witness kit which is merely a file and index of a copy of all documents which were authored by or addressed to the deponent. The attorney will review the documents in the witness kit for potential deposition exhibits as well as for formulating potential questions to add to the outline 39. If such documents have been scanned into the tailored outline 39, the witness kit review may take place fully on the attorney terminal. Therein, the attorney's notes or annotations can be directly made and reviewed to the scanned image. Associating a scanned document image to a specific question or questions may provide the attorney with direct reference to the basis for the inquiry, for example. Similarly, documents, annotations, questions, case law, etc., might be associated with a communication from another terminal: 1) as illustrated in FIG. 2, to help guide the first chair attorney using the terminal 19 in conducting the questioning; or 2) as illustrated in FIG. 1, to help clarify the requests for information or receipts thereof.

Furthermore, if during the attorney presentation of the documentary evidence, he wishes to review case law to understand the import of a certain document, the attorney may use the tailored outline 39 to retrieve the law.

FIG. 9 is a perspective view providing further detail of the system configuration of attorney terminals operating in the Evidence Mode according to the present invention. In a trial or deposition proceeding, attorney terminals automatically track the status of the entry of Exhibits into the record.

Specifically, during a proceeding while in the Evidence Mode, the attorney terminal displays Exhibit entry information 321 in the stack window 254 while displaying the ongoing transcribed text of the proceeding in the transcription window 295. Each entry in the stack window 254 includes an indication of the exhibit number, date, time, and description of the results of the attempted entry.

When an attorney uses the term "Exhibit" during a deposition or at trial, the use of the word triggers an analysis of the status of that Exhibit number's use in the lawsuit, for example, as occurs in response to a tran-
scribed statement 331 from a moving attorney. If the use of an Exhibit is detected, the attorney terminal compares the Exhibit number to a list of Exhibits already entered into the record. This list is contained in the chronologically ordered listing displayed in the stack window 321. If the Exhibit number already exists, the attorney terminal 21 considers the use acceptable and continues the monitoring process. If, however, as illustrated, the Exhibit number does not exist, the attorney terminal 21 further analyzes the context of the usage to determine whether a proper attempt has been made to enter the Exhibit into the record, and, if so, whether objections were stated, and whether the attempt was successful.

To determine whether a proper attempt to enter the Exhibit has occurred, the attorney terminal analyzes the unit of speech containing the usage of the new Exhibit number, i.e., most likely the current question being asked, to determine whether the attorney is attempting to enter the Exhibit into the record. In FIG. 9, the unit of speech is the transcribed statement 331. Specifically, the determination is made based on the existence of key terms such as "mark" for a deposition proceeding and "move" for trial. If the use of the term "Exhibit" is determined to be for an attempted entry into the record, the terminal 21 updates the Exhibit list and displays a message to the attorney indicating that a new Exhibit has been added, for example, as illustrated by a new entry 337. If the determination is incorrect, the message acts as a warning to the attorney that an improper attempted entry of the Exhibit has been made. Similarly, if the determination is made that the new Exhibit has been improperly used, i.e., without proper entry, the attorney terminal 21 displays a warning message to that effect.

Upon determining that a proper attempt to enter an Exhibit has been made, the terminal 21 automatically evaluates the subsequent units of speech, i.e., transcribed statements 333, 334 and 335, to identify any related objections and, if so and at trial, to identify the judge's ruling. Upon identifying any objections raised, the attorney terminal 21 adds the objections to the new entry, entry 337, in the Exhibit list. If the judge makes a ruling, as is illustrated by the unit 335, that ruling is associated with the Exhibit list. The Exhibit list contained within the stack window 254 also automatically, directly associates the corresponding exchanges between the parties and the judge, i.e., the units 331, 333 and 335, for later review. Upon double clicking on any of the exhibit list entries, as with any stack window 254 entry, an edit window (not shown) is used to provide for modifying the entry if necessary. In addition, upon clicking the right button of the mouse 31, the transcription window 295 automatically displays the associated corresponding exchanges.

In addition, it is also contemplated that the tailored outline 39 may directly store all lawsuit information including case evidence, case law and work product. However, as FIGS. 4b and 4c illustrate, the tailored outline 39 merely points to the separate lawsuit information. The tailored outline 39 and lawsuit information can be stored locally (within the attorney terminals), remotely (at possibly a dial-up location), or distributed between the two. Storage remotely carries the advantage of creating a common access point for use by all of the attorneys on the lawsuit. A remote, common access point provides for easier back-up and maintenance than that required in a distributed system. One drawback, however, is that the access may sometimes be slow or unavailable because of faulty or nonexistent communication links. To accommodate such situations, the attorney terminals may use the pertinence selection process to extract for local storage portions of the remotely stored tailored outline 39 before going to a deposition. Upon returning, the newly added information in the extracted local portion of the tailored outline 39 is automatically extracted into the remote tailored outline 39 to bring it up-to-date.

In addition, as generally illustrated by FIGS. 7a-c, any data items contained within the tailored outline can be used inside or outside of a legal proceeding. For example, by selecting a preset search request with the corresponding search context from the pointer structures 127 and 129, in a similar process as described in FIGS. 7a-c, a search request may be executed immediately or after minor modification to perform either a boolean or natural language search on the case law library 63. Similarly, draft jury instructions might be accessed, displayed, modified, and printed for preparing a Pretrial Order.

During a proceeding, should a particular categorization entry not be contained in the selected tailored outline 39, the attorney may use an attorney terminal to access the outline library 43 to retrieve generic Q's, law, etc., during a deposition. For example, if during the deposition the examining attorney asks:

Q78. Now what makes you think that my client copied your invention?
A78. Your client stole my product out of my engineering department.

The examining attorney immediately searches his brain for the law of slander and libel. What does he need to prove? He may or may not know. The questioning continues:

Q79. Did you tell anyone about this?
A79. Yes, I told my sales force.
A80. Did you tell your independent sales reps about this?
A80. Yes.

The examining attorney decides that he desires more testimony on this issue in the next 5 minutes before the witness' counsel, the defending attorney, walks the witness outside for counseling regarding the law.

While the first chair struggles for questions, the second chair attorney may use the terminal 21 to quickly access the categorization entries in the outline library 43 regarding the law of slander and libel. Instant access is provided to case law information, i.e., the types of data contained under the case law grouping and to associated draft questions which may have been at least partially tailored to the lawsuit at issue. Thereafter, the second attorney may send the draft questions and case law information to the first chair attorney examining attorney along the link 23 (FIG. 2). In addition, although not as desirable, the first chair attorney may manage direct access to the outline library 43 himself without assistance from the second chair attorney.

Although the second chair attorney is illustrated as being physically located at the legal proceeding in FIG. 2, the second chair attorney might also be remotely located. Similarly, any of the other attorneys, paralegals, experts, or clients might also step in to assist the attorney(s) during the deposition, these individuals being either locally or remotely located.
Moreover, it is obvious that the embodiments of the present invention described hereinabove are merely illustrative and that other modifications and adaptations may be made without departing from the scope of the appended claims.

We claim:

1. A transcription system used to convert words spoken during a transcription proceeding to a textual form for real time display and categorization comprising:
   transcription means for producing, in real time, transcript signals representative of spoken words;
   outliner means providing for the creation and modification of an outline of categories which relate to the transcription proceeding;
   selection means for displaying during the transcription proceeding a selected category from the outline of categories; and
   association means for automatically classifying in real time all transcript signals produced by said transcription means as belonging to the category currently selected and displayed.

2. The transcription system of claim 1 wherein the selection means also provides for the automatic display of previously categorized information upon selection of a category from the outline of categories.

3. The transcription system of claim 1 further comprising:
   a communication network for receiving communications; and

4. The transcription system of claim 1 wherein the selection means also provides for the automatic display of previously categorized draft questions upon selection of a category from the outline of categories.

5. A transcription system used to convert words spoken during a transcription proceeding to a textual form for real time display comprising:
   transcription means for producing, in real time, transcript signals representative of spoken words;
   a communication network for receiving communications;
   outliner means providing for the creation and modification of an outline of categories which relate to the transcription proceeding;
   selection means for automatically displaying of one category of previously categorized information from the outline of categories; and
   association means for automatically classifying in real time each communication received via said communication network as belonging to the category currently selected and being displayed.

6. The transcription system of claim 5 wherein said association means also automatically classifies in real time all transcript signals produced by said transcription means as belonging to the category currently selected and displayed.
The USA PATRIOT Act: A Legal Analysis

April 15, 2002

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The USA PATRIOT Act: A Legal Analysis

Summary

The USA PATRIOT Act passed in the wake of the September 11 terrorist attacks. It flows from a consultation draft circulated by the Department of Justice, to which Congress made substantial modifications and additions. The stated purpose of the Act is to enable law enforcement officials to track down and punish those responsible for the attacks and to protect against any similar attacks.

The Act grants federal officials greater powers to trace and intercept terrorists’ communications both for law enforcement and foreign intelligence purposes. It reenforces federal anti-money laundering laws and regulations in an effort to deny terrorists the resources necessary for future attacks. It tightens our immigration laws to close our borders to foreign terrorists and to expel those among us. Finally, it creates a few new federal crimes, such as the one outlawing terrorists’ attacks on mass transit; increases the penalties for many others; and institutes several procedural changes, such as a longer statute of limitations for crimes of terrorism.

Critics have suggested that it may go too far. The authority to monitor e-mail traffic, to share grand jury information with intelligence and immigration officers, to confiscate property, and to impose new book-keeping requirements on financial institutions, are among the features troubling to some.

The Act itself responds to some of these reservations. Many of the wiretapping and foreign intelligence amendments sunset on December 31, 2005. The Act creates judicial safeguards for e-mail monitoring and grand jury disclosures; recognizes innocent owner defenses to forfeiture; and entrusts enhanced anti-money laundering powers to those regulatory authorities whose concerns include the well being of our financial institutions.

This report, stripped of its citations and footnotes, is available in an abbreviated form as The USA PATRIOT Act: A Sketch, CRS Rep.No. RS21203. In addition, much of the information contained here may also be found under a different arrangement in a report entitled, Terrorism: Section by Section Analysis of the USA PATRIOT Act, CRS Rep.No. RL31200 (Dec. 10, 2001). A wider array of terrorism-related analysis appears on the CRS terrorism electronic briefing book page.
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The USA PATRIOT Act: A Legal Analysis

Introduction

Congress passed the USA PATRIOT Act (the Act) in response to the terrorists’ attacks of September 11, 2001.¹ The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to further close our borders to foreign terrorists and to detain and remove those within our borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it is not without safeguards, critics contend some of its provisions go too far. Although it grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough.


¹ P.L. 107-56, 115 Stat. 272 (2001); its full title is the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT).”

² H.R. 2975 was introduced by Representative Sensenbrenner for himself and Representatives Conyers, Hyde, Coble, Goodlatte, Jenkins, Jackson-Lee, Cannon, Meehan, Graham, Bachus, Wexler, Hostettler, Keller, Issa, Hart, Flake, Schiff, Thomas, Goss, Rangel, Berman and Lofgren; S.1510 by Senator Daschle for himself and Senators Lott, Leahy, Hatch, Graham, Shelby and Sarbanes.

³ H.R. 3004 was introduced by Representative Oxley for himself and Representatives LaFalce, Leach, Maloney, Roukema, Bentsen, Hooley, Bereuter, Baker, Bachus, King, Kelly, Gillmore, Cantor, Riley, Latourette, Green (of Wisconsin), and Grucci; and reported out of the House Financial Services Committee with amendments on October 15, 2001, H.R.Rep.No. 107-250. H.R. 3004, as reported out, included Internet gambling amendments that were not included in H.R. 2975/H.R.3108.
ed. Oct. 24, 2001), and H.R. 3162 was sent to the President who signed it on October 26, 2001.

Criminal Investigations: Tracking and Gathering Communications

A portion of the Act addresses issues suggested originally in a Department of Justice proposal circulated in mid-September. The first of its suggestions called for amendments to federal surveillance laws, laws which govern the capture and tracking of suspected terrorists’ communications within the United States. Federal law features a three tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications.

The tiers reflected the Supreme Court’s interpretation of the Fourth Amendment’s ban on unreasonable searches and seizures. The Amendment protects private conversations, *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967). It does not cloak information, even highly personal information, for which there is no individual justifiable expectation of privacy, such as telephone company records of calls made to and from an individual's home, *Smith v. Maryland*, 442 U.S. 735 (1979), or bank records of an individual's financial dealings, *United States v. Miller*, 425 U.S. 435 (1976).

Congress responded to *Berger* and *Katz*, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications, 18 U.S.C. 2511. At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious

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4 The Department’s proposal, dated September 20, 2001, came with a brief section by section analysis. Both the proposal (Draft) and analysis (DoJ) were printed as an appendix in *Administration’s Draft Anti-Terrorism Act of 2001, Hearing Before the House Comm. on the Judiciary, 107th Cong., 1st Sess.* 54 (2001).


6 “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,” *U.S. Const.* Amend. IV.

7 Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
criminal cases. When approved by senior Justice Department officials, law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.  

*The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of” one or more predicate offense, 18 U.S.C. 2516.

The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement), 1751 (presidential and presidential staff assassination, kidnapping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnapping, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or naturalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations, 18 U.S.C. 2518. The court notifies the parties to any conversations seized under the order after the order expires, 18 U.S.C. 2518(8).

Below Title III, the next tier of privacy protection covers some of those matters which the Supreme Court has described as beyond the reach of the Fourth Amendment protection – telephone records, e-mail held in third party storage, and the like, 18 U.S.C. 2701-2709 (Chapter 121). Here, the law permits law enforcement access, ordinarily pursuant to a warrant or court order or under a subpoena in some cases, but in connection with any criminal investigation and without the extraordinary levels of approval or constraint that mark a Title III interception, 18 U.S.C. 2703.

Least demanding and perhaps least intrusive of all is the procedure that governs court orders approving the government’s use of trap and trace devices and pen registers, a kind of secret “caller id”, which identify the source and destination of calls made to and from a particular telephone, 18 U.S.C. 3121-3127 (Chapter 206). The orders are available based on the government's certification, rather than a finding of the court, that the use of the device is likely to produce information relevant to the investigation of a crime, any crime, 18 U.S.C. 3123. The devices record no more than the identity of the participants in a telephone conversation, but neither the orders nor the results they produce need ever be revealed to the participants.

The Act modifies the procedures at each of the three levels. It:

offense involving counterfeiting punishable under 18 U.S.C. 471, 472, or 473; (e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States; (f) any offense including extortionate credit transactions under 18 U.S.C. 892, 893, or 894; (g) a violation of 31 U.S.C. 5322 (dealing with the reporting of currency transactions); (h) any felony violation of 18 U.S.C. 2511 and 2512 (interception and disclosure of certain communications and to certain intercepting devices); (i) any felony violation of 18 U.S.C. ch. 71 (obscenity); (j) 49 U.S.C. 60123(b) (destruction of a natural gas pipeline), 46502 (aircraft piracy); (k) 22 U.S.C. 2778 (Arms Export Control Act); (l) the location of any fugitive from justice from an offense described in this section; (m) a violation of 8 U.S.C. 1324, 1327, or 1328; (n) any felony violation of 18 U.S.C. 922, 924 (firearms); (o) any violation of 26 U.S.C. 5861 (firearms); (p) a felony violation of 18 U.S.C. 1028 (production of false identification documents, 1542 (false statements in passport applications), 1546 (fraud and misuse of visas, permits, and other documents) or a violation of 8 U.S.C. 1324, 1327, or 1328 (smuggling of aliens); (p) 229 (chemical weapons), 2332 (terrorist violence against Americans overseas), 2332a (weapons of mass destruction), 2332b (multinational terrorism), 2332d (financial transactions with countries supporting terrorism), 2339A (support of terrorist), 2332B (support of terrorist organizations); (r) any conspiracy to commit any of these, 18 U.S.C. 2516(1)(c)(crimes added by the Act in italics). Other than telephone face to face conversations (i.e., electronic communications), the approval of senior Justice Department officials is not required and an order may be sought in any felony investigation, 18 U.S.C. 2516(3).

10 Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public the agency shall ensure that a record will be maintained which will identify – (i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of the such device.

(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof), section 216(b)(1).

Pen Registers and Trap and Trace Devices. In section 216, the Act allows court orders authorizing trap and trace devices and pen registers to be used to capture source and addressee information for computer conversations (e.g., e-mail) as well as telephone conversations, 18 U.S.C. 3121, 3123. In answer to objections that e-mail header information can be more revealing than a telephone number, it creates a detailed report to the court, 18 U.S.C. 3123(a)(3).11
The use of pen registers or trap and trace devices was limited at one time to the judicial district in which the order was issued, 18 U.S.C. 3123 (2000 ed.). Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States, 18 U.S.C. 3123(b)(1)(C), 3127(2).\textsuperscript{12}

**Communications Records and Stored E-Mail.** With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber, 18 U.S.C. 2703(a),(b). A warrant will also suffice to seize records describing telephone and other communications transactions without customer notice, 18 U.S.C. 2703(c). In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation, officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records, 18 U.S.C. 2703(b),(c). They can obtain a limited amount of record information (subscribers’ names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena, 18 U.S.C. 2703(c)(1)(C). There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial, 18 U.S.C. 2705.

In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider’s customer records, 18 U.S.C. 2703(c)(1)(C).\textsuperscript{13}

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.

\textsuperscript{12} The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” DoJ at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

\textsuperscript{13} Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user's true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” DoJ at §107.
Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

The Act, in section 209, treats voice mail like e-mail, that is, subject to the warrant or court order procedure, rather than to the more demanding coverage of Title III once required, United States v. Smith, 155 F.3d 1050, 1055-56 (9th Cir. 1998).

Finally, the Act resolves a conflict between chapter 121 and the federal law governing cable companies. Government entities may have access to cable company customer records only under a court order following an adversary hearing if they can show that the records will evidence that the customer is or has engaged in criminal activity, 47 U.S.C. 511(h). When cable companies began offering telephone and other communications services the question arose whether the more demanding cable rules applied or whether law enforcement agencies were entitled to ex parte court orders under the no-notice procedures applicable to communications providers. The Act makes it clear that the cable rules apply when cable television viewing services are

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15 See e.g., DoJ at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement’s access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

**Electronic Surveillance.** To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202. A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(i). Yet only the intruder's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.

**Criminal Investigators' Access to Foreign Intelligence Information.** The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism. It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that “the purpose for the surveillance is to obtain foreign intelligence information,” 50 U.S.C. 1804(a)(7)(B)(2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps “the purpose” might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation

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16 18 U.S.C. 299 (chemical weapons), 2332(terrorist acts of violence committed against Americans overseas), 2332a(use of weapons of mass destruction), 2332b(acts of terrorism transcending national boundaries), 2332d(financial transactions with countries which support terrorists), 2339A(providing material support to terrorists), and 2339B(providing material support to terrorist organizations).

17 “Because service providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves as permitted under current law, they often have no way to exercise their rights to protect themselves from unauthorized attackers. Moreover, such attackers can target critical infrastructures and engage in cyberterrorism,” DoJ at §106. Elsewhere the Act defines “electronic surveillance” for purposes of the Foreign Intelligence Surveillance Act (FISA) to emphasize that the law enforcement authority for this intruder surveillance does not confer similar authority for purposes of foreign intelligence gathering, section 1003 (50 U.S.C. 1801(f)(2)).

18 For a general discussion of federal intelligence and law enforcement cooperation, see, Best, Intelligence and Law Enforcement: Countering Transnational Threats to the U.S., CRS REP.NO. RL30252 (Dec. 3, 2001).
CRS-9

Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment's warrant clause. It is here that the “primary purpose” notion originated. In United States v. Truong Dinh Hung, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, “as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.” Subsequent case law, however, is not as clear as it might be: see e.g., United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984) (“FISA permits federal officials to obtain orders authorization electronic surveillance ‘for the purpose of obtaining foreign intelligence information.’ The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying officials’s belief that the information sought is the type of foreign intelligence information described”); United States v. Pelton, 835 F.2d 1067, 1075-76 (4th Cir. 1987) (“We also reject Pelton’s claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial”); United States v. Sarkissian, 841 F.2d 959, 907-8 (9th Cir. 1988) (“Defendants rely on the primary purpose test articulated in United States v. Truong Dinh Hung. . . . One other court has applied the primary purpose test. Another court has rejected it . . . distinguishing Truong. A third court has declined to decide the issue. We also decline to decide the issue”); United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1991) (“Appellants attack the government's surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance”).

20 "Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” DoJ at §153.
CRS-10

demanding standard than the “a purpose” threshold proposed by the Justice Department, but a clear departure from the original “the purpose” entry point. FISA once described a singular foreign intelligence focus prerequisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k), 1825(k).\(^{21}\)

**Protective Measures.** The Act reinforces two kinds of safeguards, one set designed to prevent abuse and the other to protect those who assist the government. The sunset clause is perhaps the best known of the Act’s safeguards. Under the direction of section 224, many of the law enforcement and foreign intelligence authorities granted by the Act expire as of December 31, 2005.\(^{22}\) The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter

\(^{21}\) “(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. (2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, infra, quoting, 50 U.S.C. 1801.

\(^{22}\) “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210[subpoenas for communications provider customer records], 211[access to cable company communication service records], 213[sneak and peek], 216[pen register and trap and trace device amendments], 221[trade sanctions], and 222[assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005. “(b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers' communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices).\textsuperscript{23} Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees,\textsuperscript{24} but could not recover against the United States.\textsuperscript{25} Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice's Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government's request until a court order authorizing access can be obtained.\textsuperscript{26} Another allows providers to disclose customer records to protect the provider's rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others.\textsuperscript{27} A third section,

\begin{itemize}
  \item \textsuperscript{23} 18 U.S.C. 2511, 2701, and 3121 (2000 ed.), respectively.
  \item \textsuperscript{24} 18 U.S.C. 2520 and 2707 (2000 ed.).
  \item \textsuperscript{26} Prior law already granted service providers immunity for disclosure of customer records in compliance with a court access order, 18 U.S.C. 2703(f).
  \item \textsuperscript{27} “Existing law contains no provision that allows providers of electronic communications service to disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies that threaten death or serious bodily injury. This section amends 18 U.S.C. §2702 to authorize such disclosures if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.

  “Current law also contains an odd disconnect: a provider may disclose the contents of the customer's communications in order to protect its rights or property but the current statute does not expressly permit a provider to voluntarily disclose non-content records (such as a subscriber's login records). 18 U.S.C. 2702(b)(5). This problem substantially hinders the ability of providers to protect themselves from cyber-terrorists and criminals. Yet the right to disclose the contents of communications necessarily implies the less intrusive ability to disclose non-content records. In order to promote the protection of our nation's critical infrastructures, this section's amendments allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems,” DoJ at
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

**Foreign Intelligence Investigations**

Although both criminal investigations and foreign intelligence investigations are conducted in the United States, criminal investigations seek information about unlawful activity; foreign intelligence investigations seek information about other countries and their citizens. Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough.

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA), something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President's authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, *United States v. United States District Court*, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage

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28 Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

29 Thus in the name of assisting in the execution of Title III, chapter 121, or chapter 206 order, the courts may not cite the Act as the basis for an order compelling a service provider to make system modifications or provide any other technical assistance not already required under 18 U.S.C. 2518(4), 2706, or 3124(c), see, H.R.Rep.No. 107-236, at 62-3 (2001) (emphasis added) (“This Act is not intended to affect obligations under Communications Assistance for Law Enforcement Act [which addresses law enforcement-beneficial system modifications and the compensation to be paid for the changes], nor does the act impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance”).

30 E.g., As amended by section 902 of the Act, “‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2)(language added by the Act in italics).

31 50 U.S.C. 1801 et seq.
In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs. There were and still are extra


33 “As used in this subchapter: (a) ‘Foreign power’ means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

“(b) ‘Agent of a foreign power’ means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C).

“(c) ‘International terrorism’ means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnaping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

“(d) ‘Sabotage’ means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

“(e) ‘foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans (“United States persons,” *i.e.*, citizens or permanent resident aliens). The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

- permits “roving” surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)

- increases the number of judges on the FISA court from 7 to 11

- allows application for a FISA surveillance or search order when gathering foreign intelligence is a significant reason for the application rather than the reason

- authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations

- sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses

- carries a sunset provision

- establishes a claim against the U.S. for certain communications privacy violations by government personnel

- expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to – (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States,” 50 U.S.C. 1801.

34 Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
**FISA.** FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases. It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

**Search and Surveillance for Intelligence Purposes.** Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, Draft at §151.

Section 901 of the Act address a concern raised during the 106th Congress relating to the availability of the FISA orders and the effective use of information gleaned from the execution of a FISA order. It vests the Director of Central

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36 See also, DoJ at §151, “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order’s minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed(50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

37 See e.g., S.Rep.No. 106-352, at 3, 6, 7 (2000)(“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application
process, as interpreted by the OIPR is administratively burdensome and, at times, extremely slow. Many applications undergo months of scrutiny before submission to the court because the OIPR prescribes standards and restrictions not imposed by the statute. . . . In particular, the OIPR has been criticized for an overly restrictive interpretation of the FISA ‘currency’ requirement. This is the issue of how recent a subject’s activities must be to support a finding of probable cause that the subject is engaged in clandestine intelligence gathering activities. . . . While existing law does not specifically address ‘past activities,’ it does not preclude, and legislative history supports, the conclusion that past activities may be part of the totality of circumstances considered by the FISC in making a probable cause determination. . . . By definition, information collected pursuant to a court order issued under the Foreign Intelligence Surveillance Act is foreign intelligence not law enforcement information. Accordingly, the Committee wants to clarify that the FISA ‘take’ can and must be shared by the Federal Bureau of Investigation with appropriate intelligence agencies. For the intelligence mission of the United States to be successful, there must be a cooperative and concerted effort among intelligence agencies. Any information collected by one agency under foreign intelligence authorities that could assist another agency in executing its lawful mission should be shared fully and promptly. Only then can the United States Government pursue aggressively important national security targets including, for example, counterterrorist and counternarcotics targets”); see also, 147 Cong.Rec. S799-803 (daily ed. Feb. 24, 2000)(remarks of Sens. Specter, Torricelli and Biden).

Pen Registers and Trap and Trace Devices for Intelligence Gathering. Section 214 grants the request of the Department of Justice by dropping requirements which limited FISA pen register and trap and trace device orders to facilities used by foreign agents or those engaged in international terrorist or clandestine intelligence activities, 50 U.S.C. 1842(c)(3)(2000 ed.). It is enough that the order is sought as part of an investigation to protect against international terrorism or clandestine intelligence activities and is not motivated solely by an American’s exercise of his or her First Amendment rights. Elsewhere (section 505), the Act drops a similar limitation for intelligence officials’ access to telephone records, 18 U.S.C.

38 “When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevance, an additional factual showing that the communications device has been used to contact an ‘agent of a foreign power’ engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the ‘agent of a foreign power’ prong from the predication, and thus makes the FISA authority more closely track the criminal authority,” DoJ at §155.
Section 214 adjusts the language of the FISA pen register-trap and trace authority to permit its use to capture source and destination information relating to electronic communications (e.g., e-mail) as well as telephone communications, 50 U.S.C. 1842(d). The section makes it clear that requests for a FISA pen register-trap and trace order, like requests for other FISA orders, directed against Americans (U.S. persons) may not be based solely on activities protected by the First Amendment, 50 U.S.C. 1842, 1843.

**Third Party Cooperation and Tangible Evidence.** As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target's activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.40

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39 Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise to be entitled to confidentiality. Section 505, in response to the Justice Department's suggestion, allows FBI field offices to make the requests, see DoJ at §157 (“At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports”.

40 When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court's order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.’ This would enhance the FBI's ability to monitor international terrorists and intelligence officers who are
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian. The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities, in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B);
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a);
- the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a);
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v;


41 “The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigatory contexts. The time and difficulty involved in getting such pleadings before the Court usually outweighs the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” DoJ at §156.

42 Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.\(^\text{43}\)

**Access to Law Enforcement Information.** Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community's access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, *Draft* at §103.\(^\text{44}\)

\(^{43}\) H.R.Rep.No. 107-205, at 60-1 (2001) (“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

“The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

“Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual’s credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding--without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information”).

\(^{44}\) See also, *DoJ* at §103, “This section facilities the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, Draft at §354.\(45\)

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, Draft at §154.\(46\)

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion.\(47\) It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions.”

\(45\) See also, DoJ at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.” Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officers

\(46\) See also, DoJ at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”

\(47\) Blair v. United States, 250 U.S. 273, 281 (1919)(the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

Critics may protest that the change could lead to the use of the grand jury for intelligence gathering purposes, or less euphemistically, to spy on Americans. The proposal was never among those scheduled to sunset, but earlier versions of the section followed the path used for most other disclosures of grand jury material: prior

48 These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

49 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25 Harvard Journal of Law & Public Policy 699, 719-20 (2002)(“There is a significant danger that the rule permitting disclosure will be treated as the de facto authorization of an expansion of the grand jury’s investigative role to encompass seeking material relevant only to matters of national security, national defense, immigration, and so forth. The grand jury’s awesome powers should not be unwittingly extended to a much wider range of issues. . . Since the grand jury operates in secret, there are no public checks on the scope of its investigations, and witnesses are not permitted to challenge its jurisdiction. Only the supervising court is in a position to keep the grand jury’s investigation within proper bounds. Requiring judicial approval of foreign intelligence and counterintelligence information disclosures would provide a natural check against the temptation to manipulate the grand jury to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6 (Nov. 2001)(“The grand jury secrecy rule is a rule of policy which has always had exceptions, and it has been frequently modified. The secrecy rule has no credible claim to constitutional stature”).
Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” or [B] “with respect to a foreign power or foreign government or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

“Notwithstanding any other provisions of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. ) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification. By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

**Increasing Institutional Capacity.** As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a

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52 *Duncan v. Walker*, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted) (“It is our duty to give effect, if possible, to every clause and word of a statute. *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)); see also *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879) (As early as in Bacon's Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.

53 Draft at §154, “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”
computerized translation capability to be used in foreign intelligence gathering. Section 907 instructs the Director of the Central Intelligence, in consultation with the Director of the FBI, to report on the creation of a National Virtual Translation Center. The report is to include information concerning staffing, allocation of resources, compatibility with comparable systems to be used for law enforcement purposes, and features which permit its efficient and secure use by all of the intelligence agencies.

**Money Laundering**

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture. The Act bolsters federal efforts in each area.

**Regulation.** Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.

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54 “The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

“The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so,” S.Rep.No. 107-63, at 11 (2001).


56 See e.g., 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
**Records and Reports.** For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department's Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler's checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to files SARs as well, reflecting Congress’ view that the information provided the IRS may be valuable for other law enforcement purposes. This concern is likewise

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58 H.R.Rep.No. 107-250, at 38-9 (2001)("Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

"Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a ‘Safeguard Procedures Report’ which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

"While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement
Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action. 59 Section 355 expands the immunity to cover disclosures in

authorities as the various reports mandated by the Bank Secrecy Act, which can typically be retrieved electronically from a database maintained by the Treasury Department. The differential access to the two kinds of reports is made anomalous by the fact that Form 8300 elicits much the same information that is required to be disclosed by the Bank Secrecy Act. For example, just as Form 8300 seeks the name, address, and social security number of a customer who engages in a cash transaction exceeding $10,000 with a trade or business, Currency Transaction Reports (CTRs) mandated by the Bank Secrecy Act require the same information to be reported on a cash transaction exceeding $10,000 between a financial institution and its customer”).

59 “Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

“First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor from civil liability applies in arbitration, as well as judicial, proceedings. Second, it amends section 5318(g)(3) to clarify the safe harbor's coverage of voluntary disclosures (that is, those not covered by the SAR regulatory reporting requirement). The language in section 5318(g)(3)(A) providing that ‘any financial institution that *** makes a disclosure pursuant to *** any other authority *** shall not be liable to any person’ is not intended to avoid the application of the reporting and disclosure provisions of the Federal securities laws to any person, or to insulate any issuers from private rights of actions for disclosures made under the Federal securities laws.

“Subsection [351](b) amends section 5318(g)(2) of title 31--which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed--to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee's official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
employment references to other insured depository financial institutions provided disclosure is not done with malicious intent.\textsuperscript{60}

The Financial Crimes Enforcement Network (FinCEN), a component within the Treasury Department long responsible for these anti-money laundering reporting and record-keeping requirements, 31 C.F.R. pt. 103, was administratively created in 1990 to provide other government agencies with an “intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes,” \textit{55 Fed.Reg. 18433} (May 2, 1990).

The Act, in section 361, makes FinCEN a creature of statute, a bureau within the Treasury Department, 31 U.S.C. 310. Section 362 charges it with the responsibility of establishing a highly secure network to allow financial institutions to file required reports electronically and to permit FinCEN to provide those institutions with alerts and other information concerning money laundering protective measures, 31 U.S.C. 310 note.

\textbf{Special Measures.} In extraordinary circumstances involving international financial matters, the Act grants the Secretary of the Treasury, in consultation with other appropriate regulatory authorities, the power to issue regulations and orders involving additional required “special measures” and additional “due diligence” requirements to combat money laundering. The special measure authority, available under section 311, comes to life with the determination that particular institutions, jurisdictions, types of accounts, or types of transactions pose a primary money

\textsuperscript{60} 31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 67 (2001).
These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

61 31 U.S.C. 5318A. The circumstances considered in the case of a suspect jurisdiction are: evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction’s banking regulation; the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

62 The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’ including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

“Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate
business transactions.

“Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

“Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

“The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

“The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

“The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

“The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

“The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

“The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed
Due Diligence. Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.63

63 See generally, H.R.Rep. No. 107-250, at 71-2 ("Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

"The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

"The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

"For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
**General Regulatory Matters.** The Act establishes several other regulatory mechanisms directed at the activities involving U.S. financial institutions and foreign individuals or institutions. Section 313, for instance, in another restriction on correspondent accounts for foreign financial institutions, prohibits U.S. financial institutions from maintaining correspondent accounts either directly or indirectly for foreign shell banks (banks with no physical place of business\(^{64}\)) which have no affiliation with any financial institution through which their banking activities are subject to regulatory supervision.\(^{65}\)

The Act, in section 325, empowers the Secretary of the Treasury to promulgate regulations to prevent financial institutions from allowing their customers to conceal their financial activities by taking advantage of the institutions’ concentration account practices.\(^{66}\)

The Secretary of the Treasury is instructed in section 326 to issue regulations for financial institutions’ minimum new customer identification standards and record-

detect and report transactions that may involve the proceeds of foreign corruption. A private bank account is defined as an account (or any combination of accounts) that requires a minimum aggregate deposit of funds or other assets of not less than $1 million; is established on behalf of one or more individuals who have a direct or beneficial ownership in the account; and is assigned to, or administered or managed by, an officer, employee or agent of a financial institution acting as a liaison between the institution and the direct or beneficial owner of the account.

“This section directs the Secretary of the Treasury, within 6 months of enactment of this bill and in consultation with appropriate Federal functional regulators, to further define and clarify, by regulation, the requirements imposed by this section”).

\(^{64}\) Or more exactly, a bank which has no physical presence in any country; a “physical presence” for a foreign bank is defined as “a place of business that – (i) is maintained by a foreign bank; (ii) is located at a fixed address (other than solely an electronic address) in a country in which the foreign bank is authorized to conduct banking activities, at which location the foreign bank – (I) employs 1 or more individuals on a full-time basis; and (II) maintains operating records relating to its banking activities; and (iii) is subject to inspection by the banking authority which licensed the foreign bank to conduct banking activities,” 31 U.S.C. 5318(j)(4).


\(^{66}\) The Act does not define “concentration accounts,” although the House Financial Services Committee report provides some incite into the section’s intent, H.R.Rep.No. 107-250, at 72-3 (2001)(“This section gives the Secretary of the Treasury discretionary authority to prescribe regulations governing the maintenance of concentration accounts by financial institutions, to ensure that these accounts are not used to prevent association of the identity of an individual customer with the movement of funds of which the customer is the direct or beneficial owner. If promulgated, the regulations are required to prohibit financial institutions from allowing clients to direct transactions into, out of, or through the concentration accounts of the institution; prohibit financial institutions and their employees from informing customers of the existence of, or means of identifying, the concentration accounts of the institution; and to establish written procedures governing the documentation of all transactions involving a concentration account.”)
keeping and to recommend a means to effectively verify the identification of foreign customers.\textsuperscript{67}

\textsuperscript{67} 31 U.S.C. 5318(l); H.R.Rep.No. 107-250, at 62-3 (2001)(“Section [326](a) amends 31 U.S.C. 5318 by adding a new subsection governing the identification of account holders. Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a ‘street name’ or omnibus account in the broker-dealer's name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to ‘look through’ the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund's customers. Thus, the fund would not be required to ‘look through’ the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature.  

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

**Reports to Congress.** Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding...

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“Paragraph (6) requires that Treasury's regulations prescribed under paragraph (1) become effective within one year after enactment of this bill”).

exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.\textsuperscript{69}

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

**International Cooperation.** Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.\textsuperscript{70}

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (\textit{i.e.}, the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.


\textsuperscript{70} H.R.Rep.No. 107-250, at 67 (2001)(“This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury's progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

“The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime”).
**Crimes.** Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, smuggling, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
Section 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds 'by, to or through a financial institution.' For the purposes of both statutes, the term 'financial institution' is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

The definition of 'financial institution' in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of 'commercial bank' or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad--say to a Mexican bank--and launders them through a series of financial transactions, the government conceivably could not rely on the definition of a 'financial institution' in 1956(c)(6) to establish that the transaction was a 'financial transaction' within the meaning of 1956(c)(4)(B) (defining a 'financial transaction' as a transaction involving the use of a 'financial institution'), or that it was a 'monetary transaction' within the meaning of 1957(f) (defining 'monetary transaction' as, inter alia, a transaction that would be a 'financial transaction' under 1956(c)(4)(B)).

Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launders the proceeds of one of the crimes set forth on a list of 'specified unlawful activities.' 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),” H.R.Rep.No. 107-250, at 38 (2000).

Expands 18 U.S.C. 1956 to cover financial transactions conducted in foreign financial institutions.71

Section 329 makes it a federal crime to corruptly administer the money laundering regulatory scheme. Offenders are punishable by imprisonment for not more than 15 years and a fine of not more than three times the amount of the bribe.

Section 5326 of title 31 authorizes the Secretary of the Treasury to impose temporary, enhanced reporting requirements upon financial institutions in areas victimized by substantial money laundering activity (geographic targeting regulations and orders). Section 353 makes it clear that the civil sanctions, criminal penalties, and prohibitions on smurfing (structuring transactions to evade reporting requirements) apply to violations of the regulations and orders issued under 31 U.S.C. 5326. It also extends the permissible length of the temporary geographical orders from 60 to 180 days.

Violations of the special measures and special due diligence requirements of sections 311 and 312 are subject to both civil and criminal penalties by virtue of section 363's amendments to 31 U.S.C. 5321(a) and 5322. The amendments authorize civil penalties and criminal fines of twice the amount of the transaction but not more than $1 million. Criminal offenders would be subject to a fine in the same amount.

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71 “[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

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Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.73

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents.74 They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

73 “The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business.

“Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.

“Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive,” H.R.Rep.No. 107-250, at 54 (2001).

74 “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual, 31 U.S.C. 5332(a)(2).

- 18 U.S.C. 476 (taking impressions of tools used for obligations and securities) from 10 to 25 years;
- 18 U.S.C. 477 (possessing or selling impressions of tools used for obligations or securities) from 10 to 25 years;
- 18 U.S.C. 484 (connecting parts of different notes) from 5 to 10 years;
- 18 U.S.C. 493 (bonds and obligations of certain lending agencies) from 5 to 10 years;
- 18 U.S.C. 478 (foreign obligations or securities) from 5 to 20 years;
- 18 U.S.C. 479 (uttering counterfeit foreign obligations or securities) from 3 to 20 years;
- 18 U.S.C. 480 (possessing counterfeit foreign obligations or securities) from 1 to 20 years;
- 18 U.S.C. 481 (plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities) from 5 to 25 years;
- 18 U.S.C. 482 (foreign bank notes) from 2 to 20 years; and
- 18 U.S.C. 483 (uttering counterfeit foreign bank notes) from 1 to 20 years.

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

**Bulk Cash.** Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act’s bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting. 75

The section appears to be the product of reactions to the Supreme Court’s decision in *United States v. Bajakian*, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court's

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75 “For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).
As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency – representing the proceeds of drug trafficking and other criminal offenses – is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad.

Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United States without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

Section 5317 of title 31 once called for civil forfeiture of property traceable to a violation of 31 U.S.C. 5316 (reports on exporting or importing money instruments worth $10,000 or more). Section 372 of the Act recasts section 5317 to provide for civil and criminal forfeitures for violations of 31 U.S.C. 5316, of 31 U.S.C. 5313 (reports on domestic coins and currency transactions involving $10,000 or more) and of 31 U.S.C. 5324 (structuring transactions to evade reporting requirements (smurfing)).

**Extraterritorial Jurisdiction.** The Act makes 18 U.S.C. 1029, the federal statute condemning various crimes involving credit cards, PIN numbers and other access devices, applicable overseas if the card or device is issued by or controlled by an American bank or other entity and some article is held in or transported to or through the United States during the course of the offense, section 377. The change was part of the original Justice Department proposals. Justice explained that, “[f]inancial crime[] admits of no border, utilizing the integrated global financial network for ill purposes. This provision would apply the financial crimes prohibitions to conduct committed abroad, so long as the tools or proceeds of the crimes pass through or are in the United States,” DoJ at §408. The section, however, appears to limit the otherwise applicable extraterritorial jurisdiction implicit in section 1029, since federal courts would likely recognize extraterritorial jurisdiction over a violation

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“Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute,” H.R.Rep.No. 107-250 at 36-7 (2001).
under either circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.77

**Venue.** Section 1004 relies on dicta in United States v. Cabrales, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering,78 in the state and district in which the monetary transaction takes place. The Supreme Court in Cabrales held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in dicta, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.79

**Forfeiture.** Forfeiture is the government confiscation of property as a consequence of crime.80 The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 et seq. (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

**Constitutional Considerations.** The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 et seq., which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the

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78 “The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed,” U.S.Const. Art.III, §2, cl.3.

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“[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,” U.S.Const. Amend. VI.

79 See also, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnaping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.

80 For general background information, see, Doyle, Crime and Forfeiture, CRS REP.NO. 97-139A (Oct. 11, 2000).
jurisdiction of the United States, belonging to any foreign individual, foreign entity, or foreign country whom they determine to have planned, authorized, aided or engaged in an attack on the United States by a foreign country or foreign nationals. The section also permits the government to present secretly (ex parte and in camera) any classified information upon which the forfeiture was based should the decision be subject to judicial review. The Justice Department requested the section as a revival of the President's powers in times of unconventional wars.\(^{81}\) By virtue of section 316, property owners may initiate a challenge to a confiscation by filing a claim under the rules applicable in maritime confiscations. The section permits two defenses to forfeiture – that the property is not subject to confiscation under section 106 or that the claimant is entitled to the innocent owner defense of 18 U.S.C. 983(d).\(^{82}\) The characterization of the defenses as “affirmative defense” indicates that the claimant bears the burden of proof. The innocent owner defenses of 18 U.S.C. 983(d) are probably not available in cases under section 106, since that section is explicitly

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\(^{81}\) This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App. U.S.C. §5(b).

“This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress's war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

“The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2),” DoJ at §159.

\(^{82}\) “An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
excepted from the coverage of 18 U.S.C. 983. The challenge proceedings permit
the court to admit evidence, such as hearsay evidence, that would not otherwise be
admissible under the Federal Rules of Evidence if the evidence is reliable and if
national security might be imperiled should dictates of the Federal Rules be followed,
§316(b). The section recognizes the rights of claimants to proceed alternatively
under the Constitution or the Administrative Procedure Act.

The Justice Department also recommended enactment of an overlapping
 provision which ultimately passed as section 806 of the Act without any real
discussion of the relationship of the two sections. Section 806 authorizes
confiscation of all property, regardless of where it is found, of any individual, entity,
or organization engaged in domestic or international terrorism (as defined in 18
U.S.C. 2331), against the United States, Americans or their property, 18 U.S.C.

83 18 U.S.C. 983(i)(2)(D).
84 "The exclusion of certain provisions of Federal law from the definition of the term 'civil
forfeiture statute' in section 983(i) of title 18, United States Code, shall not be construed to
deny an owner of property the right to contest the confiscation of assets of suspected
international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C)
subchapter II of chapter 5 of title 5, United States Code (commonly known as the
'Administrative Procedure Act')." Sec. 316(c)(1).
85 "Current law does not contain any authority tailored specifically to the confiscation of
terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for
the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of
such offenses. However, most terrorism offenses do not yield 'proceeds,' and available
current forfeiture laws require detailed tracing that is quite difficult for accounts coming
through the banks of countries used by many terrorists.

'This section increases the government's ability to strike at terrorist organizations' economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001," DoJ, at §403. The House Report on H.R. 2975 which contained versions of both
sections is no more explicit on the relation of the two sections.
86 "(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5)(as amended by section 802 of the Act).

87 Austin v. United States, 509 U.S. 602, 611-12 (1993)(“Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture . . . . Of England’s three kinds of forfeiture, only the third took hold in the United States”).


89 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal in personam proceedings following criminal conviction as a means of accomplishing confiscation.
Neither section 106 nor 806 require conviction of the terrorist property owner.\(^9^0\) Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers.\(^9^1\) The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners.\(^9^2\) Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them.\(^9^3\) The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate

\(^9^0\) Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c) (“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act”).

\(^9^1\) *Silesian American Corp. v. Clark*, 332 U.S. 469 (1947); *cf., Societe Internationale v. Rogers*, 357 U.S. 197, 211 (1958) (“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).

\(^9^2\) *Zittman v. McGrath*, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’”).

any presumption of remedial purposes.\textsuperscript{94} The same has been said of the applicability of the ex post facto clause.\textsuperscript{95}

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO.\textsuperscript{96} If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

\textbf{Other Forfeiture Amendments.} In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.\textsuperscript{97}

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\textsuperscript{95} See e.g., \textit{United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.)}, 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, \textit{Landgraf v. USI Film Products}, 511 U.S. 244, 265-66 (1994).
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\textsuperscript{96} DoJ, at §403.
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\textsuperscript{97} 18 U.S.C. 1956(b). \textit{Cf.}, H.R.Rep.No. 107-250, at 54-5 (2001)(“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas.\textsuperscript{98} Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted

\textsuperscript{98} 18 U.S.C. 981(k). H.R.Rep.No. 107-250, at 57-8 (2001)(“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank's customers.

“Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank's correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

“The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”).
defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation.\textsuperscript{99}

Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here.\textsuperscript{100} Section 320 enlarges this provisions to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements.\textsuperscript{101} This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.\textsuperscript{102}

\textsuperscript{99} Cf., H.R.Rep. No. 107-250, at 58-9 (2001) (“Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of ‘substitute assets’ when the defendant has placed the property otherwise subject to forfeiture ‘beyond the jurisdiction of the court.’ Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

“This section amends 21 U.S.C. 853 to make clear that a court in a criminal case may issue a repatriation order—either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court’s authority under 21 U.S.C. 853(e) to restrain property—so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both”).

\textsuperscript{100} 18 U.S.C. 981(a)(1)(B).

\textsuperscript{101} H.R.Rep. No. 107-250, at 56 (2001) (“This section is intended to reinforce the United States’ compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act”).

\textsuperscript{102} H.R.Rep. No. 107-250, at 59-60 (2001) (“Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country.

“Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
A fugitive may not challenge a federal forfeiture. Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in “order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.”

to contest the restraining order could do so on the ground that 28 U.S.C. 2467 was not properly applied to the particular case, but could not oppose the restraining order on any ground that could also be raised in the proceedings pending in a foreign court. This provision prevents a litigant from taking ‘two bites at the apple’ by raising objections to the basis for the forfeiture in the Federal court that he also raised, or is entitled to raise, in the foreign court where the forfeiture action is pending. It complements the existing provision in section 2467(e) providing that the Federal court is bound by the findings of fact of the foreign court, and may not look behind such findings in determining whether to enter an order enforcing a foreign forfeiture judgment.

“This section also amends 28 U.S.C. 2467 to make clear that it is not necessary to prove that the person asserting an interest in the property received actual notice of the forfeiture proceedings. As is the case with respect to forfeitures under U.S. law, it is sufficient if the foreign nation takes steps to provide notice, in accordance with the principles of due process. See Gonzalez v. United States, 1997 WL 278123 (S.D.N.Y. 1997) (‘the [G]overnment is not required to ensure actual receipt of notice that is properly mailed’); Albajon v. Gugliotta , 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant's identifications, and mailed after claimant released from jail, is sufficient to satisfy due process, even if claimant never received notice); United States v. Schiavo , 897 F. Supp. 644, 648 49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; due process satisfied even if he did not receive the notice).

“Finally, 28 U.S.C. 2467 is amended to authorize the enforcement of a forfeiture judgment based on any foreign offense that would constitute an offense giving rise to a civil or criminal forfeiture of the same property if the offense had been committed in the United States. This is one of two safeguards that the statute contains against the enforcement of judgments that the United States does not consider appropriate for enforcement: if the judgment is based on an act that would not constitute a crime in the United States, such as removing assets from the reach of a repressive regime, it could not be enforced. In addition, section 2467 already provides that a foreign judgment may only be enforced by a Federal court at the request of the United States, and only after the Attorney General has certified that the judgment was obtained in accordance with the principles of due process. Thus, neither a foreign Government nor a foreign private party could enforce a foreign judgment on its own under this provision.”). Note that the safeguard to which the report refers is the range of foreign offenses that will support an enforceable confiscation order, i.e., drug offenses and crimes on the money laundering predicate offense list, and that the amendment narrows that safeguard by adding additional foreign offenses, i.e., any foreign equivalent of a federal crime which would support a confiscation order.

Alien Terrorists and Victims

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

Border Protection. The border protection provisions:

• authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401

• authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402

• remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404

• authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405

• authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.

• instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007

• direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418

• express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414

• add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415

• call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416

• limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
• instruct the Attorney General to report on the feasibility of using biometric scanners to help prevent terrorists and other foreign criminals from entering the country, section 1008

• authorize appropriations of $250,000 for the FBI to determine the feasibility of providing airlines with computer access to the names of suspected terrorists, section 1009

• authorize reciprocal sharing of the State Department’s visa lookout data and related information with other nations in order to prevent terrorism, drug trafficking, slave marketing, and gun running, section 413

**Detention and Removal.** Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity, 8 U.S.C. 1227 (a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(i)(IV). Aliens may be inadmissible for any number of terrorism-related reasons, 8 U.S.C. 1182 (a)(3)(B). Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported.


Section 411 defines “terrorist organization” to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the Federal Register as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C.

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104 As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).
Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).


An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in “premeditated, politically motivated violence perpetrated against noncombatant targets,” or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security or endanger some individual or the general public. The Attorney General's determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

Victims. The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

- permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421
- extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422

105 “The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

106 “The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks.

“The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application.

“Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
• preservation of certain immigration benefits available to alien family members that would be otherwise lost as a consequence of the death of a victim of September 11, section 423

• limited easing of age restrictions on visas available to aliens under 21 years of age for those whose 21st birthday occurred immediately before or soon after September 11, section 424

• temporary administrative relief for alien family members of a victim of September 11 who are not otherwise entitled to relief under the Act, section 425

the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

“Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 31.

“Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.


107 “Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

“The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

“The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death),” H.R.Rep.No. 107-236, at 68 (2001).

108 “Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien’s 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien’s 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
Other Crimes, Penalties, & Procedures

New Crimes. The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

- wreck, derail, burn, or disable mass transit;
- place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
- burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
- impair a mass transit signal system;
- interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
- act with the intent to kill or seriously injure someone on mass transit property;
- convey a false alarm concerning violations of the section;
- attempt to violate the section;
- threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department, the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offense for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents, 18 U.S.C. 175b. Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.

109 “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . . .” DoJ at §305.

110 The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

111 “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2)(“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.112

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D). The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

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112 U.S. Const. Art. III, §2, cl.3 (“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . .”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . .”); United States v. Cabrales, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from Cabrales when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnaping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999)(“By way of comparison, last Term in [Cabrales] we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).
The Justice Department sought the expansion along with the enlargement of the predicate offense list, "18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of 'material support or resources' is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill ('Federal terrorism offenses')," DoJ, at §304.

And it adds expert advice or assistance to the types of assistance that may not be provided under section 2339A. This last addition may encounter the same First Amendment vagueness problems some courts have found in assistance which takes the form of “training” and “personnel,” Humanitarian Law Project v. Reno, 205 F.3d 1130, 1137-136 (9th Cir. 2000). Finally, the section announces that a prosecution for violation of section 2339A (support of terrorists) may be brought where the support is provided or where the predicate act of terrorism occurs. There may be some question whether the Constitution permits prosecution where the predicate act occurs.

Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.


113 The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of 'material support or resources' is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill ('Federal terrorism offenses'),” DoJ at 306.


115 “The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill ('Federal terrorism offenses') is used in identifying the relevant crimes,” DoJ, at §304.

**New Penalties.** The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. 3571(b),(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense.117

The proposal, however, failed to identify the critical elements that would trigger the alternative.118 Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

- for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

- for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

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117 “Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersede lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,”DoJ, at §302.

118 “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense,” Draft at §302.
• for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;

• for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;

• for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;

• for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and

• for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism.119 Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:

• arson committed within a federal enclave, 18 U.S.C. 81;
• killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);
• destruction of communications facilities, 18 U.S.C. 1362;
• destruction of property within a federal enclave, 18 U.S.C. 1363;
• causing a train wreck, 18 U.S.C. 1922;
• providing material support to a terrorist, 18 U.S.C. 2339A;
• torture committed overseas under color of law, 18 U.S.C. 2340A;
• sabotage of a nuclear facility, 42 U.S.C. 2284;

119 “The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §§846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

“This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.
When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years). The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission), a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

120 Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

121 “Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.

“This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders). 122

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

Other Procedural Adjustments. In other procedural adjustments designed to facilitate criminal investigations, the Act:

- increases the rewards for information in terrorism cases
- expands the Posse Comitatus Act exceptions
- authorizes “sneak and peek” search warrants
- permits nationwide and perhaps worldwide execution of warrants in terrorism cases
- eases government access to confidential information
- allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
- lengthens the statute of limitations applicable to crimes of terrorism
- clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
- adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B. 123

122 It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, e.g., damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

123 When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001)(remarks of Rep. Sensenbrenner); for general background, see, Doyle, McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys, CRS Rep.No. RL30060 (Dec. 14, 2001).
Rewards. The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L. 105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism.124

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

Posse Comitatus. The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.125

Delayed notification of a search (sneak and peek). Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take

124 The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct threat assessments for federal agencies, and to reimburse federal agencies for the costs of detaining terrorist suspects overseas.

125 For a general discussion of the Posse Comitatus Act, see, Doyle, The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law, CRS REP.NO. 95-964 (June 1, 2000).
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, Richards v. Wisconsin, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, Wilson v. Arkansas, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, Dalia v. United States, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, cf., United States v. Miller, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, United States v. Freitas, 800 F.2d 1451, 1453 (9th Cir. 1986).126

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126 The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in United States v. New York Telephone Co., 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth
Amendment, demands that surreptitious entries be closely circumscribed,” United States v. Freitas (Freitas I), 800 F.2d 1451, 1455-456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, United States v. Freitas (Freitas II), 856 F.2d 1425 (9th Cir. 1988).

127 “No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in Dalia v. United States, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in Dalia, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property. . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. See United States v. New York Telephone Co., 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . . Although the Freitas I court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in United States v. Villegas, 899 F.2d 1324 (1999). Although the Freitas I court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in Villegas. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the Freitas I court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” United States v. Pangburn, 983 F.2d 449, 453-55 (2d Cir. 1993).

128 In Simons, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
The Justice Department urged that the conflict be resolved with a uniform rule which permitted sneak and peek warrants under the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage.\(^{129}\)

The Act, in section 213, stops short of the Justice Department proposal. Characterized as a codification of the Second Circuit decision, 147 Cong. Rec. H7197 (daily ed. Oct. 23, 2001), the Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C. 3103a. Its sneak and peek authorization reaches all federal search and seizure warrants where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (e.g., risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (e.g., jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, i.e., in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation.\(^{130}\) The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

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129 The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities,” DoJ at §353.

130 Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department’s initial proposal, the Department’s justification does not address the question.
constitutionally “reasonable,” that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

**Nationwide terrorism search warrants.** The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either “within or outside the district,” (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases. The provision may anticipate execution both in this country and overseas. The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage. Neither Rule 41 nor any other provision of federal

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131 The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

132 The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

133 *United States v. Barona*, 56 F.3d 1087, 1092 (9th Cir. 1995)(“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994)(“if American law enforcement officials substantially participated in the search or if the
If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” F.R.Crim.P. 41, Advisory Committee Notes: 1990 Amendment. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

**Terrorists’ DNA.** The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards *per se.* Existing federal law allowed the Attorney General to collect samples from foreign officials conducting the search were actually acting as agents for their American counterparts’); *United States v. Maturo,* 982 F.2d 57, 61 (2d Cir. 1992)(“where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials” or “where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials”); *United States v. Mitro,* 880 F.2d 1480, 1482 (1st Cir. 1989)(“if American agents participated in the foreign search or the foreign officers acted as agents for their American counterparts”); *United States v. Mount,* 757 F.2d 1315, 1318 (D.C.Cir. 1985)(“if American officials or officers participated in some significant way”); *United States v. Marzano,* 537 F.2d 120, 139 (5th Cir. 1976)(“if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts”); each of the decisions also suggests that evidence secured in a manner which shocked the conscience of the court would be excluded.

The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, see, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), reprinted, 78 Cong.Rec. 4982-983 (1934)(“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.)(conferring judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

Roe v. Marcotte, 193 F.3d 72 (2d Cir. 1999); Shaffer v. Saffle, 148 F.3d 1180 (10th Cir. 1998); Rise v. Oregon, 59 F.3d 1556 (9th Cir. 1995); Jones v. Murray, 962 F.2d 302 (4th Cir. 1992).
federal prisoners convicted of a variety of violent crimes, 42 U.S.C. 14135a. The Act enlarges the predicate offense list to include any crime of violence or any terrorism offense, section 503.136

**Access to Educational Records.** Finally, the Act calls for an ex parte court order procedure under which senior Justice Department officials may seek authorization to collect educational records relevant to an investigation or prosecution of a crime of terrorism, section 507 (as an exception to the confidentiality requirements of the General Education Provisions Act, 20 U.S.C. 1232g), section 508 (as an exception to the confidentiality requirements of the National Education Statistics Act, 20 U.S.C. 9007).

**Statute of Limitations.** Prosecution for murder in violation of federal law may be initiated at any time, 18 U.S.C. 3281. A five year statute of limitations applied for most other federal crimes before passage of the Act, with a few exceptions. Among the relevant exceptions were an eight year statute of limitations for several terrorist offenses, 18 U.S.C. 3286,137 and a ten year statute of limitations for a few arson and explosives offenses, 18 U.S.C. 3295. The Justice Department recommended the elimination of a statute of limitations in terrorism cases.138

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136 Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples form convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes,” DoJ at §353.

For a general discussion, see, Fischer, DNA Identification: Applications and Issues, CRS REP.NO. RL30717 (Jan. 12, 2001).

137 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

138 “This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

“This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in
The Act takes less dramatic action in section 809. It eliminates the statute of limitations for any crime of terrorism that risks or results in a death or serious bodily injury, 18 U.S.C. 3286. In the absence of such a risk or result, all other terrorism offenses become subject to the eight year statute of limitations unless already covered by the ten year statute for explosives and arson offenses, 18 U.S.C. 3286.

Application of the statute of limitations rarely provokes a constitutional inquiry. Nevertheless, due process precludes prosecution when it can be shown that pre-indictment delay “caused substantial prejudice to [a defendant’s] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.” Moreover, a judicial difference of opinion has appeared in those cases connection with the September 11, 2001 terrorist attacks. The constitutionality of such retroactive applications of changes in statutes of limitations is well-settled. See, e.g., United States v. Grimes, 142 F.3d 1342, 1350-51 (11th Cir. 1998); People v. Frazer, 982 P.2d 180 (Cal. 1999).

“Existing federal law (18 U.S.C. §3282) bars prosecuting most offenses after five years. 18 U.S.C. §3286, as currently formulated, extends the limitation period for prosecution for certain offenses that may be committed by terrorists – but only to eight years. While this is a limited improvement over the five-year limitation period for most federal offenses, it is patently inadequate in relation to the catastrophic human and social costs that frequently follow from such crimes as destruction of aircraft (18 U.S.C. §32), aircraft hijackings ([49] U.S.C. §§46502, 46504-06, attempted political assassinations (18 U.S.C. §§351, 1116, 1751), or hostage taking (18 U.S.C. §1203). These are not minor acts of misconduct which can properly be forgiven or forgotten merely because the perpetrator has avoided apprehension for some period of time. Anomalously, existing law provides longer limitation periods for such offenses as bank frauds and certain artwork thefts (18 U.S.C.§§3293-94) than it does for crimes characteristically committed by terrorists.

“In many American jurisdictions, the limitation periods for prosecution for serious offenses are more permissible than those found in federal law, including a number of states which have no limitation period for the prosecution of felonies generally. While this section does not go so far, it does eliminate the limitation period for prosecution of the major crimes that are most likely to be committed by terrorists (‘Federal terrorism offenses’), as specified in section 309 of this bill,” DoJ at 301.

As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 (sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period.\(^{141}\) Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.\(^{142}\)

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (Grimes, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (Frazer, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

**Extraterritoriality.** Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States or elsewhere. . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.\(^{143}\)

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnaping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.

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\(^{141}\) United States v. De La Matta, 266 F.3d 1275, 1286 (11th Cir. 2001); United States v. Grimes, 142 F.3d 1342, 1351 (11th Cir. 1998); United States v. Morrow, 177 F.3d 272, 294 (5th Cir. 1999); Falter v. United States, 23 F.2d 420, 425-26 (2d Cir. 1928).

\(^{142}\) People v. Frazer, 24 Cal.4th 737, 759, 982 P.2d 180, 1294, 88 Cal.Rptr.2d 312, 327 (1999).

\(^{143}\) United States v. Layton, 855 F.2d 1388 (9th Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); United States v. Benitez, 741 F.2d 1312 (11th Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.\textsuperscript{144}

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

\textbf{Victims.} Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11\textsuperscript{th} Victim Compensation Fund legislation before it passed the Act. Consequently, the Act’s victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 \textit{et seq.}, and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 \textit{et seq.}

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:

\textsuperscript{144} Compare, United States v. Gatlin, 216 F.3d 207 (2d Cir. 2000); United States v. Laden, 92 F.Supp.2d 189 (S.D.N.Y. 2000); with, United States v. Corey, 232 F.3d 1166 (9th Cir. 2000); United States v. Erdos, 474 F.2d 157 (4\textsuperscript{th} Cir. 1973).
• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year) (42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d)(5)), section 621(d)

• waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

• eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
• makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

• prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

• allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

• reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

• makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

• allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

• establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

Increasing Institutional Capacity. A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

- $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)

- necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)

- $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)

- $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816

- $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701

- $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)

- $5 million for DEA police training in South and Central Asia, section 1007.

Miscellaneous. Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might to used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
The USA PATRIOT Act: A Legal Analysis

April 15, 2002

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The USA PATRIOT Act: A Legal Analysis

Summary

The USA PATRIOT Act passed in the wake of the September 11 terrorist attacks. It flows from a consultation draft circulated by the Department of Justice, to which Congress made substantial modifications and additions. The stated purpose of the Act is to enable law enforcement officials to track down and punish those responsible for the attacks and to protect against any similar attacks.

The Act grants federal officials greater powers to trace and intercept terrorists’ communications both for law enforcement and foreign intelligence purposes. It reenforces federal anti-money laundering laws and regulations in an effort to deny terrorists the resources necessary for future attacks. It tightens our immigration laws to close our borders to foreign terrorists and to expel those among us. Finally, it creates a few new federal crimes, such as the one outlawing terrorists’ attacks on mass transit; increases the penalties for many others; and institutes several procedural changes, such as a longer statute of limitations for crimes of terrorism.

Critics have suggested that it may go too far. The authority to monitor e-mail traffic, to share grand jury information with intelligence and immigration officers, to confiscate property, and to impose new book-keeping requirements on financial institutions, are among the features troubling to some.

The Act itself responds to some of these reservations. Many of the wiretapping and foreign intelligence amendments sunset on December 31, 2005. The Act creates judicial safeguards for e-mail monitoring and grand jury disclosures; recognizes innocent owner defenses to forfeiture; and entrusts enhanced anti-money laundering powers to those regulatory authorities whose concerns include the well being of our financial institutions.

This report, stripped of its citations and footnotes, is available in an abbreviated form as The USA PATRIOT Act: A Sketch, CRS Rep.No. RS21203. In addition, much of the information contained here may also be found under a different arrangement in a report entitled, Terrorism: Section by Section Analysis of the USA PATRIOT Act, CRS Rep.No. RL31200 (Dec. 10, 2001). A wider array of terrorism-related analysis appears on the CRS terrorism electronic briefing book page.
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The USA PATRIOT Act: A Legal Analysis

Introduction

Congress passed the USA PATRIOT Act (the Act) in response to the terrorists’ attacks of September 11, 2001. The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to further close our borders to foreign terrorists and to detain and remove those within our borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it is not without safeguards, critics contend some of its provisions go too far. Although it grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough.


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1 P.L. 107-56, 115 Stat. 272 (2001); its full title is the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT).”

2 H.R. 2975 was introduced by Representative Sensenbrenner for himself and Representatives Conyers, Hyde, Coble, Goodlatte, Jenkins, Jackson-Lee, Cannon, Meehan, Graham, Bachus, Wexler, Hostettler, Keller, Issa, Hart, Flake, Schiff, Thomas, Goss, Rangel, Berman and Lofgren; S.1510 by Senator Daschle for himself and Senators Lott, Leahy, Hatch, Graham, Shelby and Sarbanes.

3 H.R. 3004 was introduced by Representative Oxley for himself and Representatives LaFalce, Leach, Maloney, Roukema, Bentsen, Hooley, Bereuter, Baker, Bachus, King, Kelly, Gillmore, Cantor, Riley, Latourette, Green (of Wisconsin), and Grucci; and reported out of the House Financial Services Committee with amendments on October 15, 2001, H.R.Rep.No. 107-250. H.R. 3004, as reported out, included Internet gambling amendments that were not included in H.R. 2975/H.R.3108.
Criminal Investigations: Tracking and Gathering Communications

A portion of the Act addresses issues suggested originally in a Department of Justice proposal circulated in mid-September. The first of its suggestions called for amendments to federal surveillance laws, laws which govern the capture and tracking of suspected terrorists’ communications within the United States. Federal law features a three tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications.

The tiers reflected the Supreme Court’s interpretation of the Fourth Amendment’s ban on unreasonable searches and seizures. The Amendment protects private conversations, *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967). It does not cloak information, even highly personal information, for which there is no individual justifiable expectation of privacy, such as telephone company records of calls made to and from an individual's home, *Smith v. Maryland*, 442 U.S. 735 (1979), or bank records of an individual's financial dealings, *United States v. Miller*, 425 U.S. 435 (1976).

Congress responded to *Berger* and *Katz*, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications, 18 U.S.C. 2511. At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious

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6 “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,” *U.S. Const*. Amend. IV.

7 Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
criminal cases. When approved by senior Justice Department officials,\(^8\) law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.\(^9\)

\(^8\) “The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of” one or more predicate offense, 18 U.S.C. 2516.

\(^9\) The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement), 1751 (presidential and presidential staff assassination, kidnapping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnapping, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or naturalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations, 18 U.S.C. 2518. The court notifies the parties to any conversations seized under the order after the order expires, 18 U.S.C. 2518(8).

Below Title III, the next tier of privacy protection covers some of those matters which the Supreme Court has described as beyond the reach of the Fourth Amendment protection – telephone records, e-mail held in third party storage, and the like, 18 U.S.C. 2701-2709 (Chapter 121). Here, the law permits law enforcement access, ordinarily pursuant to a warrant or court order or under a subpoena in some cases, but in connection with any criminal investigation and without the extraordinary levels of approval or constraint that mark a Title III interception, 18 U.S.C. 2703.

Least demanding and perhaps least intrusive of all is the procedure that governs court orders approving the government’s use of trap and trace devices and pen registers, a kind of secret “caller id”, which identify the source and destination of calls made to and from a particular telephone, 18 U.S.C. 3121-3127 (Chapter 206). The orders are available based on the government's certification, rather than a finding of the court, that the use of the device is likely to produce information relevant to the investigation of a crime, any crime, 18 U.S.C. 3123. The devices record no more than the identity of the participants in a telephone conversation,10 but neither the orders nor the results they produce need ever be revealed to the participants.

The Act modifies the procedures at each of the three levels. It:

10 Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
• permits pen register and trap and trace orders for electronic communications (e.g., e-mail)

• authorizes nationwide execution of court orders for pen registers, trap and trace devices, and access to stored e-mail or communication records

• treats stored voice mail like stored e-mail (rather than like telephone conversations)

• permits authorities to intercept communications to and from a trespasser within a computer system (with the permission of the system’s owner)

• adds terrorist and computer crimes to Title III’s predicate offense list

• reenforces protection for those who help execute Title III, ch. 121, and ch. 206 orders

• encourages cooperation between law enforcement and foreign intelligence investigators

• establishes a claim against the U.S. for certain communications privacy violations by government personnel

• terminates the authority found in many of the these provisions and several of the foreign intelligence amendments with a sunset provision (Dec. 31, 2005).

**Pen Registers and Trap and Trace Devices.** In section 216, the Act allows court orders authorizing trap and trace devices and pen registers to be used to capture source and addressee information for computer conversations (e.g., e-mail) as well as telephone conversations, 18 U.S.C. 3121, 3123. In answer to objections that e-mail header information can be more revealing than a telephone number, it creates a detailed report to the court, 18 U.S.C. 3123(a)(3).\(^{11}\)

\(^{11}\) “Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public the agency shall ensure that a record will be maintained which will identify – (i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of the such device.

“(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof),” section 216(b)(1).
The use of pen registers or trap and trace devices was limited at one time to the judicial district in which the order was issued, 18 U.S.C. 3123 (2000 ed.). Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States, 18 U.S.C. 3123(b)(1)(C), 3127(2).

The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” DoJ at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

Communications Records and Stored E-Mail. With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber, 18 U.S.C. 2703(a),(b). A warrant will also suffice to seize records describing telephone and other communications transactions without customer notice, 18 U.S.C. 2703(c). In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation, officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records, 18 U.S.C. 2703(b),(c). They can obtain a limited amount of record information (subscribers’ names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena, 18 U.S.C. 2703(c)(1)(C). There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial, 18 U.S.C. 2705.

In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider’s customer records, 18 U.S.C. 2703(c)(1)(C).

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.

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13 Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user's true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” DoJ at §107.
Previously, only a federal court in the district in which the e-mail was stored could issue the order. Under section 220, federal courts in the district where an offense under investigation occurred may issue orders applicable “without geographic limitation,” 18 U.S.C. 2703.14

The Act, in section 209, treats voice mail like e-mail, that is, subject to the warrant or court order procedure, rather than to the more demanding coverage of Title III once required, United States v. Smith, 155 F.3d 1050, 1055-56 (9th Cir. 1998).

Finally, the Act resolves a conflict between chapter 121 and the federal law governing cable companies. Government entities may have access to cable company customer records only under a court order following an adversary hearing if they can show that the records will evidence that the customer is or has engaged in criminal activity, 47 U.S.C. 511(h). When cable companies began offering telephone and other communications services the question arose whether the more demanding cable rules applied or whether law enforcement agencies were entitled to ex parte court orders under the no-notice procedures applicable to communications providers.15 The Act makes it clear that the cable rules apply when cable television viewing services are

14 Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

15 See e.g., DoJ at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement’s access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

**Electronic Surveillance.** To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202. A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(i). Yet only the interloper's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.

**Criminal Investigators' Access to Foreign Intelligence Information.** The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism. It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that “the purpose for the surveillance is to obtain foreign intelligence information,” 50 U.S.C. 1804(a)(7)(B)(2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps “the purpose” might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation

16 18 U.S.C. 229 (chemical weapons), 2332(terrorist acts of violence committed against Americans overseas), 2332a(use of weapons of mass destruction), 2332b(acts of terrorism transcending national boundaries), 2332d(financial transactions with countries which support terrorists), 2339A(providing material support to terrorists), and 2339B(providing material support to terrorist organizations).

17 “Because service providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves as permitted under current law, they often have no way to exercise their rights to protect themselves from unauthorized attackers. Moreover, such attackers can target critical infrastructures and engage in cyberterrorism,” DoJ at §106. Elsewhere the Act defines “electronic surveillance” for purposes of the Foreign Intelligence Surveillance Act (FISA) to emphasize that the law enforcement authority for this intruder surveillance does not confer similar authority for purposes of foreign intelligence gathering, section 1003 (50 U.S.C. 1801(f)(2)).

The Justice Department sought FISA surveillance and physical search authority on the basis of “a” foreign intelligence purpose. Section 218 of the Act insists that foreign intelligence gathering be a “significant purpose” for the request for the FISA surveillance or physical search order, 50 U.S.C. 1804(a)(7)(B), 1823(a)(7)(B), a more

Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment's warrant clause. It is here that the “primary purpose” notion originated. In United States v. Truong Dinh Hung, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, “as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.” Subsequent case law, however, is not as clear as it might be: see e.g., United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984) (“FISA permits federal officials to obtain orders authorizing electronic surveillance ‘for the purpose of obtaining foreign intelligence information.’ The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying officials’ belief that the information sought is the type of foreign intelligence information described”); United States v. Pelton, 835 F.2d 1067, 1075-76 (4th Cir. 1987) (“We also reject Pelton's claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial”); United States v. Sarkissian, 841 F.2d 959, 907-8 (9th Cir. 1988) (“Defendants rely on the primary purpose test articulated in United States v. Truong Dinh Hung. . . . One other court has applied the primary purpose test. Another court has rejected it . . . distinguishing Truong. A third court has declined to decide the issue. We also decline to decide the issue”); United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1991) (“Appellants attack the government's surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance”).

Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” DoJ at §153.
demanding standard than the “a purpose” threshold proposed by the Justice Department, but a clear departure from the original “the purpose” entry point. FISA once described a singular foreign intelligence focus prerequisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k), 1825(k).

**Protective Measures.** The Act reenforces two kinds of safeguards, one set designed to prevent abuse and the other to protect those who assist the government. The sunset clause is perhaps the best known of the Act’s safeguards. Under the direction of section 224, many of the law enforcement and foreign intelligence authorities granted by the Act expire as of December 31, 2005. The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter

21 “(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against—(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. (2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, infra, quoting, 50 U.S.C. 1801.

22 “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210[subpoenas for communications provider customer records], 211[access to cable company communication service records], 213[sneak and peek], 216[pen register and trap and trace device amendments], 217[trade sanctions], and 222[assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005. “(b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers' communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices). \textsuperscript{23} Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees,\textsuperscript{24} but could not recover against the United States.\textsuperscript{25} Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice's Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government's request until a court order authorizing access can be obtained.\textsuperscript{26} Another allows providers to disclose customer records to protect the provider's rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others.\textsuperscript{27} A third section,


\textsuperscript{24} 18 U.S.C. 2520 and 2707 (2000 ed.).


\textsuperscript{26} Prior law already granted service providers immunity for disclosure of customer records in compliance with a court access order, 18 U.S.C. 2703(f).

\textsuperscript{27} “Existing law contains no provision that allows providers of electronic communications service to disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies that threaten death or serious bodily injury. This section amends 18 U.S.C. §2702 to authorize such disclosures if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.

“Current law also contains an odd disconnect: a provider may disclose the contents of the customer's communications in order to protect its rights or property but the current statute does not expressly permit a provider to voluntarily disclose non-content records (such as a subscriber's login records). 18 U.S.C. 2702(b)(5). This problem substantially hinders the ability of providers to protect themselves from cyber-terrorists and criminals. Yet the right to disclose the contents of communications necessarily implies the less intrusive ability to disclose non-content records. In order to promote the protection of our nation's critical infrastructures, this section's amendments allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems,” DoJ at
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

### Foreign Intelligence Investigations

Although both criminal investigations and foreign intelligence investigations are conducted in the United States, criminal investigations seek information about unlawful activity; foreign intelligence investigations seek information about other countries and their citizens. Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough.

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA), something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President's authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, United States v. United States District Court, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage

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28 Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

29 Thus in the name of assisting in the execution of Title III, chapter 121, or chapter 206 order, the courts may not cite the Act as the basis for an order compelling a service provider to make system modifications or provide any other technical assistance not already required under 18 U.S.C. 2518(4), 2706, or 3124(c), see, H.R.Rep.No. 107-236, at 62-3 (2001) (emphasis added) (“This Act is not intended to affect obligations under Communications Assistance for Law Enforcement Act [which addresses law enforcement-beneficial system modifications and the compensation to be paid for the changes], nor does the act impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance”).

30 E.g., As amended by section 902 of the Act, “‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2)(language added by the Act in italics).

31 50 U.S.C. 1801 et seq.
lockers, 50 U.S.C. 1861-1863 (2000 ed.). Intelligence authorities gained narrow passages through other privacy barriers as well.\textsuperscript{32}

In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs.\textsuperscript{33} There were and still are extra


\textsuperscript{33} “As used in this subchapter: (a) ‘Foreign power’ means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

“(b) ‘Agent of a foreign power’ means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person’s presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of a foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C).

“(c) ‘International terrorism’ means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnapping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

“(d) ‘Sabotage’ means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

“(e) ‘Foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans ("United States persons," i.e., citizens or permanent resident aliens). The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

- permits “roving” surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)

- increases the number of judges on the FISA court from 7 to 11

- allows application for a FISA surveillance or search order when gathering foreign intelligence is a significant reason for the application rather than the reason

- authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations

- sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses

- carries a sunset provision

- establishes a claim against the U.S. for certain communications privacy violations by government personnel

- expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to – (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States,” 50 U.S.C. 1801.

34 Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
**FISA.** FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases.\(^{35}\) It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

**Search and Surveillance for Intelligence Purposes.** Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, Draft at §151.\(^{36}\)

Section 901 of the Act address a concern raised during the 106th Congress relating to the availability of the FISA orders and the effective use of information gleaned from the execution of a FISA order.\(^{37}\) It vests the Director of Central

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\(^{36}\) See also, DoJ at §151, “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order’s minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed (50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

\(^{37}\) See e.g., S.Rep.No. 106-352, at 3, 6, 7 (2000)(“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application
Intelligence with the responsibility to formulate requirements and priorities for the use of FISA to collect foreign intelligence information. He is also charged with the responsibility of assisting the Attorney General in the efficient and effective dissemination of FISA generated information (50 U.S.C. 403-3(c)).

**Pen Registers and Trap and Trace Devices for Intelligence Gathering.** Section 214 grants the request of the Department of Justice by dropping requirements which limited FISA pen register and trap and trace device orders to facilities used by foreign agents or those engaged in international terrorist or clandestine intelligence activities, 50 U.S.C. 1842(c)(3)(2000 ed.). It is enough that the order is sought as part of an investigation to protect against international terrorism or clandestine intelligence activities and is not motivated solely by an American’s exercise of his or her First Amendment rights. Elsewhere (section 505), the Act drops a similar limitation for intelligence officials’ access to telephone records, 18 U.S.C. 3127(a).

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process, as interpreted by the OIPR is administratively burdensome and, at times, extremely slow. Many applications undergo months of scrutiny before submission to the court because the OIPR prescribes standards and restrictions not imposed by the statute. . . . In particular, the OIPR has been criticized for an overly restrictive interpretation of the FISA ‘currency’ requirement. This is the issue of how recent a subject's activities must be to support a finding of probable cause that the subject is engaged in clandestine intelligence gathering activities. . . . While existing law does not specifically address "past activities," it does not preclude, and legislative history supports, the conclusion that past activities may be part of the totality of circumstances considered by the FISC in making a probable cause determination. . . . By definition, information collected pursuant to a court order issued under the Foreign Intelligence Surveillance Act is foreign intelligence not law enforcement information. Accordingly, the Committee wants to clarify that the FISA ‘take’ can and must be shared by the Federal Bureau of Investigation with appropriate intelligence agencies. For the intelligence mission of the United States to be successful, there must be a cooperative and concerted effort among intelligence agencies. Any information collected by one agency under foreign intelligence authorities that could assist another agency in executing its lawful mission should be shared fully and promptly. Only then can the United States Government pursue aggressively important national security targets including, for example, counterterrorist and counternarcotics targets”); see also, 147 Cong.Rec. S799-803 (daily ed. Feb. 24, 2000)(remarks of Sens. Specter, Torricelli and Biden).

38 “When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevance, an additional factual showing that the communications device has been used to contact an ‘agent of a foreign power’ engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the ‘agent of a foreign power’ prong from the predication, and thus makes the FISA authority more closely track the criminal authority,” DoJ at §155.
Section 214 adjusts the language of the FISA pen register-trap and trace authority to permit its use to capture source and destination information relating to electronic communications (e.g., e-mail) as well as telephone communications, 50 U.S.C. 1842(d). The section makes it clear that requests for a FISA pen register-trap and trace order, like requests for other FISA orders, directed against Americans (U.S. persons) may not be based solely on activities protected by the First Amendment, 50 U.S.C. 1842, 1843.

**Third Party Cooperation and Tangible Evidence.** As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target's activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.40

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39 Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise be entitled to confidentiality. Section 505, in response to the Justice Department’s suggestion, allows FBI field offices to make the requests, see DoJ at §157 (“At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports”.

40 When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court’s order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.’ This would enhance the FBI’s ability to monitor international terrorists and intelligence officers who are
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian.\footnote{41} The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities,\footnote{42} in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B));
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a);
- the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a);
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v;

\footnote{41} “The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigational contexts. The time and difficulty involved in getting such pleadings before the Court usually outweighs the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” DoJ at §156.

\footnote{42} Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
Access to Law Enforcement Information. Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community's access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, Draft at §103.

43 H.R.Rep.No. 107-205, at 60-1 (2001)(“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

“The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

“Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual’s credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding—without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information”).

44 See also, DoJ at §103, “This section facilities the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, Draft at §354.45

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, Draft at §154.46

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion.47 It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions.”

45 See also, DoJ at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.” Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officers

46 See also, DoJ at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”

47 Blair v. United States, 250 U.S. 273, 281 (1919)(the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

The Act, in section 203(a), allows disclosure of matters occurring before the grand jury to “any federal law enforcement, intelligence, protective, immigration, national defense, or national security” officer to assist in the performance of his official duties, F.R.Crim.P. 6(e)(3)(C)(i)(V).  

Critics may protest that the change could lead to the use of the grand jury for intelligence gathering purposes, or less euphemistically, to spy on Americans. The proposal was never among those scheduled to sunset, but earlier versions of the section followed the path used for most other disclosures of grand jury material: prior

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48 These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(i)(V).

49 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25 HARVARD JOURNAL OF LAW & PUBLIC POLICY 699, 719-20 (2002)(“There is a significant danger that the rule permitting disclosure will be treated as the de facto authorization of an expansion of the grand jury’s investigative role to encompass seeking material relevant only to matters of national security, national defense, immigration, and so forth. The grand jury’s awesome powers should not be unwittingly extended to a much wider range of issues. . . Since the grand jury operates in secret, there are no public checks on the scope of its investigations, and witnesses are not permitted to challenge its jurisdiction. Only the supervising court is in a position to keep the grand jury’s investigation within proper bounds. Requiring judicial approval of foreign intelligence and counterintelligence information disclosures would provide a natural check against the temptation to manipulate the grand jury to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6 (Nov. 2001)(“The grand jury secrecy rule is a rule of policy which has always had exceptions, and it has been frequently modified. The secrecy rule has no credible claim to constitutional stature”).
Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

Law enforcement officials may share Title III information with the intelligence community under the same conditions, section 203(b), although the grand jury and Title III sharing provisions differ in at least three important respects. The court need not be notified of Title III disclosures. On the other hand, the authority for sharing Title III information expires on December 31, 2005, section 224, and agencies and their personnel guilty of intentional improper disclosures may be subject to a claim for damages and disciplinary action, 18 U.S.C. 2520.

The third subsection of section 203 remains something of an enigma. It speaks in much the same language as its counterparts. It allows law enforcement officials to share information with the intelligence community, “notwithstanding any other provisions of law,” section 203(d). It either swallows the other subsections, or supplements them. Several factors argue for its classification as a supplement. Congress is unlikely to have crafted subsections (a), (b) and (c) only to completely

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51 “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person’s official duties subject to any limitations on the unauthorized disclosure of such information;” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification.\(^{52}\) By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.\(^{53}\)

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

**Increasing Institutional Capacity.** As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a

\(^{52}\) *Duncan v. Walker*, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted) (“It is our duty to give effect, if possible, to every clause and word of a statute. *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)); see also *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879)(As early as in Bacon's Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.\(^{53}\)

\(^{53}\) *Draft* at §154, “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”
computerized translation capability to be used in foreign intelligence gathering. Section 907 instructs the Director of the Central Intelligence, in consultation with the Director of the FBI, to report on the creation of a National Virtual Translation Center. The report is to include information concerning staffing, allocation of resources, compatibility with comparable systems to be used for law enforcement purposes, and features which permit its efficient and secure use by all of the intelligence agencies.

**Money Laundering**

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture. The Act bolsters federal efforts in each area.

**Regulation.** Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.

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54 “The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

“The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so,” S.Rep.No. 107-63, at 11 (2001).


56 See e.g., 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
**Records and Reports.** For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler’s checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to files SARs as well,\(^57\) reflecting Congress’ view that the information provided the IRS may be valuable for other law enforcement purposes.\(^58\) This concern is likewise

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\(^{58}\) H.R.Rep.No. 107-250, at 38-9 (2001)(“Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

“Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a ‘Safeguard Procedures Report’ which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

“While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement
authorities as the various reports mandated by the Bank Secrecy Act, which can typically be retrieved electronically from a database maintained by the Treasury Department. The differential access to the two kinds of reports is made anomalous by the fact that Form 8300 elicits much the same information that is required to be disclosed by the Bank Secrecy Act. For example, just as Form 8300 seeks the name, address, and social security number of a customer who engages in a cash transaction exceeding $10,000 with a trade or business, Currency Transaction Reports (CTRs) mandated by the Bank Secrecy Act require the same information to be reported on a cash transaction exceeding $10,000 between a financial institution and its customer.

59 “Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor from civil liability applies in arbitration, as well as judicial, proceedings. Second, it amends section 5318(g)(3) to clarify the safe harbor’s coverage of voluntary disclosures (that is, those not covered by the SAR regulatory reporting requirement). The language in section 5318(g)(3)(A) providing that ‘any financial institution that *** makes a disclosure pursuant to *** any other authority *** shall not be liable to any person’ is not intended to avoid the application of the reporting and disclosure provisions of the Federal securities laws to any person, or to insulate any issuers from private rights of actions for disclosures made under the Federal securities laws.

“Subsection [351](b) amends section 5318(g)(2) of title 31—which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed—to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee’s official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
employment references to other insured depository financial institutions provided disclosure is not done with malicious intent.\textsuperscript{60}

The Financial Crimes Enforcement Network (FinCEN), a component within the Treasury Department long responsible for these anti-money laundering reporting and record-keeping requirements, 31 C.F.R. pt. 103, was administratively created in 1990 to provide other government agencies with an “intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes,” 55 \textit{Fed.Reg.} 18433 (May 2, 1990).

The Act, in section 361, makes FinCEN a creature of statute, a bureau within the Treasury Department, 31 U.S.C. 310. Section 362 charges it with the responsibility of establishing a highly secure network to allow financial institutions to file required reports electronically and to permit FinCEN to provide those institutions with alerts and other information concerning money laundering protective measures, 31 U.S.C. 310 note.

\textbf{Special Measures.} In extraordinary circumstances involving international financial matters, the Act grants the Secretary of the Treasury, in consultation with other appropriate regulatory authorities, the power to issue regulations and orders involving additional required “special measures” and additional “due diligence” requirements to combat money laundering. The special measure authority, available under section 311, comes to life with the determination that particular institutions, jurisdictions, types of accounts, or types of transactions pose a primary money

\textsuperscript{60} 31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 66 (2001).
laundering concern. These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

31 U.S.C. 5318A. The circumstances considered in the case of a suspect jurisdiction are: evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction’s banking regulation; the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’ including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

“Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate
business transactions.

“Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

“Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

“The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

“The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

“The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

“The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent’ account for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information that it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

“The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

“The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed
**Due Diligence.** Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.\(^{63}\)

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\(^{63}\) See generally, H.R. Rep. No. 107-250, at 71-2 (“Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

“The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

“The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

“For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
**General Regulatory Matters.** The Act establishes several other regulatory mechanisms directed at the activities involving U.S. financial institutions and foreign individuals or institutions. Section 313, for instance, in another restriction on correspondent accounts for foreign financial institutions, prohibits U.S. financial institutions from maintaining correspondent accounts either directly or indirectly for foreign shell banks (banks with no physical place of business) which have no affiliation with any financial institution through which their banking activities are subject to regulatory supervision.

The Act, in section 325, empowers the Secretary of the Treasury to promulgate regulations to prevent financial institutions from allowing their customers to conceal their financial activities by taking advantage of the institutions’ concentration account practices.

The Secretary of the Treasury is instructed in section 326 to issue regulations for financial institutions’ minimum new customer identification standards and record-
keeping and to recommend a means to effectively verify the identification of foreign customers.  

67 31 U.S.C. 5318(l); H.R.Rep.No. 107-250, at 62-3 (2001)(“Section [326](a) amends 31 U.S.C. 5318 by adding a new subsection governing the identification of account holders. Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a ‘street name’ or omnibus account in the broker-dealer's name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to ‘look through’ the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund's customers. Thus, the fund would not be required to ‘look through’ the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature.

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

**Reports to Congress.** Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

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“Paragraph (6) requires that Treasury's regulations prescribed under paragraph (1) become effective within one year after enactment of this bill”).

exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.69

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

International Cooperation. Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.70

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (i.e., the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.

70 H.R.Rep.No. 107-250, at 67 (2001)(“This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury's progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

“The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime”).
Crimes. Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, smuggling, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
expands 18 U.S.C. 1956 to cover financial transactions conducted in foreign financial institutions.\textsuperscript{71}

Section 329 makes it a federal crime to corruptly administer the money laundering regulatory scheme. Offenders are punishable by imprisonment for not more than 15 years and a fine of not more than three times the amount of the bribe.

Section 5326 of title 31 authorizes the Secretary of the Treasury to impose temporary, enhanced reporting requirements upon financial institutions in areas victimized by substantial money laundering activity (geographic targeting regulations and orders). Section 353 makes it clear that the civil sanctions, criminal penalties, and prohibitions on smurfing (structuring transactions to evade reporting requirements) apply to violations of the regulations and orders issued under 31 U.S.C. 5326.\textsuperscript{72} It also extends the permissible length of the temporary geographical orders from 60 to 180 days.

Violations of the special measures and special due diligence requirements of sections 311 and 312 are subject to both civil and criminal penalties by virtue of section 363's amendments to 31 U.S.C. 5321(a) and 5322. The amendments authorize civil penalties and criminal fines of twice the amount of the transaction but not more than $1 million. Criminal offenders would be subject to a fine in the same amount.

\textsuperscript{71} “[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

“The definition of ‘financial institution’ in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of ‘commercial bank’ or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad--say to a Mexican bank--and launders them through a series of financial transactions, the government conceivably could not rely on the definition of a ‘financial institution’ in 1956(c)(6) to establish that the transaction was a ‘financial transaction’ within the meaning of 1956(c)(4)(B) (defining a ‘financial transaction’ as a transaction involving the use of a ‘financial institution’), or that it was a ‘monetary transaction’ within the meaning of 1957(f) (defining ‘monetary transaction’ as, inter alia, a transaction that would be a ‘financial transaction’ under 1956(c)(4)(B)).

“Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launders the proceeds of one of the crimes set forth on a list of ‘specified unlawful activities.’ 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),” H.R.Rep.No. 107-250, at 38 (2000).

Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.  

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents. They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

73 The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business.

“Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.

“Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive,” H.R.Rep.No. 107-250, at 54 (2001).

74 “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
• 18 U.S.C. 476 (taking impressions of tools used for obligations and securities) from 10 to 25 years;  
• 18 U.S.C. 477 (possessing or selling impressions of tools used for obligations or securities) from 10 to 25 years;  
• 18 U.S.C. 484 (connecting parts of different notes) from 5 to 10 years;  
• 18 U.S.C. 493 (bonds and obligations of certain lending agencies) from 5 to 10 years;  
• 18 U.S.C. 478 (foreign obligations or securities) from 5 to 20 years;  
• 18 U.S.C. 479 (uttering counterfeit foreign obligations or securities) from 3 to 20 years;  
• 18 U.S.C. 480 (possessing counterfeit foreign obligations or securities) from 1 to 20 years;  
• 18 U.S.C. 481 (plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities) from 5 to 25 years;  
• 18 U.S.C. 482 (foreign bank notes) from 2 to 20 years; and  
• 18 U.S.C. 483 (uttering counterfeit foreign bank notes) from 1 to 20 years.

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

**Bulk Cash.** Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act’s bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting.  

The section appears to be the product of reactions to the Supreme Court’s decision in *United States v. Bajakian*, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court’s

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75 “For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).
As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency – representing the proceeds of drug trafficking and other criminal offenses – is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad.

Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United State without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute,” H.R.Rep.No. 107-250 at 36-7 (2001).
under *either* circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.\(^77\)

**Venue.** Section 1004 relies on *dicta* in *United States v. Cabrales*, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering,\(^78\) in the state and district in which the monetary transaction takes place. The Supreme Court in *Cabrales* held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in *dicta*, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.\(^79\)

**Forfeiture.** Forfeiture is the government confiscation of property as a consequence of crime.\(^80\) The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 *et seq.* (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

**Constitutional Considerations.** The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 *et seq.*, which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the

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\(^78\) “The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed,” U.S.Const. Art.III, §2, cl.3.

“[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,” U.S.Const. Amend. VI.

\(^79\) *See also, United States v. Rodriguez-Moreno*, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnaping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.

jurisdiction of the United States, belonging to any foreign individual, foreign entity, or foreign country whom they determine to have planned, authorized, aided or engaged in an attack on the United States by a foreign country or foreign nationals. The section also permits the government to present secretly (ex parte and in camera) any classified information upon which the forfeiture was based should the decision be subject to judicial review. The Justice Department requested the section as a revival of the President’s powers in times of unconventional wars.\(^{81}\) By virtue of section 316, property owners may initiate a challenge to a confiscation by filing a claim under the rules applicable in maritime confiscations. The section permits two defenses to forfeiture – that the property is not subject to confiscation under section 106 or that the claimant is entitled to the innocent owner defense of 18 U.S.C. 983(d).\(^{82}\) The characterization of the defenses as “affirmative defense” indicates that the claimant bears the burden of proof. The innocent owner defenses of 18 U.S.C. 983(d) are probably not available in cases under section 106, since that section is explicitly

\(^{81}\) This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App.U.S.C. §5(b).

“This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress's war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

“The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2),” DoJ at §159.

\(^{82}\) “An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
excepted from the coverage of 18 U.S.C. 983.\textsuperscript{83} The challenge proceedings permit the court to admit evidence, such as hearsay evidence, that would not otherwise be admissible under the Federal Rules of Evidence if the evidence is reliable and if national security might be imperiled should dictates of the Federal Rules be followed, §316(b). The section recognizes the rights of claimants to proceed alternatively under the Constitution or the Administrative Procedure Act.\textsuperscript{84}

The Justice Department also recommended enactment of an overlapping provision which ultimately passed as section 806 of the Act without any real discussion of the relationship of the two sections.\textsuperscript{85} Section 806 authorizes confiscation of all property, regardless of where it is found, of any individual, entity, or organization engaged in domestic or international terrorism (as defined in 18 U.S.C. 2331),\textsuperscript{86} against the United States, Americans or their property, 18 U.S.C.

\textsuperscript{83} 18 U.S.C. 983(i)(2)(D).

\textsuperscript{84} “The exclusion of certain provisions of Federal law from the definition of the term ‘civil forfeiture statute’ in section 983(i) of title 18, United States Code, shall not be construed to deny an owner of property the right to contest the confiscation of assets of suspected international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C) subchapter II of chapter 5 of title 5, United States Code (commonly known as the ‘Administrative Procedure Act’).” Sec. 316(c)(1).

\textsuperscript{85} “Current law does not contain any authority tailored specifically to the confiscation of terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available current forfeiture laws require detailed tracing that is quite difficult for accounts coming through the banks of countries used by many terrorists.

‘This section increases the government's ability to strike at terrorist organizations' economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001,” DoJ, at §403. The House Report on H.R. 2975 which contained versions of both sections is no more explicit on the relation of the two sections.

\textsuperscript{86} “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5)(as amended by section 802 of the Act).

87 Austin v. United States, 509 U.S. 602, 611-12 (1993)(“Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture . . . . Of England’s three kinds of forfeiture, only the third took hold in the United States”).


89 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal in personam proceedings following criminal conviction as a means of accomplishing confiscation.
Neither section 106 nor 806 require conviction of the terrorist property owner.\textsuperscript{90}\textsuperscript{93} Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers.\textsuperscript{91} The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners.\textsuperscript{92} Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them.\textsuperscript{93} The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate

\textsuperscript{90} Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c) (“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act.”).

\textsuperscript{91} Silesian American Corp. V. Clark, 332 U.S. 469 (1947); cf., Societe Internationale v. Rogers, 357 U.S. 197, 211 (1958) (“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).

\textsuperscript{92} Zittman v. McGrath, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’”).

any presumption of remedial purposes. The same has been said of the applicability of the ex post facto clause.

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO. If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

**Other Forfeiture Amendments.** In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.

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95 See e.g., United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.), 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994).

96 DoJ, at §403.

97 18 U.S.C. 1956(b). Cf., H.R.Rep.No. 107-250, at 54-5 (2001)(“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas. Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted

American Bank, 191 F.3d 30 (1st Cir. 1999).

“The second provision, modeled on 18 U.S.C. 1345(b), gives the district court the power to restrain property, issue seizure warrants, or take other action necessary to ensure that a defendant in an action covered by the statute does not dissipate the assets that would be needed to satisfy a judgment.

“This section also authorizes a court, on the motion of the Government or a State or Federal regulator, to appoint a receiver to gather and protect assets needed to satisfy a judgment under sections 1956 and 957, and the forfeiture provisions in sections 981 and 982. This authority is intended to apply in three circumstances: (1) when there is a judgment in a criminal case, including an order of restitution, following a conviction for a violation of section 1956 or 1957; (2) when there is a judgment in a civil case under section 1956(b) assessing a penalty for a violation of either section 1956 or 1957; and (3) when there is a civil forfeiture judgment under section 981 or a criminal forfeiture judgment, including a personal money judgment, under section 982.

“The amendment also makes section 1956(b) applicable to violations of section 1957. It applies to conduct occurring before the effective date of the Act”).

18 U.S.C. 981(k). H.R.Rep.No. 107-250, at 57-8 (2001)(“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank's customers.

“Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank's correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

“The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”).
defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation.\textsuperscript{99}

Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here.\textsuperscript{100} Section 320 enlarges this provisions to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements.\textsuperscript{101} This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.\textsuperscript{102}

\textsuperscript{99} Cf., H.R.Rep.No. 107-250, at 58-9 (2001) ("Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of 'substitute assets' when the defendant has placed the property otherwise subject to forfeiture 'beyond the jurisdiction of the court.' Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

"This section amends 21 U.S.C. 853 to make clear that a court in a criminal case may issue a repatriation order--either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. 853(e) to restrain property--so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both").

\textsuperscript{100} 18 U.S.C. 981(a)(1)(B).

\textsuperscript{101} H.R.Rep.No. 107-250, at 56 (2001)("This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act").

\textsuperscript{102} H.R.Rep.No. 107-250, at 59-60 (2001)("Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country.

"Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
A fugitive may not challenge a federal forfeiture.\footnote{28 U.S.C. 2466.} Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in “order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.”
Alien Terrorists and Victims

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

Border Protection. The border protection provisions:

• authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401

• authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402

• remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404

• authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405

• authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.

• instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007

• direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418

• express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414

• add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415

• call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416

• limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).
Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).


An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in "premeditated, politically motivated violence perpetrated against noncombatant targets," or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security or endanger some individual or the general public. The Attorney General's determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

Victims. The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

- permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421105
- extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422106

105 “The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

106 “The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks.

“The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application.

“Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

"Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 31.

"Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.


107 "Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

"The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

"The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death)," H.R.Rep.No. 107-236, at 68 (2001).

108 "Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien’s 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien’s 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
• a denial of benefits of the Act to terrorists and their families, section 427

• authority for the Attorney General to establish evidentiary standards to implement the alien victim provisions of the Act, section 426.

Other Crimes, Penalties, & Procedures

New Crimes. The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxim as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department,\(^\text{109}\) the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offenses for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents, 18 U.S.C. 175b.\(^\text{110}\) Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.\(^\text{111}\)

\(^{109}\) “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . . .” DoJ at §305.

\(^{110}\) The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

\(^{111}\) “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2)(“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
Summary

The USA PATRIOT Act passed in the wake of the September 11 terrorist attacks. It flows from a consultation draft circulated by the Department of Justice, to which Congress made substantial modifications and additions. The stated purpose of the Act is to enable law enforcement officials to track down and punish those responsible for the attacks and to protect against any similar attacks.

The Act grants federal officials greater powers to trace and intercept terrorists’ communications both for law enforcement and foreign intelligence purposes. It reinforces federal anti-money laundering laws and regulations in an effort to deny terrorists the resources necessary for future attacks. It tightens our immigration laws to close our borders to foreign terrorists and to expel those among us. Finally, it creates a few new federal crimes, such as the one outlawing terrorists’ attacks on mass transit; increases the penalties for many others; and institutes several procedural changes, such as a longer statute of limitations for crimes of terrorism.

Critics have suggested that it may go too far. The authority to monitor e-mail traffic, to share grand jury information with intelligence and immigration officers, to confiscate property, and to impose new book-keeping requirements on financial institutions, are among the features troubling to some.

The Act itself responds to some of these reservations. Many of the wiretapping and foreign intelligence amendments sunset on December 31, 2005. The Act creates judicial safeguards for e-mail monitoring and grand jury disclosures; recognizes innocent owner defenses to forfeiture; and entrusts enhanced anti-money laundering powers to those regulatory authorities whose concerns include the well being of our financial institutions.

This report, stripped of its citations and footnotes, is available in an abbreviated form as The USA PATRIOT Act: A Sketch, CRS Rep.No. RS21203. In addition, much of the information contained here may also be found under a different arrangement in a report entitled, Terrorism: Section by Section Analysis of the USA PATRIOT Act, CRS Rep.No. RL31200 (Dec. 10, 2001). A wider array of terrorism-related analysis appears on the CRS terrorism electronic briefing book page.
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The USA PATRIOT Act: A Legal Analysis

Introduction

Congress passed the USA PATRIOT Act (the Act) in response to the terrorists’ attacks of September 11, 2001. The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to further close our borders to foreign terrorists and to detain and remove those within our borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it is not without safeguards, critics contend some of its provisions go too far. Although it grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough.


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1 P.L. 107-56, 115 Stat. 272 (2001); its full title is the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT).”

2 H.R. 2975 was introduced by Representative Sensenbrenner for himself and Representatives Conyers, Hyde, Coble, Goodlatte, Jenkins, Jackson-Lee, Cannon, Meehan, Graham, Bachus, Wexler, Hostettler, Keller, Issa, Hart, Flake, Schiff, Thomas, Goss, Rangel, Berman and Lofgren; S.1510 by Senator Daschle for himself and Senators Lott, Leahy, Hatch, Graham, Shelby and Sarbanes.

3 H.R. 3004 was introduced by Representative Oxley for himself and Representatives LaFalce, Leach, Maloney, Roukema, Bentsen, Hooley, Bereuter, Baker, Bachus, King, Kelly, Gillmore, Cantor, Riley, Latourette, Green (of Wisconsin), and Grucci; and reported out of the House Financial Services Committee with amendments on October 15, 2001, H.R.Rep.No. 107-250. H.R. 3004, as reported out, included Internet gambling amendments that were not included in H.R. 2975/H.R.3108.
ed. Oct. 24, 2001), and H.R. 3162 was sent to the President who signed it on October 26, 2001.

**Criminal Investigations: Tracking and Gathering Communications**

A portion of the Act addresses issues suggested originally in a Department of Justice proposal circulated in mid-September. The first of its suggestions called for amendments to federal surveillance laws, laws which govern the capture and tracking of suspected terrorists’ communications within the United States. Federal law features a three tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications.

The tiers reflected the Supreme Court’s interpretation of the Fourth Amendment’s ban on unreasonable searches and seizures. The Amendment protects private conversations, *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967). It does not cloak information, even highly personal information, for which there is no individual justifiable expectation of privacy, such as telephone company records of calls made to and from an individual's home, *Smith v. Maryland*, 442 U.S. 735 (1979), or bank records of an individual's financial dealings, *United States v. Miller*, 425 U.S. 435 (1976).

Congress responded to *Berger* and *Katz*, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III, as amended, generally prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications, 18 U.S.C. 2511. At the same time, it gives authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious

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4 The Department’s proposal, dated September 20, 2001, came with a brief section by section analysis. Both the proposal (Draft) and analysis (DoJ) were printed as an appendix in *Administration's Draft Anti-Terrorism Act of 2001, Hearing Before the House Comm. on the Judiciary*, 107th Cong., 1st Sess. 54 (2001).


6 “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,” *U.S. Const. Amend. IV.*

7 Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
criminal cases. When approved by senior Justice Department officials, law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.

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8 "The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of one or more predicate offense, 18 U.S.C. 2516.

9 The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement), 1751 (presidential and presidential staff assassination, kidnapping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundering of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenved and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnaping, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or naturalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations, 18 U.S.C. 2518. The court notifies the parties to any conversations seized under the order after the order expires, 18 U.S.C. 2518(8).

Below Title III, the next tier of privacy protection covers some of those matters which the Supreme Court has described as beyond the reach of the Fourth Amendment protection – telephone records, e-mail held in third party storage, and the like, 18 U.S.C. 2701-2709 (Chapter 121). Here, the law permits law enforcement access, ordinarily pursuant to a warrant or court order or under a subpoena in some cases, but in connection with any criminal investigation and without the extraordinary levels of approval or constraint that mark a Title III interception, 18 U.S.C. 2703.

Least demanding and perhaps least intrusive of all is the procedure that governs court orders approving the government’s use of trap and trace devices and pen registers, a kind of secret “caller id”, which identify the source and destination of calls made to and from a particular telephone, 18 U.S.C. 3121-3127 (Chapter 206). The orders are available based on the government’s certification, rather than a finding of the court, that the use of the device is likely to produce information relevant to the investigation of a crime, any crime, 18 U.S.C. 3123. The devices record no more than the identity of the participants in a telephone conversation, but neither the orders nor the results they produce need ever be revealed to the participants.

The Act modifies the procedures at each of the three levels. It:

offense involving counterfeiting punishable under 18 U.S.C. 471, 472, or 473; (e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States; (f) any offense including extortionate credit transactions under 18 U.S.C. 892, 893, or 894; (g) a violation of 31 U.S.C. 5322 (dealing with the reporting of currency transactions); (h) any felony violation of 18 U.S.C. 2511 and 2512 (interception and disclosure of certain communications and to certain intercepting devices); (i) any felony violation of 18 U.S.C. ch. 71 (obscenity); (j) 49 U.S.C. 60123(b) (destruction of a natural gas pipeline), 46502 (aircraft piracy); (k) 22 U.S.C. 2778 (Arms Export Control Act); (l) the location of any fugitive from justice from an offense described in this section; (m) a violation of 8 U.S.C. 1324, 1327, or 1328; (n) any felony violation of 18 U.S.C. 922, 924 (firearms); (o) any violation of 26 U.S.C. 5861 (firearms); (p) a felony violation of 18 U.S.C. 1028 (production of false identification documents), 1542 (false statements in passport applications), 1546 (fraud and misuse of visas, permits, and other documents) or a violation of 8 U.S.C. 1324, 1327, or 1328 (smuggling of aliens); (p) 229 (chemical weapons), 2332 (terrorist violence against Americans overseas), 2332a (weapons of mass destruction), 2332b (multinational terrorism), 2332d (financial transactions with countries supporting terrorism), 2339A (support of terrorist), 2332B (support of terrorist organizations); (r) any conspiracy to commit any of these, 18 U.S.C. 2516(1)(crimes added by the Act in italics). Other than telephone face to face conversations (i.e., electronic communications), the approval of senior Justice Department officials is not required and an order may be sought in any felony investigation, 18 U.S.C. 2516(3).

10 Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
• permits pen register and trap and trace orders for electronic communications (e.g., e-mail)

• authorizes nationwide execution of court orders for pen registers, trap and trace devices, and access to stored e-mail or communication records

• treats stored voice mail like stored e-mail (rather than like telephone conversations)

• permits authorities to intercept communications to and from a trespasser within a computer system (with the permission of the system’s owner)

• adds terrorist and computer crimes to Title III’s predicate offense list

• reenforces protection for those who help execute Title III, ch. 121, and ch. 206 orders

• encourages cooperation between law enforcement and foreign intelligence investigators

• establishes a claim against the U.S. for certain communications privacy violations by government personnel

• terminates the authority found in many of the these provisions and several of the foreign intelligence amendments with a sunset provision (Dec. 31, 2005).

Pen Registers and Trap and Trace Devices. In section 216, the Act allows court orders authorizing trap and trace devices and pen registers to be used to capture source and addressee information for computer conversations (e.g., e-mail) as well as telephone conversations, 18 U.S.C. 3121, 3123. In answer to objections that e-mail header information can be more revealing than a telephone number, it creates a detailed report to the court, 18 U.S.C. 3123(a)(3).11

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11 “Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public the agency shall ensure that a record will be maintained which will identify – (i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of the such device.

“(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof),” section 216(b)(1).
The use of pen registers or trap and trace devices was limited at one time to the judicial district in which the order was issued, 18 U.S.C. 3123 (2000 ed.). Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States, 18 U.S.C. 3123(b)(1)(C), 3127(2).12

Communications Records and Stored E-Mail. With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber, 18 U.S.C. 2703(a),(b). A warrant will also suffice to seize records describing telephone and other communications transactions without customer notice, 18 U.S.C. 2703(c). In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation, officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records, 18 U.S.C. 2703(b),(c). They can obtain a limited amount of record information (subscribers' names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena, 18 U.S.C. 2703(c)(1)(C). There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial, 18 U.S.C. 2705.

In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider’s customer records, 18 U.S.C. 2703(c)(1)(C).13

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.

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12 The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” DoJ at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

13 Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user's true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” DoJ at §107.
Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

Previously, only a federal court in the district in which the e-mail was stored could issue the order. Under section 220, federal courts in the district where an offense under investigation occurred may issue orders applicable “without geographic limitation,” 18 U.S.C. 2703.14

The Act, in section 209, treats voice mail like e-mail, that is, subject to the warrant or court order procedure, rather than to the more demanding coverage of Title III once required, United States v. Smith, 155 F.3d 1050, 1055-56 (9th Cir. 1998).

Finally, the Act resolves a conflict between chapter 121 and the federal law governing cable companies. Government entities may have access to cable company customer records only under a court order following an adversary hearing if they can show that the records will evidence that the customer is or has engaged in criminal activity, 47 U.S.C. 511(h). When cable companies began offering telephone and other communications services the question arose whether the more demanding cable rules applied or whether law enforcement agencies were entitled to ex parte court orders under the no-notice procedures applicable to communications providers.15 The Act makes it clear that the cable rules apply when cable television viewing services are

14 Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

15 See e.g., DoJ at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement’s access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

**Electronic Surveillance.** To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202. A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(i). Yet only the interloper's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.

**Criminal Investigators' Access to Foreign Intelligence Information.** The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism. It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that “the purpose for the surveillance is to obtain foreign intelligence information,” 50 U.S.C. 1804(a)(7)(B)(2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps “the purpose” might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation

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16 18 U.S.C. 229 (chemical weapons), 2332 (terrorist acts of violence committed against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2332d (financial transactions with countries which support terrorists), 2339A (providing material support to terrorists), and 2339B (providing material support to terrorist organizations).

17 “Because service providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves as permitted under current law, they often have no way to exercise their rights to protect themselves from unauthorized attackers. Moreover, such attackers can target critical infrastructures and engage in cyberterrorism,” DoJ at §106. Elsewhere the Act defines “electronic surveillance” for purposes of the Foreign Intelligence Surveillance Act (FISA) to emphasize that the law enforcement authority for this intruder surveillance does not confer similar authority for purposes of foreign intelligence gathering, section 1003 (50 U.S.C. 1801(f)(2)).

18 For a general discussion of federal intelligence and law enforcement cooperation, see, Best, Intelligence and Law Enforcement: Countering Transnational Threats to the U.S., CRS REP.NO. RL30252 (Dec. 3, 2001).
Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment's warrant clause. It is here that the “primary purpose” notion originated. In United States v. Truong Dinh Hung, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, “as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.” Subsequent case law, however, is not as clear as it might be: see e.g., United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984)(“FISA permits federal officials to obtain orders authorizing electronic surveillance ‘for the purpose of obtaining foreign intelligence information.’ The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying officials’s belief that the information sought is the type of foreign intelligence information described”); United States v. Pelton, 835 F.2d 1067, 1075-76 (4th Cir. 1987)(“We also reject Pelton’s claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial”); United States v. Sarkissian, 841 F.2d 959, 907-8 (9th Cir. 1988)(“Defendants rely on the primary purpose test articulated in United States v. Truong Dinh Hung. . . . One other court has applied the primary purpose test. Another court has rejected it . . . distinguishing Truong. A third court has declined to decide the issue. We also decline to decide the issue”); United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1991)(“Appellants attack the government’s surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance”).

“Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” DoJ at §153.
demanding standard than the “a purpose” threshold proposed by the Justice Department, but a clear departure from the original “the purpose” entry point. FISA once described a singular foreign intelligence focus prerequisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k), 1825(k).21

**Protective Measures.** The Act reenforces two kinds of safeguards, one set designed to prevent abuse and the other to protect those who assist the government. The sunset clause is perhaps the best known of the Act’s safeguards. Under the direction of section 224, many of the law enforcement and foreign intelligence authorities granted by the Act expire as of December 31, 2005.22 The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter

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21 “(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. (2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, infra, quoting, 50 U.S.C. 1801.

22 “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210[subpoenas for communications provider customer records], 211[access to cable company communication service records], 213[sneak and peek], 216[pen register and trap and trace device amendments], 221[trade sanctions], and 222[assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005. “(b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers' communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices).\textsuperscript{23} Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees,\textsuperscript{24} but could not recover against the United States.\textsuperscript{25} Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice's Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government's request until a court order authorizing access can be obtained.\textsuperscript{26} Another allows providers to disclose customer records to protect the provider's rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others.\textsuperscript{27} A third section,
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.

**Foreign Intelligence Investigations**

Although both criminal investigations and foreign intelligence investigations are conducted in the United States, criminal investigations seek information about unlawful activity; foreign intelligence investigations seek information about other countries and their citizens. Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough.

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA), something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President’s authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, United States v. United States District Court, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage

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28 Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

29 Thus in the name of assisting in the execution of Title III, chapter 121, or chapter 206 order, the courts may not cite the Act as the basis for an order compelling a service provider to make system modifications or provide any other technical assistance not already required under 18 U.S.C. 2518(4), 2706, or 3124(c), see, H.R.Rep.No. 107-236, at 62-3 (2001) (emphasis added) (“This Act is not intended to affect obligations under Communications Assistance for Law Enforcement Act [which addresses law enforcement-beneficial system modifications and the compensation to be paid for the changes], nor does the act impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance”).

30 E.g., As amended by section 902 of the Act, “‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2)(language added by the Act in italics).

31 50 U.S.C. 1801 *et seq.*
lockers, 50 U.S.C. 1861-1863 (2000 ed.). Intelligence authorities gained narrow passages through other privacy barriers as well.32

In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs.33 There were and still are extra


33 “As used in this subchapter: (a) ‘Foreign power’ means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

“(b) ‘Agent of a foreign power’ means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power; (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C).

“(c) ‘International terrorism’ means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnapping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

“(d) ‘Sabotage’ means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

“(e) ‘Foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans (“United States persons,” i.e., citizens or permanent resident aliens). The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

- permits “roving” surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)
- increases the number of judges on the FISA court from 7 to 11
- allows application for a FISA surveillance or search order when gathering foreign intelligence is a significant reason for the application rather than the reason
- authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations
- sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses
- carries a sunset provision
- establishes a claim against the U.S. for certain communications privacy violations by government personnel
- expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to – (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States,” 50 U.S.C. 1801.

34 Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
FISA. FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases.\textsuperscript{35} It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

Search and Surveillance for Intelligence Purposes. Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, Draft at §151.\textsuperscript{36}

Section 901 of the Act address a concern raised during the 106th Congress relating to the availability of the FISA orders and the effective use of information gleaned from the execution of a FISA order.\textsuperscript{37} It vests the Director of Central


\textsuperscript{36} See also, DoJ at §151, “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order’s minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed (50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

\textsuperscript{37} See e.g., S.Rep.No. 106-352, at 3, 6, 7 (2000)(“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application
Intelligence with the responsibility to formulate requirements and priorities for the use of FISA to collect foreign intelligence information. He is also charged with the responsibility of assisting the Attorney General in the efficient and effective dissemination of FISA generated information (50 U.S.C. 403-3(c)).

**Pen Registers and Trap and Trace Devices for Intelligence Gathering.** Section 214 grants the request of the Department of Justice by dropping requirements which limited FISA pen register and trap and trace device orders to facilities used by foreign agents or those engaged in international terrorist or clandestine intelligence activities, 50 U.S.C. 1842(c)(3)(2000 ed.). It is enough that the order is sought as part of an investigation to protect against international terrorism or clandestine intelligence activities and is not motivated solely by an American’s exercise of his or her First Amendment rights. Elsewhere (section 505), the Act drops a similar limitation for intelligence officials’ access to telephone records, 18 U.S.C.

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38 “When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevance, an additional factual showing that the communications device has been used to contact an ‘agent of a foreign power’ engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the ‘agent of a foreign power’ prong from the predication, and thus makes the FISA authority more closely track the criminal authority,” *DoJ* at §155.
Section 214 adjusts the language of the FISA pen register-trap and trace authority to permit its use to capture source and destination information relating to electronic communications (e.g., e-mail) as well as telephone communications, 50 U.S.C. 1842(d). The section makes it clear that requests for a FISA pen register-trap and trace order, like requests for other FISA orders, directed against Americans (U.S. persons) may not be based solely on activities protected by the First Amendment, 50 U.S.C. 1842, 1843.

Third Party Cooperation and Tangible Evidence. As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target's activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.40

39 Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise to be entitled to confidentiality. Section 505, in response to the Justice Department's suggestion, allows FBI field offices to make the requests, see DoJ at §157 (“At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports”).

40 When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court's order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.’ This would enhance the FBI's ability to monitor international terrorists and intelligence officers who are
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian. The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities, in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B);
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a);
- the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a);
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v;

41 “The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigative contexts. The time and difficulty involved in getting such pleadings before the Court usually outweighs the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” DoJ at §156.

42 Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.43

**Access to Law Enforcement Information.** Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community's access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, Draft at §103.44

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43 H.R.Rep.No. 107-205, at 60-1 (2001)(“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

“The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

“Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual’s credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding--without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information”).

44 See also, DoJ at §103, “This section facilities the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, Draft at §354.  

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, Draft at §154.

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion. It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions."

45 See also, DoJ at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.” Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officers

46 See also, DoJ at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”

47 Blair v. United States, 250 U.S. 273, 281 (1919)(the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
Crimes are conducted in private and outside the presence of the court. Only the
attorney for the government, witnesses under examination, and a court reporter may
attend its proceedings, F.R.Crim.P. 6(d). Matters occurring before the grand jury are
secret and may be disclosed by the attending attorney for the government and those
assisting the grand jury only in the performance of their duties; in presentation to a
successor grand jury; or under court order for judicial proceedings, for inquiry into
misconduct before the grand jury, or for state criminal proceedings, F.R.Crim.P. 6(e).

The Act, in section 203(a), allows disclosure of matters occurring before the
grand jury to “any federal law enforcement, intelligence, protective, immigration,
national defense, or national security” officer to assist in the performance of his

Critics may protest that the change could lead to the use of the grand jury for
intelligence gathering purposes, or less euphemistically, to spy on Americans. The
proposal was never among those scheduled to sunset, but earlier versions of the
section followed the path used for most other disclosures of grand jury material: prior

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48 These officers may receive: (1) “foreign intelligence information” that is, information
regardless whether it involves Americans or foreign nationals that “[a] relates to the ability
of the United States to protect against – (aa) actual or potential attack or other grave hostile
acts of a foreign power or an agent of a foreign power; (bb) sabotage or international
terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence
activities by an intelligence service or network of a foreign power;” or [b] “with respect to a
foreign power or foreign territory that relates to – (aa) the national defense or security of the
United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P.
6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that
is, [a] “information relating to the capabilities, intentions, or activities of foreign governments
or elements thereof, foreign organizations, or foreign persons, or international terrorist
activities” or [b] “information gathered and activities conducted, to protect against espionage,
other intelligence activities, sabotage, or assassinations conducted on behalf of foreign
governments or elements thereof, foreign organizations, or foreign persons, or international
terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in
italics).

49 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on
Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25
Harvard Journal of Law & Public Policy 699, 719-20 (2002)(“There is a significant
danger that the rule permitting disclosure will be treated as the de facto authorization of an
expansion of the grand jury’s investigative role to encompass seeking material relevant only
to matters of national security, national defense, immigration, and so forth. The grand jury’s
awesome powers should not be unwittingly extended to a much wider range of issues. . .
Since the grand jury operates in secret, there are no public checks on the scope of its
investigations, and witnesses are not permitted to challenge its jurisdiction. Only the
supervising court is in a position to keep the grand jury’s investigation within proper bounds.
Requiring judicial approval of foreign intelligence and counterintelligence information
disclosures would provide a natural check against the temptation to manipulate the grand jury
to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist
Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6
(Nov. 2001)(“The grand jury secrecy rule is a rule of policy which has always had exceptions,
and it has been frequently modified. The secrecy rule has no credible claim to constitutional
stature”).
Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

50 Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

51 “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C.) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification.\footnote{Duncan v. Walker, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted)(“It is our duty to give effect, if possible, to every clause and word of a statute. United States v. Menasche, 348 U.S. 528, 538-539 (1955) (quoting Montclair v. Ramsdell, 107 U.S. 147, 152 (1883)); see also Williams v. Taylor, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); Market Co. v. Hoffman, 101 U.S. 112, 115 (1879)(As early as in Bacon's Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage in any setting. Babbitt v. Sweet Home Chapter, Communities for Great Ore., 515 U.S. 687, 698 (1995); see also Ratzlaf v. United States, 510 U.S. 135, 140 (1994)).

It is not possible to conclude that Congress intended the universal subsection (d) to apply until sunset and the grand jury and Title III subsections (a), (b), and (c) to operate thereafter, because the Title III subsection expires at the same time as the universal subsection.

\footnote{Draft at §154, “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”}
computerized translation capability to be used in foreign intelligence gathering. Section 907 instructs the Director of the Central Intelligence, in consultation with the Director of the FBI, to report on the creation of a National Virtual Translation Center. The report is to include information concerning staffing, allocation of resources, compatibility with comparable systems to be used for law enforcement purposes, and features which permit its efficient and secure use by all of the intelligence agencies.

**Money Laundering**

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture. The Act bolsters federal efforts in each area.

**Regulation.** Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.

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54 “The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

“The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so,” S.Rep.No. 107-63, at 11 (2001).

55 For a brief overview, see, Murphy, Money Laundering: Current Law and Proposals, CRS REP.NO. RS21032 (DEC. 21, 2001).

56 See e.g., 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
**Records and Reports.** For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler’s checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to files SARs as well, reflecting Congress’ view that the information provided the IRS may be valuable for other law enforcement purposes. This concern is likewise

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58 H.R.Rep.No. 107-250, at 38-9 (2001)(“Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a ‘Safeguard Procedures Report’ which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement...
reflected in section 357 which asks the Secretary of the Treasury to report on the Internal Revenue Service’s role in the administration of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311 et seq.), and what transfers of authority, if any, are appropriate.

Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action. 59 Section 355 expands the immunity to cover disclosures in...
employment references to other insured depository financial institutions provided disclosure is not done with malicious intent.\textsuperscript{60}

The Financial Crimes Enforcement Network (FinCEN), a component within the Treasury Department long responsible for these anti-money laundering reporting and record-keeping requirements, 31 C.F.R. pt. 103, was administratively created in 1990 to provide other government agencies with an “intelligence and analytical network in support of the detection, investigation, and prosecution of domestic and international money laundering and other financial crimes,” 55 Fed.Reg. 18433 (May 2, 1990).

The Act, in section 361, makes FinCEN a creature of statute, a bureau within the Treasury Department, 31 U.S.C. 310. Section 362 charges it with the responsibility of establishing a highly secure network to allow financial institutions to file required reports electronically and to permit FinCEN to provide those institutions with alerts and other information concerning money laundering protective measures, 31 U.S.C. 310 note.

\textbf{Special Measures.} In extraordinary circumstances involving international financial matters, the Act grants the Secretary of the Treasury, in consultation with other appropriate regulatory authorities, the power to issue regulations and orders involving additional required “special measures” and additional “due diligence” requirements to combat money laundering. The special measure authority, available under section 311, comes to life with the determination that particular institutions, jurisdictions, types of accounts, or types of transactions pose a primary money

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\textsuperscript{60} 31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 66 (2001).
laundrying concern. These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

31 U.S.C. 5318A. The circumstances considered in the case of a suspect jurisdiction are: evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction’s banking regulation; the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’ including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

“Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate
business transactions.

“Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

“Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

“The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

“The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

“The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

“The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

“The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

“The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed
**Due Diligence.** Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.  

63 See generally, H.R.Rep.No. 107-250, at 71-2 ("Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

"The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

"The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

"For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
detect and report transactions that may involve the proceeds of foreign corruption. A private
bank account is defined as an account (or any combination of accounts) that requires a
minimum aggregate deposit of funds or other assets of not less than $1 million; is established
on behalf of one or more individuals who have a direct or beneficial ownership in the account;
and is assigned to, or administered or managed by, an officer, employee or agent of a financial
institution acting as a liaison between the institution and the direct or beneficial owner of the
account.

“This section directs the Secretary of the Treasury, within 6 months of enactment of this
bill and in consultation with appropriate Federal functional regulators, to further define and
clarify, by regulation, the requirements imposed by this section”.

64 Or more exactly, a bank which has no physical presence in any country; a “physical
presence” for a foreign bank is defined as “a place of business that – (i) is maintained by a
foreign bank; (ii) is located at a fixed address (other than solely an electronic address) in a
country in which the foreign bank is authorized to conduct banking activities, at which
location the foreign bank – (I) employs 1 or more individuals on a full-time basis; and (II)
maintains operating records relating to its banking activities; and (iii) is subject to inspection
by the banking authority which licensed the foreign bank to conduct banking activities,” 31


66 The Act does not define “concentration accounts,” although the House Financial Services
Committee report provides some incite into the section’s intent, H.R.Rep.No. 107-250, at 72-3
(2001) (“This section gives the Secretary of the Treasury discretionary authority to prescribe
regulations governing the maintenance of concentration accounts by financial institutions,
to ensure that these accounts are not used to prevent association of the identity of an individual
customer with the movement of funds of which the customer is the direct or beneficial owner.
If promulgated, the regulations are required to prohibit financial institutions from allowing
clients to direct transactions into, out of, or through the concentration accounts of the
institution; prohibit financial institutions and their employees from informing customers of the
existence of, or means of identifying, the concentration accounts of the institution; and to
establish written procedures governing the documentation of all transactions involving a
concentration account.”)
keeping and to recommend a means to effectively verify the identification of foreign customers.\(^67\)

\(^67\) 31 U.S.C. 5318(l); H.R.Rep.No. 107-250, at 62-3 (2001)(“Section [326](a) amends 31 U.S.C. 5318 by adding a new subsection governing the identification of account holders. Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a ‘street name’ or omnibus account in the broker-dealer's name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to ‘look through’ the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund's customers. Thus, the fund would not be required to ‘look through’ the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature. 68

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

**Reports to Congress.** Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

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"Paragraph (6) requires that Treasury's regulations prescribed under paragraph (1) become effective within one year after enactment of this bill").
exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.\footnote{31 U.S.C. 5313 note; H.R.Rep.No. 107-205, at 65 (2001).}

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

**International Cooperation.** Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.\footnote{H.R.Rep.No. 107-250, at 67 (2001)(“This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury’s progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

“The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime”).}

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (i.e., the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.
**Crimes.** Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, smuggling, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
Section 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds 'by, to or through a financial institution.' For the purposes of both statutes, the term 'financial institution' is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

The definition of 'financial institution' in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of 'commercial bank' or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad--say to a Mexican bank--and launders them through a series of financial transactions, the government conceivably could not rely on the definition of a 'financial institution' in 1956(c)(6) to establish that the transaction was a 'financial transaction' within the meaning of 1956(c)(4)(B) (defining a 'financial transaction' as a transaction involving the use of a 'financial institution'), or that it was a 'monetary transaction' within the meaning of 1957(f) (defining 'monetary transaction' as, inter alia, a transaction that would be a 'financial transaction' under 1956(c)(4)(B)).

Section 329 makes it a federal crime to corruptly administer the money laundering regulatory scheme. Offenders are punishable by imprisonment for not more than 15 years and a fine of not more than three times the amount of the bribe.

Section 5326 of title 31 authorizes the Secretary of the Treasury to impose temporary, enhanced reporting requirements upon financial institutions in areas victimized by substantial money laundering activity (geographic targeting regulations and orders). Section 353 makes it clear that the civil sanctions, criminal penalties, and prohibitions on smurfing (structuring transactions to evade reporting requirements) apply to violations of the regulations and orders issued under 31 U.S.C. 5326. It also extends the permissible length of the temporary geographical orders from 60 to 180 days.

Violations of the special measures and special due diligence requirements of sections 311 and 312 are subject to both civil and criminal penalties by virtue of section 363's amendments to 31 U.S.C. 5321(a) and 5322. The amendments authorize civil penalties and criminal fines of twice the amount of the transaction but not more than $1 million. Criminal offenders would be subject to a fine in the same amount.

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71 “[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.\textsuperscript{73}

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents.\textsuperscript{74} They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

\textsuperscript{73} “The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business.

Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.

Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive,” H.R.Rep.No. 107-250, at 54 (2001).

\textsuperscript{74} “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
• 18 U.S.C. 476 (taking impressions of tools used for obligations and securities) from 10 to 25 years;
• 18 U.S.C. 477 (possessing or selling impressions of tools used for obligations or securities) from 10 to 25 years;
• 18 U.S.C. 484 (connecting parts of different notes) from 5 to 10 years;
• 18 U.S.C. 493 (bonds and obligations of certain lending agencies) from 5 to 10 years;
• 18 U.S.C. 478 (foreign obligations or securities) from 5 to 20 years;
• 18 U.S.C. 479 (uttering counterfeit foreign obligations or securities) from 3 to 20 years;
• 18 U.S.C. 480 (possessing counterfeit foreign obligations or securities) from 1 to 20 years;
• 18 U.S.C. 481 (plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities) from 5 to 25 years;
• 18 U.S.C. 482 (foreign bank notes) from 2 to 20 years; and
• 18 U.S.C. 483 (uttering counterfeit foreign bank notes) from 1 to 20 years.

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

**Bulk Cash.** Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act's bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting.\(^\text{75}\)

The section appears to be the product of reactions to the Supreme Court’s decision in *United States v. Bajakian*, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court's

\(^{75}\) "For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual," 31 U.S.C. 5332(a)(2).
As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency — representing the proceeds of drug trafficking and other criminal offenses — is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad. . . .

"Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United State without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

"Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute," H.R.Rep.No. 107-250 at 36-7 (2001).

Extraterritorial Jurisdiction. The Act makes 18 U.S.C. 1029, the federal statute condemning various crimes involving credit cards, PIN numbers and other access devices, applicable overseas if the card or device is issued by or controlled by an American bank or other entity and some article is held in or transported to or through the United States during the course of the offense, section 377. The change was part of the original Justice Department proposals. Justice explained that, "[financial crime] admits of no border, utilizing the integrated global financial network for ill purposes. This provision would apply the financial crimes prohibitions to conduct committed abroad, so long as the tools or proceeds of the crimes pass through or are in the United States," DoJ at §408. The section, however, appears to limit the otherwise applicable extraterritorial jurisdiction implicit in section 1029, since federal courts would likely recognize extraterritorial jurisdiction over a violation
under *either* circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.\(^{77}\)

**Venue.** Section 1004 relies on *dicta* in *United States v. Cabrales*, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering,\(^{78}\) in the state and district in which the monetary transaction takes place. The Supreme Court in *Cabrales* held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in *dicta*, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.\(^{79}\)

**Forfeiture.** Forfeiture is the government confiscation of property as a consequence of crime.\(^{80}\) The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 *et seq.* (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

**Constitutional Considerations.** The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 *et seq.*, which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the

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\(^{78}\) “The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.” *U.S.Const.* Art.III, §2, cl.3.

“[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertained by law,” *U.S.Const.* Amend. VI.

\(^{79}\) *See also, United States v. Rodriguez-Moreno*, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnaping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.

\(^{80}\) For general background information, see, Doyle, *Crime and Forfeiture*, CRS REP.NO. 97-139A (Oct. 11, 2000).
This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App.U.S.C. §5(b).

“This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress’s war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

“The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2),” DoJ at §159.

“An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that – (1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
excepted from the coverage of 18 U.S.C. 983. The challenge proceedings permit
the court to admit evidence, such as hearsay evidence, that would not otherwise be
admissible under the Federal Rules of Evidence if the evidence is reliable and if
national security might be imperiled should dictates of the Federal Rules be followed,
§316(b). The section recognizes the rights of claimants to proceed alternatively
under the Constitution or the Administrative Procedure Act.

The Justice Department also recommended enactment of an overlapping
provision which ultimately passed as section 806 of the Act without any real
discussion of the relationship of the two sections. Section 806 authorizes
confiscation of all property, regardless of where it is found, of any individual, entity,
or organization engaged in domestic or international terrorism (as defined in 18
U.S.C. 2331), against the United States, Americans or their property, 18 U.S.C.

83 18 U.S.C. 983(i)(2)(D).

84 “The exclusion of certain provisions of Federal law from the definition of the term ‘civil
forfeiture statute’ in section 983(i) of title 18, United States Code, shall not be construed to
deny an owner of property the right to contest the confiscation of assets of suspected
international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C)
subchapter II of chapter 5 of title 5, United States Code (commonly known as the
‘Administrative Procedure Act’).” Sec. 316(c)(1).

85 “Current law does not contain any authority tailored specifically to the confiscation of
terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for
the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of
such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available
current forfeiture laws require detailed tracing that is quite difficult for accounts coming
through the banks of countries used by many terrorists.

‘This section increases the government’s ability to strike at terrorist organizations’
economic base by permitting the forfeiture of its property regardless of the source of the
property, and regardless of whether the property has actually been used to commit a terrorism
offense. This is similar in concept to the forfeiture now available under RICO. In parity with
the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended
to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate
criminal forfeiture provision because criminal forfeiture is incorporated under current law by
reference. The provision is retroactive to permit it to be applied to the events of September
sections is no more explicit on the relation of the two sections.

86 “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or
acts dangerous to human life that are a violation of the criminal laws of the United States or
of any State, or that would be a criminal violation if committed within the jurisdiction of the
United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian
population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to
affect the conduct of a government by mass destruction, assassination or kidnapping; and (C)
occur primarily outside the territorial jurisdiction of the United States, or transcend national
boundaries in terms of the means by which they are accomplished, the persons they appear
intended to intimidate or coerce, or the locale in which their perpetrators operate or seek
asylum . . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts
dangerous to human life that are a violation of the criminal laws of the United States or of any
State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to
influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
981(a)(1)(G). Section 806 as discussed below also calls for the more common confiscation of property derived from and or facilitating acts of domestic or international terrorism against the United States or its citizens. Confiscations under 806 may be challenged under the procedures of 18 U.S.C. 983, since they are not exempted there. To the extent that forfeiture under section 806 is based on international rather than domestic terrorism, claimants may also use the procedures of section 316.

Confiscation based solely on the fact that the property is owned by a criminal offender, rather than that it is derived from or facilitates some crime is fairly uncommon. It is the mark of common law forfeiture of estate. At common law, a felon forfeited all of his property. Most contemporary forfeiture statutes employ statutory forfeiture, a more familiar presence in American law,\(^{87}\) which consists of the confiscation of things whose possession is criminal, of the fruits of crime, and of the means of crime – untaxed whiskey, the drug dealer’s profits, and the rum runner’s ship.

Three characteristics set forfeiture of estate apart. The property is lost solely by reason of its ownership by a felon. All of a felon’s property is confiscated, not merely that which is related to the crime for which he is convicted. Finally, it occasions attainder which negates the felon’s right to hold property or for title to property to pass through him to his heirs. It was with this in mind, that the Framers declared that “no attainder of treason shall work corruption of blood or forfeiture exception during the life of the person attainted.”\(^{88}\) And for this reason, President Lincoln insisted that the confiscated real estate of Confederate supporters should revert their heirs at death.\(^{89}\)

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\(^{87}\) *Austin v. United States*, 509 U.S. 602, 611-12 (1993) (“Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture . . . . Of England’s three kinds of forfeiture, only the third took hold in the United States”).

\(^{88}\) *U.S.Const.* Art.III, §3, cl.2.

\(^{89}\) 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal *in personam* proceedings following criminal conviction as a means of accomplishing confiscation.
Neither section 106 nor 806 require conviction of the terrorist property owner. Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers. The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners. Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them. The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate

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90 Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c)(“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act”).

91 Silesian American Corp. v. Clark, 332 U.S. 469 (1947); cf., Societe Internationale v. Rogers, 357 U.S. 197, 211 (1958)(“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).

92 Zittman v. McGrath, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’”).

any presumption of remedial purposes. The same has been said of the applicability of the ex post facto clause.

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO. If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

Other Forfeiture Amendments. In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.


95 See e.g., United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.), 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994).

96 DoJ, at §403.

97 18 U.S.C. 1956(b). Cf., H.R.Rep.No. 107-250, at 54-5 (2001) (“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas.\(^9\) Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted

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\(^9\) 18 U.S.C. 981(k). H.R.Rep.No. 107-250, at 57-8 (2001)(“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank's customers.

“Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank's correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

“The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”).
defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation.\textsuperscript{99}

Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here.\textsuperscript{100} Section 320 enlarges this provisions to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements.\textsuperscript{101} This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.\textsuperscript{102}

\textsuperscript{99} Cf., H.R.Rep.No. 107-250, at 58-9 (2001) ("Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of 'substitute assets' when the defendant has placed the property otherwise subject to forfeiture 'beyond the jurisdiction of the court.' Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

"This section amends 21 U.S.C. 853 to make clear that a court in a criminal case may issue a repatriation order--either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. 853(e) to restrain property--so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both").

\textsuperscript{100} 18 U.S.C. 981(a)(1)(B).

\textsuperscript{101} H.R.Rep.No. 107-250, at 56 (2001)("This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act").

\textsuperscript{102} H.R.Rep.No. 107-250, at 59-60 (2001)("Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country.

"Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
A fugitive may not challenge a federal forfeiture. Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in “order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.”

to contest the restraining order could do so on the ground that 28 U.S.C. 2467 was not properly applied to the particular case, but could not oppose the restraining order on any ground that could also be raised in the proceedings pending in a foreign court. This provision prevents a litigant from taking ‘two bites at the apple’ by raising objections to the basis for the forfeiture in the Federal court that he also raised, or is entitled to raise, in the foreign court where the forfeiture action is pending. It complements the existing provision in section 2467(e) providing that the Federal court is bound by the findings of fact of the foreign court, and may not look behind such findings in determining whether to enter an order enforcing a foreign forfeiture judgment.

“This section also amends 28 U.S.C. 2467 to make clear that it is not necessary to prove that the person asserting an interest in the property received actual notice of the forfeiture proceedings. As is the case with respect to forfeitures under U.S. law, it is sufficient if the foreign nation takes steps to provide notice, in accordance with the principles of due process. See Gonzalez v. United States, 1997 WL 278123 (S.D.N.Y. 1997) (‘the [G]overnment is not required to ensure actual receipt of notice that is properly mailed’); Albajon v. Gugliotta , 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant’s identifications, and mailed after claimant released from jail, is sufficient to satisfy due process, even if claimant never received notice); United States v. Schiavo , 897 F. Supp. 644, 648 49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; due process satisfied even if he did not receive the notice).

“Finally, 28 U.S.C. 2467 is amended to authorize the enforcement of a forfeiture judgment based on any foreign offense that would constitute an offense giving rise to a civil or criminal forfeiture of the same property if the offense had been committed in the United States. This is one of two safeguards that the statute contains against the enforcement of judgments that the United States does not consider appropriate for enforcement: if the judgment is based on an act that would not constitute a crime in the United States, such as removing assets from the reach of a repressive regime, it could not be enforced. In addition, section 2467 already provides that a foreign judgment may only be enforced by a Federal court at the request of the United States, and only after the Attorney General has certified that the judgment was obtained in accordance with the principles of due process. Thus, neither a foreign Government nor a foreign private party could enforce a foreign judgment on its own under this provision.”). Note that the safeguard to which the report refers is the range of foreign offenses that will support an enforceable confiscation order, i.e., drug offenses and crimes on the money laundering predicate offense list, and that the amendment narrows that safeguard by adding additional foreign offenses, i.e., any foreign equivalent of a federal crime which would support a confiscation order.

Alien Terrorists and Victims

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

Border Protection. The border protection provisions:

- authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401

- authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402

- remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404

- authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405

- authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.

- instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007

- direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418

- express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414

- add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415

- call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416

- limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
• instruct the Attorney General to report on the feasibility of using biometric scanners to help prevent terrorists and other foreign criminals from entering the country, section 1008.104

• authorize appropriations of $250,000 for the FBI to determine the feasibility of providing airlines with computer access to the names of suspected terrorists, section 1009

• authorize reciprocal sharing of the State Department’s visa lookout data and related information with other nations in order to prevent terrorism, drug trafficking, slave marketing, and gun running, section 413

Detention and Removal. Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity, 8 U.S.C. 1227 (a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(iv). Aliens may be inadmissible for any number of terrorism-related reasons, 8 U.S.C. 1182 (a)(3). Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported.


Section 411 defines “terrorist organization” to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the Federal Register as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C.

104 As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).
Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).


An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in “premeditated, politically motivated violence perpetrated against noncombatant targets,” or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security or endanger some individual or the general public. The Attorney General's determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

Victims. The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

• permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421

• extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422

105 “The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

106 “The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks.

“The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application.

“Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

“Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 31.

“Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.


107 “Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

“The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

“The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death),” H.R.Rep.No. 107-236, at 68 (2001).

108 “Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien’s 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien’s 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
• a denial of benefits of the Act to terrorists and their families, section 427

• authority for the Attorney General to establish evidentiary standards to implement the alien victim provisions of the Act, section 426.

Other Crimes, Penalties, & Procedures

New Crimes. The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department, the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offense for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents, 18 U.S.C. 175b. Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.

109 “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . . .” DoJ at §305.

110 The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

111 “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2)(“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.\footnote{U.S. Const. Art.III, §2, cl.3 (“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . .”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . .”); United States v. Cabrales, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from Cabrales when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnaping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999)(“By way of comparison, last Term in [Cabrales] we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).}

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D). The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:
The Justice Department sought the expansion along with the enlargement of the predicate offense list, "18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of 'material support or resources' is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill ('Federal terrorism offenses')," DoJ at 306.

Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.


113 The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of ‘material support or resources’ is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’),” DoJ at 306.


115 “The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill (‘Federal terrorism offenses’) is used in identifying the relevant crimes,” DoJ, at §304.

**New Penalties.** The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. 3571(b),(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense.\(^{117}\)

The proposal, however, failed to identify the critical elements that would trigger the alternative.\(^{118}\) Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

- for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

- for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

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\(^{117}\) “Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersede lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,” *DoJ*, at §302.

\(^{118}\) “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense,” *Draft* at §302.
• for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;

• for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;

• for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;

• for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and

• for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism. Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:

• arson committed within a federal enclave, 18 U.S.C. 81;
• killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);
• destruction of communications facilities, 18 U.S.C. 1362;
• destruction of property within a federal enclave, 18 U.S.C. 1363;
• causing a train wreck, 18 U.S.C. 1922;
• providing material support to a terrorist, 18 U.S.C. 2339A;
• torture committed overseas under color of law, 18 U.S.C. 2340A;
• sabotage of a nuclear facility, 42 U.S.C. 2284;

119 “The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §§846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

“This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.
• interfering with a flight crew within U.S. special aircraft jurisdiction, 49 U.S.C. 46504;
• carrying a weapon or explosive abroad an aircraft within U.S. special aircraft jurisdiction, 49 U.S.C. 46505; and
• sabotage of interstate gas pipeline facilities, 49 U.S.C. 60123.

When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years).\footnote{Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).}

The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission),\footnote{“Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses. “This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill. “This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.} a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders).\footnote{It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, e.g., damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.}

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

**Other Procedural Adjustments.** In other procedural adjustments designed to facilitate criminal investigations, the Act:

- increases the rewards for information in terrorism cases
- expands the Posse Comitatus Act exceptions
- authorizes “sneak and peek” search warrants
- permits nationwide and perhaps worldwide execution of warrants in terrorism cases
- eases government access to confidential information
- allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
- lengthens the statute of limitations applicable to crimes of terrorism
- clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
- adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B.\footnote{When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001)(remarks of Rep. Sensenbrenner); for general background, see, Doyle, *McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys*, CRS REP.NO. RL30060 (Dec. 14, 2001).}
Rewards. The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L.105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism.124

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

Posse Comitatus. The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.125

Delayed notification of a search (sneak and peek). Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take...
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, Richards v. Wisconsin, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, Wilson v. Arkansas, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, Dalia v. United States, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, cf., United States v. Miller, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, United States v. Freitas, 800 F.2d 1451, 1453 (9th Cir. 1986).126

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126 “The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in United States v. New York Telephone Co., 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth
The Second Circuit was less convinced and preferred to hold sneak and peek searches to the demands of Rule 41, United States v. Pangburn, 983 F.2d 449 (2d Cir. 1993). The Fourth Circuit was, if anything, less convinced. Moreover, the facts in the case demonstrate the potential impact of the issue on computer privacy, United States v. Simons, 206 F.3d 392 (4th Cir. 2000).

Amendment, demands that surreptitious entries be closely circumscribed,” United States v. Freitas (Freitas I), 800 F.2d 1451, 1455–456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, United States v. Freitas (Freitas II), 856 F.2d 1425 (9th Cir. 1988).

“No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in Dalia v. United States, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in Dalia, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property. . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. See United States v. New York Telephone Co., 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . . Although the Freitas I court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in United States v. Villegas, 899 F.2d 1324 (1999). Although the Freitas I court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in Villegas. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the Freitas I court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” United States v. Pangburn, 983 F.2d 449, 453–55 (2d Cir. 1993).

In Simons, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
The Justice Department urged that the conflict be resolved with a uniform rule which permitted sneak and peek warrants under the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage.\textsuperscript{129}

The Act, in section 213, stops short of the Justice Department proposal. Characterized as a codification of the Second Circuit decision, 147 Cong.Rec. H7197 (daily ed. Oct. 23, 2001), the Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C. 3103a. Its sneak and peek authorization reaches all federal search and seizure warrants where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (\textit{e.g.}, risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (\textit{e.g.}, jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, \textit{i.e.}, in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation.\textsuperscript{130} The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

\textsuperscript{129} The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities,” \textit{DoJ} at §353.

\textsuperscript{130} Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department’s initial proposal, the Department’s justification does not address the question.
The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

Neither Rule 41 nor any other provision of federal law constitutionally “reasonable,” that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

**Nationwide terrorism search warrants.** The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either “within or outside the district,” (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases. The provision may anticipate execution both in this country and overseas. The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage. Neither Rule 41 nor any other provision of federal law constitutionally “reasonable,” that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

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131 The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

132 The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

133 *United States v. Barona*, 56 F.3d 1087, 1092 (9th Cir. 1995)(“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994)(“if American law enforcement officials substantially participated in the search or if the law enforcement officials in the foreign port are not American”).

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” *F.R.Crim.P. 41, Advisory Committee Notes: 1990 Amendment.* There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

*Terrorists’ DNA.* The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards *per se.* 135 Existing federal law allowed the Attorney General to collect samples from foreign officials conducting the search were actually acting as agents for their American counterparts’); *United States v. Maturo,* 982 F.2d 57, 61 (2d Cir. 1992)(“where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials” or “where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials”); *United States v. Mitro,* 880 F.2d 1480, 1482 (1st Cir. 1989)(“where American agents participated in the foreign search or the foreign officers acted as agents for their American counterparts”); *United States v. Mount,* 757 F.2d 1315, 1318 (D.C.Cir. 1985)(“if American officials or officers participated in some significant way”); *United States v. Marzano,* 537 F.2d 257, 270 (7th Cir. 1976)(declining to adopt the “joint venture” standards, but finding level of American participation in the case before it insignificant); *United States v. Morrow,* 537 F.2d 120, 139 (5th Cir. 1976)(“if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts”); each of the decisions also suggests that evidence secured in a manner which shocked the conscience of the court would be excluded.

134 The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, see, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), reprinted, 78 Cong.Rec. 4982-983 (1934)(“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.)(conferring judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

135 *Roe v. Marcotte,* 193 F.3d 72 (2d Cir. 1999); *Shaffer v. Saffle,* 148 F.3d 1180 (10th Cir. 1998); *Rise v. Oregon,* 59 F.3d 1556 (9th Cir. 1995); *Jones v. Murray,* 962 F.2d 302 (4th Cir. 1992).
federal prisoners convicted of a variety of violent crimes, 42 U.S.C. 14135a. The Act
enlarges the predicate offense list to include any crime of violence or any terrorism
offense, section 503.\footnote{Summarizing the law in place at the time, the Department of Justice argued that, “The
statutory provisions governing the collection of DNA samples form convicted federal
offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the
offenses that are most likely to be committed by terrorists. DNA samples cannot now be
collected even from persons federally convicted of terrorist murders in most circumstances.
For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking
aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up
buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad,
are not included in the qualifying federal offenses for purposes of DNA sample collection
under existing law. This section addresses the deficiency of the current law in relation to
terrorists by extending DNA sample collection to all persons convicted of terrorism crimes,”
DoJ at §353.}

\textbf{Access to Educational Records.} Finally, the Act calls for an ex parte
court order procedure under which senior Justice Department officials may seek
authorization to collect educational records relevant to an investigation or prosecution
of a crime of terrorism, section 507 (as an exception to the confidentiality
requirements of the General Education Provisions Act, 20 U.S.C. 1232g), section 508
(as an exception to the confidentiality requirements of the National Education

\textbf{Statute of Limitations.} Prosecution for murder in violation of federal law
may be initiated at any time, 18 U.S.C. 3281. A five year statute of limitations applied
for most other federal crimes before passage of the Act, with a few exceptions.
Among the relevant exceptions were an eight year statute of limitations for several
terrorist offenses, 18 U.S.C. 3286,\footnote{18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international
airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of
Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of
federal property), 1751 (crimes of violence against the President), 2280 (violence against
maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against
Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism
transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504
(interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506
(assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or
manslaughter in the special aircraft jurisdiction of the United States).}
and a ten year statute of limitations for a few
arson and explosives offenses, 18 U.S.C. 3295. The Justice Department
recommended the elimination of a statute of limitations in terrorism cases.\footnote{“This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be
prosecuted without limitation of time. This will make it possible to prosecute the perpetrators
of terrorist acts whenever they are identified and apprehended.

“This section expressly provides that it is applicable to offenses committed before the
date of enactment of the statute, as well as those committed thereafter. This retroactivity
 provision ensures that no limitation period will bar the prosecution of crimes committed in

For a general discussion, see, Fischer, DNA Identification: Applications and Issues,
CRS Rep.No. RL30717 (Jan. 12, 2001).}
The Act takes less dramatic action in section 809. It eliminates the statute of limitations for any crime of terrorism that risks or results in a death or serious bodily injury, 18 U.S.C. 3286. In the absence of such a risk or result, all other terrorism offenses become subject to the eight year statute of limitations unless already covered by the ten year statute for explosives and arson offenses, 18 U.S.C. 3286.

Application of the statute of limitations rarely provokes a constitutional inquiry. Nevertheless, due process precludes prosecution when it can be shown that pre-indictment delay “caused substantial prejudice to [a defendant’s] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.”140 Moreover, a judicial difference of opinion has appeared in those cases connection with the September 11, 2001 terrorist attacks. The constitutionality of such retroactive applications of changes in statutes of limitations is well-settled, See, e.g., United States v. Grimes, 142 F.3d 1342, 1350-51 (11th Cir. 1998); People v. Frazer, 982 P.2d 180 (Cal. 1999).

“Existing federal law (18 U.S.C. §3282) bars prosecuting most offenses after five years. 18 U.S.C. §3286, as currently formulated, extends the limitation period for prosecution for certain offenses that may be committed by terrorists – but only to eight years. While this is a limited improvement over the five-year limitation period for most federal offenses, it is patently inadequate in relation to the catastrophic human and social costs that frequently follow from such crimes as destruction of aircraft (18 U.S.C. §32), aircraft hijackings ([49] U.S.C. §§46502, 46504-06, attempted political assassinations (18 U.S.C. §§351, 1116, 1751), or hostage taking (18 U.S.C. §1203). These are not minor acts of misconduct which can properly be forgiven or forgotten merely because the perpetrator has avoided apprehension for some period of time. Anomalously, existing law provides longer limitation periods for such offenses as bank frauds and certain artwork thefts (18 U.S.C.§§3293-94) than it does for crimes characteristically committed by terrorists.

“In many American jurisdictions, the limitation periods for prosecution for serious offenses are more permissible than those found in federal law, including a number of states which have no limitation period for the prosecution of felonies generally. While this section does not go so far, it does eliminate the limitation period for prosecution of the major crimes that are most likely to be committed by terrorists (‘Federal terrorism offenses’), as specified in section 309 of this bill,” DoJ at 301.

139 As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 (sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period. Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (Grimes, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (Frazer, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

**Extraterritoriality.** Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States or elsewhere . . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnaping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.

141 United States v. De La Matta, 266 F.3d 1275, 1286 (11th Cir. 2001); United States v. Grimes, 142 F.3d 1342, 1351 (11th Cir. 1998); United States v. Morrow, 177 F.3d 272, 294 (5th Cir. 1999); Falter v. United States, 23 F.2d 420, 425–26 (2d Cir. 1928).


143 United States v. Layton, 855 F.2d 1388 (9th Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); United States v. Benítez, 741 F.2d 1312 (11th Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.\(^\text{144}\)

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

**Victims.** Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11\(^\text{th}\) Victim Compensation Fund legislation before it passed the Act. Consequently, the Act’s victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 *et seq.*, and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 *et seq.*

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:

• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year)(42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d) (5)), section 621(d)

• waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

• eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
• makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

• prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

• allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

• reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

• makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

• allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

• establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

**Increasing Institutional Capacity.** A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

- $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)

- necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)

- $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)

- $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816

- $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701

- $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)

- $5 million for DEA police training in South and Central Asia, section 1007.

**Miscellaneous.** Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might to used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act, or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b), 807.146

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145 *I.e.*, Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).

The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.112

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D) The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

112 U.S. Const. Art.III, §2, cl.3 (“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . . .”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . .”); United States v. Cabrales, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from Cabrales when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnapping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999)(“By way of comparison, last Term in [Cabrales] we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).
The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of ‘material support or resources’ is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’),” DoJ at 306.

And it adds expert advice or assistance to the types of assistance that may not be provided under section 2339A. This last addition may encounter the same First Amendment vagueness problems some courts have found in assistance which takes the form of “training” and “personnel,” Humanitarian Law Project v. Reno, 205 F.3d 1130, 1137-136 (9th Cir. 2000). Finally, the section announces that a prosecution for violation of section 2339A (support of terrorists) may be brought where the support is provided or where the predicate act of terrorism occurs. There may be some question whether the Constitution permits prosecution where the predicate act occurs.

Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.


113 The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of ‘material support or resources’ is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’),” DoJ at 306.


115 “The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill (‘Federal terrorism offenses’) is used in identifying the relevant crimes,” DoJ, at §304.

**New Penalties.** The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. 3571(b),(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense.\(^{117}\)

The proposal, however, failed to identify the critical elements that would trigger the alternative.\(^{118}\) Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

- for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

- for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;

\(^{117}\) “Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersede lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,” DoJ, at §302.

\(^{118}\) “A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense,” Draft at §302.
for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;

for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;

for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;

for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and

for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism.\textsuperscript{119} Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:

• arson committed within a federal enclave, 18 U.S.C. 81;
• killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);
• destruction of communications facilities, 18 U.S.C. 1362;
• destruction of property within a federal enclave, 18 U.S.C. 1363;
• causing a train wreck, 18 U.S.C. 1922;
• providing material support to a terrorist, 18 U.S.C. 2339A;
• torture committed overseas under color of law, 18 U.S.C. 2340A;
• sabotage of a nuclear facility, 42 U.S.C. 2284;

\textsuperscript{119} “The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §§846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists. “This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.
• interfering with a flight crew within U.S. special aircraft jurisdiction, 49 U.S.C. 46504;
• carrying a weapon or explosive abroad an aircraft within U.S. special aircraft jurisdiction, 49 U.S.C. 46505; and
• sabotage of interstate gas pipeline facilities, 49 U.S.C. 60123.

When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years). The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission), a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

120 Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

121 “Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.

“This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders).122

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

Other Procedural Adjustments. In other procedural adjustments designed to facilitate criminal investigations, the Act:

- increases the rewards for information in terrorism cases
- expands the Posse Comitatus Act exceptions
- authorizes “sneak and peek” search warrants
- permits nationwide and perhaps worldwide execution of warrants in terrorism cases
- eases government access to confidential information
- allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
- lengthens the statute of limitations applicable to crimes of terrorism
- clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
- adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B.123

122 It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, e.g., damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

123 When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001)(remarks of Rep. Sensenbrenner); for general background, see, Doyle, McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys, CRS REP.NO. RL30060 (Dec. 14, 2001).
Rewards. The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L.105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism.\(^\text{124}\)

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

Posse Comitatus. The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.\(^\text{125}\)

Delayed notification of a search (sneak and peek). Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take

\(^{124}\) The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct threat assessments for federal agencies, and to reimburse federal agencies for the costs of detaining terrorist suspects overseas.

\(^{125}\) For a general discussion of the Posse Comitatus Act, see, Doyle, The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law, CRS REP.NO. 95-964 (June 1, 2000).
The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in United States v. New York Telephone Co., 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth Amendment.

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, Richards v. Wisconsin, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, Wilson v. Arkansas, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, Dalia v. United States, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, cf., United States v. Miller, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, United States v. Freitas, 800 F.2d 1451, 1453 (9th Cir. 1986).126

126 “The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in United States v. New York Telephone Co., 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth Amendment...
Amendment, demands that surreptitious entries be closely circumscribed,” United States v. Freitas (Freitas I), 800 F.2d 1451, 1455-456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, United States v. Freitas (Freitas II), 856 F.2d 1425 (9th Cir. 1988).

127 “No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in Dalia v. United States, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in Dalia, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property. . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. See United States v. New York Telephone Co., 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . . Although the Freitas I court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in United States v. Villegas, 899 F.2d 1324 (1999). Although the Freitas I court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in Villegas. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the Freitas I court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” United States v. Pangburn, 983 F.2d 449, 453-55 (2d Cir. 1993).

128 In Simons, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
The Justice Department urged that the conflict be resolved with a uniform rule which permitted sneak and peek warrants under the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage.\textsuperscript{129}

The Act, in section 213, stops short of the Justice Department proposal. Characterized as a codification of the Second Circuit decision, 147 Cong.Rec. H7197 (daily ed. Oct. 23, 2001), the Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C. 3103a. Its sneak and peek authorization reaches all federal search and seizure warrants where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (e.g., risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (e.g., jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, i.e., in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation.\textsuperscript{130} The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

\textsuperscript{129} “The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities,” DoJ at §353.

\textsuperscript{130} Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department’s initial proposal, the Department’s justification does not address the question.
constitutionally “reasonable,” that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

**Nationwide terrorism search warrants.** The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either “within or outside the district,” (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases. The provision may anticipate execution both in this country and overseas.

The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage. Neither Rule 41 nor any other provision of federal

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131 The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum. (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5).

132 The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

133 *United States v. Barona*, 56 F.3d 1087, 1092 (9th Cir. 1995) (“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994) (“if American law enforcement officials substantially participated in the search or if the
law apparently contemplated extraterritorial execution, cf., F.R.Crim.P.41, Advisory Committee Notes: 1990 Amendment (discussing a proposal for extraterritorial execution that the Supreme Court rejected).  

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings.” F.R.Crim.P. 41, Advisory Committee Notes: 1990 Amendment. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

**Terrorists' DNA.** The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards *per se.* Existing federal law allowed the Attorney General to collect samples from foreign officials conducting the search were actually acting as agents for their American counterparts”); United States v. Maturo, 982 F.2d 57, 61 (2d Cir. 1992)(“where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials” or “where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials”); United States v. Mitro, 880 F.2d 1480, 1482 (1st Cir. 1989)(“where American agents participated in the foreign search or the foreign officers acted as agents for their American counterparts”); United States v. Mount, 757 F.2d 1315, 1318 (D.C.Cir. 1985)(“if American officials or officers participated in some significant way”); United States v. Marzano, 537 F.2d 257, 270 (7th Cir. 1976)(declining to adopt the “joint venture” standards, but finding level of American participation in the case before it insignificant); United States v. Morrow, 537 F.2d 120, 139 (5th Cir. 1976)(“if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts”); each of the decisions also suggests that evidence secured in a manner which shocked the conscience of the court would be excluded.

134 The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, see, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), reprinted, 78 Cong.Rec. 4982-983 (1934)(“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.)(conferring judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

135 Roe v. Marcotte, 193 F.3d 72 (2d Cir. 1999); Shaffer v. Saffle, 148 F.3d 1180 (10th Cir. 1998); Rise v. Oregon, 59 F.3d 1556 (9th Cir. 1995); Jones v. Murray, 962 F.2d 302 (4th Cir. 1992).
federal prisoners convicted of a variety of violent crimes, 42 U.S.C. 14135a. The Act enlarges the predicate offense list to include any crime of violence or any terrorism offense, section 503.136

**Access to Educational Records.** Finally, the Act calls for an ex parte court order procedure under which senior Justice Department officials may seek authorization to collect educational records relevant to an investigation or prosecution of a crime of terrorism, section 507 (as an exception to the confidentiality requirements of the General Education Provisions Act, 20 U.S.C. 1232g), section 508 (as an exception to the confidentiality requirements of the National Education Statistics Act, 20 U.S.C. 9007).

**Statute of Limitations.** Prosecution for murder in violation of federal law may be initiated at any time, 18 U.S.C. 3281. A five year statute of limitations applied for most other federal crimes before passage of the Act, with a few exceptions. Among the relevant exceptions were an eight year statute of limitations for several terrorist offenses, 18 U.S.C. 3286,137 and a ten year statute of limitations for a few arson and explosives offenses, 18 U.S.C. 3295. The Justice Department recommended the elimination of a statute of limitations in terrorism cases.138

136 Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples form convicted federal offenders (42 U.S.C. §14135a(a)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes,” DoJ at §353.


137 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

138 “This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

“This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in
The Act takes less dramatic action in section 809. It eliminates the statute of limitations for any crime of terrorism that risks or results in a death or serious bodily injury, 18 U.S.C. 3286. In the absence of such a risk or result, all other terrorism offenses become subject to the eight year statute of limitations unless already covered by the ten year statute for explosives and arson offenses, 18 U.S.C. 3286.

Application of the statute of limitations rarely provokes a constitutional inquiry. Nevertheless, due process precludes prosecution when it can be shown that pre-indictment delay “caused substantial prejudice to [a defendant’s] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.” Moreover, a judicial difference of opinion has appeared in those cases

connection with the September 11, 2001 terrorist attacks. The constitutionality of such retroactive applications of changes in statutes of limitations is well-settled, See, e.g., United States v. Grimes, 142 F.3d 1342, 1350-51 (11th Cir. 1998); People v. Frazer, 982 P.2d 180 (Cal. 1999).

“Existing federal law (18 U.S.C. §3282) bars prosecuting most offenses after five years. 18 U.S.C. §3286, as currently formulated, extends the limitation period for prosecution for certain offenses that may be committed by terrorists – but only to eight years. While this is a limited improvement over the five-year limitation period for most federal offenses, it is patently inadequate in relation to the catastrophic human and social costs that frequently follow from such crimes as destruction of aircraft (18 U.S.C. §32), aircraft hijackings ([49] U.S.C. §§46502, 46504-06, attempted political assassinations (18 U.S.C. §§351, 1116, 1751), or hostage taking (18 U.S.C. §1203). These are not minor acts of misconduct which can properly be forgiven or forgotten merely because the perpetrator has avoided apprehension for some period of time. Anomalously, existing law provides longer limitation periods for such offenses as bank frauds and certain artwork thefts (18 U.S.C.§§3293-94) than it does for crimes characteristically committed by terrorists.

“In many American jurisdictions, the limitation periods for prosecution for serious offenses are more permissible than those found in federal law, including a number of states which have no limitation period for the prosecution of felonies generally. While this section does not go so far, it does eliminate the limitation period for prosecution of the major crimes that are most likely to be committed by terrorists (‘Federal terrorism offenses’), as specified in section 309 of this bill,” DoJ at 301.

139 As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 (sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period.\textsuperscript{141} Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.\textsuperscript{142}

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (\textit{Grimes}, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (\textit{Frazer}, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

**Extraterritoriality.** Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States or elsewhere. . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.\textsuperscript{143}

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnapping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.

\textsuperscript{141} \textit{United States v. De La Matta}, 266 F.3d 1275, 1286 (11th Cir. 2001); \textit{United States v. Grimes}, 142 F.3d 1342, 1351 (11th Cir. 1998); \textit{United States v. Morrow}, 177 F.3d 272, 294 (5th Cir. 1999); \textit{Falter v. United States}, 23 F.2d 420, 425-26 (2d Cir. 1928).

\textsuperscript{142} \textit{People v. Frazer}, 24 Cal.4th 737, 759, 982 P.2d 180, 1294, 88 Cal.Rptr.2d 312, 327 (1999).

\textsuperscript{143} \textit{United States v. Layton}, 855 F.2d 1388 (9th Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); \textit{United States v. Benítez}, 741 F.2d 1312 (11th Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control.  

The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

**Victims.** Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11th Victim Compensation Fund legislation before it passed the Act. Consequently, the Act’s victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 et seq., and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 et seq.

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:

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• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year) (42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d) (5)), section 621(d)

• waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

• eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
• makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

• prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

• allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

• reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

• makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

• allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

• establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

**Increasing Institutional Capacity.** A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

- $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)

- necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)

- $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)

- $25 million a year for FY 2002 to FY 2007 for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816

- $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3795h) for federal-state-local law enforcement information sharing systems, section 701

- $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)

- $5 million for DEA police training in South and Central Asia, section 1007.

**Miscellaneous.** Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might to used for the *design* of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act, or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b), 807.\textsuperscript{146}

\textsuperscript{145} \textit{i.e.}, Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).

\textsuperscript{146} For a general discussion of trade sanctions legislation, see, Jurenas, \textit{Exempting Food and Agriculture Products from U.S. Economic Sanctions: Status and Implementation}, CRS\textsc{issue} BRIEF IB100061.
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146 For a general discussion of trade sanctions legislation, see, Jurenas, Exempting Food and Agriculture Products from U.S. Economic Sanctions: Status and Implementation, CRS ISSUE BRIEF IB100061.
The USA PATRIOT Act: A Legal Analysis

April 15, 2002

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The USA PATRIOT Act: A Legal Analysis

Summary

The USA PATRIOT Act passed in the wake of the September 11 terrorist attacks. It flows from a consultation draft circulated by the Department of Justice, to which Congress made substantial modifications and additions. The stated purpose of the Act is to enable law enforcement officials to track down and punish those responsible for the attacks and to protect against any similar attacks.

The Act grants federal officials greater powers to trace and intercept terrorists’ communications both for law enforcement and foreign intelligence purposes. It enforces federal anti-money laundering laws and regulations in an effort to deny terrorists the resources necessary for future attacks. It tightens our immigration laws to close our borders to foreign terrorists and to expel those among us. Finally, it creates a few new federal crimes, such as the one outlawing terrorists’ attacks on mass transit; increases the penalties for many others; and institutes several procedural changes, such as a longer statute of limitations for crimes of terrorism.

Critics have suggested that it may go too far. The authority to monitor e-mail traffic, to share grand jury information with intelligence and immigration officers, to confiscate property, and to impose new book-keeping requirements on financial institutions, are among the features troubling to some.

The Act itself responds to some of these reservations. Many of the wiretapping and foreign intelligence amendments sunset on December 31, 2005. The Act creates judicial safeguards for e-mail monitoring and grand jury disclosures; recognizes innocent owner defenses to forfeiture; and entrusts enhanced anti-money laundering powers to those regulatory authorities whose concerns include the well being of our financial institutions.

This report, stripped of its citations and footnotes, is available in an abbreviated form as The USA PATRIOT Act: A Sketch, CRS Rep.No. RS21203. In addition, much of the information contained here may also be found under a different arrangement in a report entitled, Terrorism: Section by Section Analysis of the USA PATRIOT Act, CRS Rep.No. RL31200 (Dec. 10, 2001). A wider array of terrorism-related analysis appears on the CRS terrorism electronic briefing book page.
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The USA PATRIOT Act: A Legal Analysis

Introduction

Congress passed the USA PATRIOT Act (the Act) in response to the terrorists’ attacks of September 11, 2001. The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to further close our borders to foreign terrorists and to detain and remove those within our borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it is not without safeguards, critics contend some of its provisions go too far. Although it grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough.

The Department's proposal, dated September 20, 2001, came with a brief section by section analysis. Both the proposal (Draft) and analysis (DoJ) were printed as an appendix in Administration's Draft Anti-Terrorism Act of 2001, Hearing Before the House Comm. on the Judiciary, 107th Cong., 1st Sess. 54 (2001).


“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,” U.S. Const. Amend. IV.

Although there are technical differences, the interception processes are popularly known as wiretapping, electronic eavesdropping, or electronic surveillance. The terms are used interchangeable here for purposes of convenience, but strictly speaking, wiretapping is limited to the mechanical or electronic interception of telephone conversations, while electronic eavesdropping or electronic surveillance refers to mechanical or electronic interception of communications generally.
criminal cases. When approved by senior Justice Department officials, law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses), 18 U.S.C. 2516.

8 “The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of” one or more predicate offense, 18 U.S.C. 2516.

9 The predicate offense list includes (a) felony violations of 42 U.S.C. 2274 through 2277 (enforcement of the Atomic Energy Act of 1954), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), or of 18 U.S.C. ch. 37 (espionage), ch. 90 (protection of trade secrets), ch. 105 (sabotage), ch. 115 (treason), ch. 102 (riots), ch. 65 (malicious mischief), ch. 111 (destruction of vessels), or ch. 81 (piracy); (b) a violation of 29 U.S.C. 186 or 501(c) (restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under title 18 of the United States Code; (c) any offense which is punishable under 18 U.S.C. 201 (bribery of public officials and witnesses), 215 (bribery of bank officials), 224 (bribery in sporting contests), 844 (d), (e), (f), (g), (h), or (i) (unlawful use of explosives), 1032 (concealment of assets), 1084 (transmission of wagering information), 751 (escape), 1014 (loans and credit applications generally; renewals and discounts), 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), 1510 (obstruction of criminal investigations), 1511 (obstruction of State or local law enforcement), 1751 (presidential and presidential staff assassination, kidnapping, or assault), 1951 (interference with commerce by threats or violence), 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), 1958 (use of interstate commerce facilities in the commission of murder for hire), 1959 (violent crimes in aid of racketeering activity), 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), 1955 (prohibition of business enterprises of gambling), 1956 (laundrying of monetary instruments), 1957 (engaging in monetary transactions in property derived from specified unlawful activity), 659 (theft from interstate shipment), 664 (embezzlement from pension and welfare funds), 1030 (computer abuse felonies), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 2251 and 2252 (sexual exploitation of children), 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), 2321 (trafficking in certain motor vehicles or motor vehicle parts), 1203 (hostage taking), 1029 (fraud and related activity in connection with access devices), 3146 (penalty for failure to appear), 3521(b)(3) (witness relocation and assistance), 32 (destruction of aircraft or aircraft facilities), 38 (aircraft parts fraud), 1963 (violations with respect to racketeer influenced and corrupt organizations), 115 (threatening or retaliating against a Federal official), 1341 (mail fraud), 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnapping, or assault), 831 (prohibited transactions involving nuclear materials), 33 (destruction of motor vehicles or motor vehicle facilities), 175 (biological weapons), 1992 (wrecking trains), a felony violation of 1028 (production of false identification documentation), 1425 (procurement of citizenship or naturalization unlawfully), 1426 (reproduction of naturalization or citizenship papers), 1427 (sale of naturalization or citizenship papers), 1541 (passport issuance without authority), 1542 (false statements in passport applications), 1543 (forgery or false use of passports), 1544 (misuse of passports), or 1546 (fraud and misuse of visas, permits, and other documents); (d) any
Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations, 18 U.S.C. 2518. The court notifies the parties to any conversations seized under the order after the order expires, 18 U.S.C. 2518(8).

Below Title III, the next tier of privacy protection covers some of those matters which the Supreme Court has described as beyond the reach of the Fourth Amendment protection – telephone records, e-mail held in third party storage, and the like, 18 U.S.C. 2701-2709 (Chapter 121). Here, the law permits law enforcement access, ordinarily pursuant to a warrant or court order or under a subpoena in some cases, but in connection with any criminal investigation and without the extraordinary levels of approval or constraint that mark a Title III interception, 18 U.S.C. 2703.

Least demanding and perhaps least intrusive of all is the procedure that governs court orders approving the government’s use of trap and trace devices and pen registers, a kind of secret “caller id”, which identify the source and destination of calls made to and from a particular telephone, 18 U.S.C. 3121-3127 (Chapter 206). The orders are available based on the government's certification, rather than a finding of the court, that the use of the device is likely to produce information relevant to the investigation of a crime, any crime, 18 U.S.C. 3123. The devices record no more than the identity of the participants in a telephone conversation, but neither the orders nor the results they produce need ever be revealed to the participants.

The Act modifies the procedures at each of the three levels. It:

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10 Or more precisely, they reveal no more than the identity of the numbers assigned to the telephone lines activated for a particular communication.
• permits pen register and trap and trace orders for electronic communications (e.g., e-mail)

• authorizes nationwide execution of court orders for pen registers, trap and trace devices, and access to stored e-mail or communication records

• treats stored voice mail like stored e-mail (rather than like telephone conversations)

• permits authorities to intercept communications to and from a trespasser within a computer system (with the permission of the system’s owner)

• adds terrorist and computer crimes to Title III’s predicate offense list

• reenforces protection for those who help execute Title III, ch. 121, and ch. 206 orders

• encourages cooperation between law enforcement and foreign intelligence investigators

• establishes a claim against the U.S. for certain communications privacy violations by government personnel

• terminates the authority found in many of the these provisions and several of the foreign intelligence amendments with a sunset provision (Dec. 31, 2005).

Pen Registers and Trap and Trace Devices. In section 216, the Act allows court orders authorizing trap and trace devices and pen registers to be used to capture source and addressee information for computer conversations (e.g., e-mail) as well as telephone conversations, 18 U.S.C. 3121, 3123. In answer to objections that e-mail header information can be more revealing than a telephone number, it creates a detailed report to the court, 18 U.S.C. 3123(a)(3).11

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11 “Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public the agency shall ensure that a record will be maintained which will identify – (i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; (iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and (iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of the such device.

“(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof),” section 216(b)(1).
The use of pen registers or trap and trace devices was limited at one time to the judicial district in which the order was issued, 18 U.S.C. 3123 (2000 ed.). Under section 216, a court with jurisdiction over the crime under investigation may issue an order to be executed anywhere in the United States, 18 U.S.C. 3123(b)(1)(C), 3127(2).\textsuperscript{12}

\textbf{Communications Records and Stored E-Mail.} With respect to chapter 126, relating among other things to the content of stored e-mail and to communications records held by third parties, the law permits criminal investigators to retrieve the content of electronic communications in storage, like e-mail, with a search warrant, and if the communication has been in remote storage for more than 180 days without notifying the subscriber, 18 U.S.C. 2703(a),(b). A warrant will also suffice to seize records describing telephone and other communications transactions without customer notice, 18 U.S.C. 2703(c). In the absence of the probable cause necessary for a warrant but with a showing of reasonable grounds to believe that the information sought is relevant to a criminal investigation, officers are entitled to a court order mandating access to electronic communications in remote storage for more than 180 days or to communications records, 18 U.S.C. 2703(b),(c). They can obtain a limited amount of record information (subscribers’ names and addresses, telephone numbers, billing records and the like) using an administrative, grand jury, or trial court subpoena, 18 U.S.C. 2703(c)(1)(C). There is no subscriber notification in record cases. Elsewhere, the court may delay customer notification in the face of exigent circumstances or if notice is likely to seriously jeopardize the investigation or unduly delay the trial, 18 U.S.C. 2705.

In order to streamline the investigation process, the Act, in section 210, adds credit card and bank account numbers to the information law enforcement officials may subpoena from a communications service provider’s customer records, 18 U.S.C. 2703(c)(1)(C).\textsuperscript{13}

Another streamlining amendment, section 220, eliminates the jurisdictional restrictions on access to the content of stored e-mail pursuant to a court order.

\textsuperscript{12} The Justice Department urged the change in the name of expediency, “At present, the government must apply for new pen trap orders in every jurisdiction where an investigation is being pursued. Hence, law enforcement officers tracking a suspected terrorist in multiple jurisdictions must waste valuable time and resources by obtaining a duplicative order in each jurisdiction,” DoJ at §101. Here and throughout citations to the United States Code (U.S.C.) without reference to an edition refer to the current Code; references to the 2000 edition of the Code refer to the law prior to amendment by the Act.

\textsuperscript{13} Prior to the amendment, “investigators [could] not use a subpoena to obtain such records as credit card number or other form of payment. In many cases, users register with Internet service providers using false names, making the form of payment critical to determining the user’s true identity. . . . this information [could] only be obtained by the slower and more cumbersome process of a court order. In fast-moving investigation[s] such as terrorist bombings – in which Internet communications are a critical method of identifying conspirators and in determining the source of the attacks – the delay necessitated by the use of court orders can often be important. Obtaining billing and other information can identify not only the perpetrator but also give valuable information about the financial accounts of those responsible and their conspirators,” DoJ at §107.
Previously, only a federal court in the district in which the e-mail was stored could issue the order. Under section 220, federal courts in the district where an offense under investigation occurred may issue orders applicable “without geographic limitation,” 18 U.S.C. 2703.14

The Act, in section 209, treats voice mail like e-mail, that is, subject to the warrant or court order procedure, rather than to the more demanding coverage of Title III once required, United States v. Smith, 155 F.3d 1050, 1055-56 (9th Cir. 1998).

Finally, the Act resolves a conflict between chapter 121 and the federal law governing cable companies. Government entities may have access to cable company customer records only under a court order following an adversary hearing if they can show that the records will evidence that the customer is or has engaged in criminal activity, 47 U.S.C. 511(h). When cable companies began offering telephone and other communications services the question arose whether the more demanding cable rules applied or whether law enforcement agencies were entitled to ex parte court orders under the no-notice procedures applicable to communications providers.15 The Act makes it clear that the cable rules apply when cable television viewing services are

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14 Speaking of the law before amendment, DoJ explained, “Current law requires the government to use a search warrant to compel a provider to disclose unopened e-mail. 18 U.S.C. §2703(a). Because Federal Rule of Criminal Procedure 41 requires that the ‘property’ to be obtained ‘be within the district’ of the issuing court, however, the rule may not allow the issuance of §2703(a) warrants for e-mail located in other districts. Thus, for example, where an investigator in Boston is seeking electronic e-mail in the Yahoo! account of a suspected terrorist, he may need to coordinate with agents, prosecutors, and judges in the Northern District of California, none of whom have any other involvement in the investigation. This electronic communications information can be critical in establishing relationships, motives, means, and plans of terrorists. Moreover, it is equally relevant to cyber-incidents in which a terrorist motive has not (but may well be) identified. Finally, even cases that require the quickest response (kidnappings, threats, or other dangers to public safety or the economy) may rest on evidence gathered under §2703(a). To further public safety, this section accordingly authorizes courts with jurisdiction over investigations to compel evidence directly, without requiring the intervention of their counterparts in other districts where major Internet service providers are located,” DoJ at §108.

15 See e.g., DoJ at §109 (“Law enforcement must have the capability to trace, intercept, and obtain records of the communications of terrorists and other criminals with great speed, even if they choose to use a cable provider for their telephone and Internet service. This section amends the Cable Communications Policy Act (‘Cable Act’) to clarify that when a cable company acts as a telephone company or an Internet service provider, it must comply with the same laws governing the interception and disclosure of wire and electronic communications that apply to any other telephone company or Internet service provider. The Cable Act, passed in 1984 to regulate various aspects of the cable television industry, could not take into account the changes in technology that have occurred over the last seventeen years. Cable television companies now often provide Internet access and telephone service in addition to television programming. Because of perceived conflicts between the Cable Act and laws that govern law enforcement's access to communications and records of communications carried by cable companies, cable providers have refused to comply with lawful court orders, thereby slowing or ending critical investigations”).
involved and that the communications rules of chapter 121 apply when a cable company or anyone else provides communications services, section 211.

**Electronic Surveillance.** To Title III's predicate offense list, the Act adds cybercrime (18 U.S.C. 1030) and several terrorists crimes, sections 201, 202. A second cybercrime initiative, section 217, permits law enforcement officials to intercept the communications of an intruder within a protected computer system (i.e., a system used by the federal government, a financial institution, or one used in interstate or foreign commerce or communication), without the necessity of a warrant or court order, 18 U.S.C. 2511(2)(i). Yet only the interloper's intruding communications, those to or from the invaded system, are exposed under the section. The Justice Department originally sought the change because the law then did not clearly allow victims of computer trespassing to request law enforcement assistance in monitoring unauthorized attacks as they occur.

**Criminal Investigators' Access to Foreign Intelligence Information.** The Act clearly contemplates closer working relations between criminal investigators and foreign intelligence investigators, particular in cases of international terrorism. It amends the Foreign Intelligence Surveillance Act (FISA) to that end. As originally enacted, the application for a surveillance order under FISA required certification of the fact that “the purpose for the surveillance is to obtain foreign intelligence information,” 50 U.S.C. 1804(a)(7)(B)(2000 ed.) (emphasis added), although it anticipated that any evidence divulged as a result might be turned over to law enforcement officials. Defendants often questioned whether authorities had used a FISA surveillance order against them in order to avoid the predicate crime threshold for a Title III order. Out of these challenges arose the notion that perhaps “the purpose” might not always mean the sole purpose. The case law indicated that, while an expectation that evidence of a crime might be discovered did not preclude a FISA order, at such time as a criminal prosecution became the focus of the investigation

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16 18 U.S.C. 229 (chemical weapons), 2332 (terrorist acts of violence committed against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2332d (financial transactions with countries which support terrorists), 2339A (providing material support to terrorists), and 2339B (providing material support to terrorist organizations).

17 “Because service providers often lack the expertise, equipment, or financial resources required to monitor attacks themselves as permitted under current law, they often have no way to exercise their rights to protect themselves from unauthorized attackers. Moreover, such attackers can target critical infrastructures and engage in cyberterrorism,” DoJ at §106. Elsewhere the Act defines “electronic surveillance” for purposes of the Foreign Intelligence Surveillance Act (FISA) to emphasize that the law enforcement authority for this intruder surveillance does not confer similar authority for purposes of foreign intelligence gathering, section 1003 (50 U.S.C. 1801(f)(2)).

18 For a general discussion of federal intelligence and law enforcement cooperation, see, Best, Intelligence and Law Enforcement: Countering Transnational Threats to the U.S., CRS REP.NO. RL30252 (Dec. 3, 2001).
officials were required to either end surveillance or secure an order under Title III.  

The Justice Department sought FISA surveillance and physical search authority on the basis of “a” foreign intelligence purpose. Section 218 of the Act insists that foreign intelligence gathering be a “significant purpose” for the request for the FISA surveillance or physical search order, 50 U.S.C. 1804(a)(7)(B), 1823(a)(7)(B), a more

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19 Before FISA, several lower federal courts recognized a foreign intelligence exception to the Fourth Amendment's warrant clause. It is here that the “primary purpose” notion originated. In United States v. Truong Dinh Hung, 629 F.2d 908, 915 (4th Cir. 1980), decided after FISA on the basis of pre-existing law, the court declared, “as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted ‘primarily’ for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.” Subsequent case law, however, is not as clear as it might be: see e.g., United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984) (“FISA permits federal officials to obtain orders authorizing electronic surveillance ‘for the purpose of obtaining foreign intelligence information.’ The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of Sec. 1802(b) but also from the requirements in Sec. 1804 as to what the application must contain. The application must contain a certification by a designated official of the executive branch that the purpose of the surveillance is to acquire foreign intelligence information, and the certification must set forth the basis for the certifying officials’ belief that the information sought is the type of foreign intelligence information described”); United States v. Pelton, 835 F.2d 1067, 1075-76 (4th Cir. 1987) (“We also reject Pelton's claim that the 1985 FISA surveillance was conducted primarily for the purpose of his criminal prosecution, and not primarily for the purpose of obtaining foreign intelligence information. . . . We agree with the district court that the primary purpose of the surveillance, both initially and throughout was to gather foreign intelligence information. It is clear that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of the surveillance may later be used . . . as evidence in a criminal trial”); United States v. Sarkissian, 841 F.2d 959, 907-8 (9th Cir. 1988) (“Defendants rely on the primary purpose test articulated in United States v. Truong Dinh Hung. . . . One other court has applied the primary purpose test. Another court has rejected it . . . distinguishing Truong. A third court has declined to decide the issue. We also decline to decide the issue”); United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1991) (“Appellants attack the government's surveillance on the ground that it was undertaken not for foreign intelligence purposes, but to gather evidence for a criminal prosecution. FISA applications must contain, among other things, a certification that the purpose of the requested surveillance is the gathering of foreign intelligence information. . . . Although the evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance”).

20 “Current law requires that FISA be used only where foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is ‘a’ purpose of the investigation. This change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities which is critical to the success of anti-terrorism efforts,” DoJ at §153.
demanding standard than the “a purpose” threshold proposed by the Justice Department, but a clear departure from the original “the purpose” entry point. FISA once described a singular foreign intelligence focus prerequisite for any FISA surveillance application. Section 504 of the Act further encourages coordination between intelligence and law enforcement officials, and states that such coordination is no impediment to a “significant purpose” certification, 50 U.S.C. 1806(k), 1825(k).21

**Protective Measures.** The Act reenforces two kinds of safeguards, one set designed to prevent abuse and the other to protect those who assist the government. The sunset clause is perhaps the best known of the Act’s safeguards. Under the direction of section 224, many of the law enforcement and foreign intelligence authorities granted by the Act expire as of December 31, 2005.22 The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter 3.

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21 "(k)(1) Federal officers who conduct electronic surveillance to acquire foreign intelligence information under this title may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power.

(2) Coordination authorized under paragraph (1) shall not preclude the certification required by section 104(a)(7)(B) or the entry of an order under section 105.” FISA defines “foreign power” and “agent of a foreign power” broadly, see note 33, infra, quoting, 50 U.S.C. 1801.

22 “(a) Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a)[sharing grand jury information], 203(c)[procedures for sharing grand jury information], 205 [FBI translators], 208 [seizure of stored voice-mail], 210[subpoenas for communications provider customer records], 211[access to cable company communication service records], 213[sneak and peek], 216[pen register and trap and trace device amendments], 219[trade sanctions], and 222[assistance to law enforcement], and the amendments made by those sections) shall cease to have effect on December 31, 2005.22 The Act also fills some of the gaps in earlier sanctions available for official, abusive invasions of privacy. Prior law made it a federal crime to violate Title III (wiretapping), chapter 3.

“(b) With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect,” section 224.

The sections which expire are: 201 and 202 (adding certain terrorism crimes to the predicate list for Title III), 293(b)(sharing Title III information with foreign intelligence officers), 204 (clarifying the foreign intelligence exception to the law enforcement pen register and trap and trace device provisions), 206 (roving foreign intelligence surveillance), 207 (duration of foreign intelligence surveillance orders and extensions), 209 (treatment of voice mail as e-mail rather than as telephone conversation), 212 (service provider disclosures in emergency cases), 214 (authority for pen registers and trap and trace devices in foreign intelligence cases), 215 (production of tangible items in foreign intelligence investigations), 217 (intercepting computer trespassers' communications), 218 (foreign intelligence surveillance when foreign intelligence gathering is “a significant” reason rather than “the” reason for the surveillance), 219 (nationwide terrorism search warrants), 220 (nationwide communication records and stored e-mail search warrants), 223 (civil liability and administrative discipline for violations of Title III, chapter 121, and certain foreign intelligence prohibitions), and 225 (immunity for foreign intelligence surveillance assistance).
121 (e-mail and communications records), or chapter 206 (pen registers and trap and trace devices).\(^{23}\) Victims of offenses under Title III and chapter 121 (but not chapter 206) were entitled to damages (punitive damages in some cases) and reasonable attorneys' fees,\(^{24}\) but could not recover against the United States.\(^{25}\) Chapter 121 alone insisted upon an investigation into whether disciplinary action ought to be taken when federal officers or employees were found to have intentionally violated its proscriptions, 18 U.S.C. 2707.

The Act augments these sanctions by authorizing a claim against the United States for not less than $10,000 and costs for violations of Title III, chapter 121, or the Foreign Intelligence Surveillance Act (FISA), by federal officials, and emphasizing the prospect of administrative discipline for offending federal officials, section 223.

Finally, the Act instructs the Department of Justice's Inspector General to designate an official to receive and review complaints of civil liberties violations by DoJ officers and employees, section 1001.

The second category of protective measures applies to service providers and others who help authorities track and gather communications information. For example, section 815 immunizes service providers who in good faith preserve customer records at the government's request until a court order authorizing access can be obtained.\(^{26}\) Another allows providers to disclose customer records to protect the provider's rights and property and to disclose stored customer communications and records in emergency circumstances, section 212. Under pre-existing law providers could disclose the content of stored communications but not customer records. The Justice Department recommended the changes in the interests of greater protection against cybercrimes committed by terrorists and others.\(^{27}\) A third section,

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\(^{24}\) 18 U.S.C. 2520 and 2707 (2000 ed.).


\(^{26}\) Prior law already granted service providers immunity for disclosure of customer records in compliance with a court access order, 18 U.S.C. 2703(f).

\(^{27}\) “Existing law contains no provision that allows providers of electronic communications service to disclose the communications (or records relating to such communications) of their customers or subscribers in emergencies that threaten death or serious bodily injury. This section amends 18 U.S.C. §2702 to authorize such disclosures if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.

“Current law also contains an odd disconnect: a provider may disclose the contents of the customer's communications in order to protect its rights or property but the current statute does not expressly permit a provider to voluntarily disclose non-content records (such as a subscriber's login records). 18 U.S.C. 2702(b)(5). This problem substantially hinders the ability of providers to protect themselves from cyber-terrorists and criminals. Yet the right to disclose the contents of communications necessarily implies the less intrusive ability to disclose non-content records. In order to promote the protection of our nation's critical infrastructures, this section's amendments allow communications providers to voluntarily disclose both content and non-content records to protect their computer systems,” DoJ at
section 222 promises reasonable compensation for service providers and anyone else who help law enforcement install or apply pen registers or trap and trace devices, but makes it clear that nothing in the Act is intended to expand communications providers’ obligation to make modifications in their systems in order to accommodate law enforcement needs.29

Foreign Intelligence Investigations

Although both criminal investigations and foreign intelligence investigations are conducted in the United States, criminal investigations seek information about unlawful activity; foreign intelligence investigations seek information about other countries and their citizens. Foreign intelligence is not limited to criminal, hostile, or even governmental activity. Simply being foreign is enough.30

Restrictions on intelligence gathering within the United States mirror American abhorrence of the creation of a secret police, coupled with memories of intelligence gathering practices during the Vietnam conflict which some felt threatened to chill robust public debate. Yet there is no absolute ban on foreign intelligence gathering in the United States. Congress enacted the Foreign Intelligence Surveillance Act (FISA), something of a Title III for foreign intelligence wiretapping conducted in this country, after the Supreme Court made it clear that the President's authority to see to national security was insufficient to excuse warrantless wiretapping of suspected terrorists who had no identifiable foreign connections, United States v. United States District Court, 407 U.S. 297 (1972). FISA later grew to include procedures for physical searches in foreign intelligence cases, 50 U.S.C. 1821-1829, for pen register and trap and trace orders, 50 U.S.C. 1841-1846, and for access to records from businesses engaged in car rentals, motel accommodations, and storage

§110.

28 Chapter 206 had long guaranteed providers and others reasonable compensation, 18 U.S.C. 3124(c), but section 216 of the Act expands the circumstances under which the authorities may request assistance including requests for the help of those not specifically mentioned in the court order. Section 222 makes it clear the expanded obligation to provide assistance is matched by a corresponding right to compensation.

29 Thus in the name of assisting in the execution of Title III, chapter 121, or chapter 206 order, the courts may not cite the Act as the basis for an order compelling a service provider to make system modifications or provide any other technical assistance not already required under 18 U.S.C. 2518(4), 2706, or 3124(c), see, H.R.Rep.No. 107-236, at 62-3 (2001) (emphasis added) (“This Act is not intended to affect obligations under Communications Assistance for Law Enforcement Act [which addresses law enforcement-beneficial system modifications and the compensation to be paid for the changes], nor does the act impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance”).

30 E.g., As amended by section 902 of the Act, “‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2)(language added by the Act in italics).

31 50 U.S.C. 1801 et seq.
lockers, 50 U.S.C. 1861-1863 (2000 ed.). Intelligence authorities gained narrow passages through other privacy barriers as well.\textsuperscript{32}

In many instances, access was limited to information related to the activities of foreign governments or their agents in this country, not simply relating to something foreign here. FISA, for example, is directed at foreign governments, international terrorists, and their agents, spies and saboteurs.\textsuperscript{33} There were and still are extra


\textsuperscript{33} “As used in this subchapter: (a) ‘Foreign power’ means – (1) a foreign government or any component thereof, whether or not recognized by the United States; (2) a faction of a foreign nation or nations, not substantially composed of United States persons; (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (4) a group engaged in international terrorism or activities in preparation therefor; (5) a foreign-based political organization, not substantially composed of United States persons; or (6) an entity that is directed and controlled by a foreign government or governments.

“(b) ‘Agent of a foreign power’ means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section; (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person’s presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or (2) any person who – (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power, (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C).

“(c) ‘International terrorism’ means activities that – (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; (2) appear to be intended – (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnaping; and (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

“(d) ‘Sabotage’ means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

“(e) ‘Foreign intelligence information’ means – (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual or potential attack or other grave hostile acts of a foreign power or an
safeguards if it appears that an intelligence investigation may generate information about Americans (“United States persons,” i.e., citizens or permanent resident aliens). The procedures tend to operate under judicial supervision and tend to be confidential as a matter of law, prudence, and practice.

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

- permits “roving” surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity)

- increases the number of judges on the FISA court from 7 to 11

- allows application for a FISA surveillance or search order when gathering foreign intelligence is a significant reason for the application rather than the reason

- authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations

- sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses

- carries a sunset provision

- establishes a claim against the U.S. for certain communications privacy violations by government personnel

- expands the prohibition against FISA orders based solely on an American’s exercise of his or her First Amendment rights.

agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to – (A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States,” 50 U.S.C. 1801.

34 Strictly speaking for FISA purposes, a United States person “means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section,” 50 U.S.C. 1801(i).
**FISA.** FISA is in essence a series of procedures available to secure court orders in certain foreign intelligence cases.\(^{35}\) It operates through the judges of a special court which prior to the Act consisted of seven judges, scattered throughout the country, two of whom were from the Washington, D.C. area. The Act, in section 208, authorizes the appointment of four additional judges and requires that three members of the court reside within twenty miles of the District of Columbia, 50 U.S.C. 1803(a).

**Search and Surveillance for Intelligence Purposes.** Unless directed at a foreign power, the maximum duration for FISA surveillance orders and extensions was once ninety days and forty-five days for physical search orders and extensions, 50 U.S.C. 1805(e), 1824(d)(2000 ed.). The Act, in section 207, extends the maximum tenure of physical search orders to ninety days and in the case of both surveillance orders and physical search orders extends the maximum life of an order involving an agent of a foreign power to 120 days, with extensions for up to a year, 50 U.S.C. 1805(e), 1824(d). This represents a compromise over the Justice Department's original proposal which would have set the required expiration date for orders at one year instead of 120 days, Draft at §151.\(^{36}\)

Section 901 of the Act address a concern raised during the 106th Congress relating to the availability of the FISA orders and the effective use of information gleaned from the execution of a FISA order.\(^{37}\) It vests the Director of Central

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\(^{36}\) *See also*, DoJ at §151, “This section reforms a critical aspect of the Foreign Intelligence Surveillance Act (FISA). It will enable the Foreign Intelligence Surveillance Court (FISC), which presides over applications made by the U.S. government under FISA, to authorize the search and surveillance in the U.S. of officers and employees of foreign powers and foreign members of international terrorist groups for up to a year. Currently, the FISC may only authorize such searches and surveillance for up to 45 days and 90 days, respectively. The proposed change would bring the authorization period in line with that allowed for search and surveillance of the foreign establishments for which the foreign officers and employees work. The proposed change would have no effect on electronic surveillance of U.S. citizens or permanent resident aliens.”

Section 314 of the Intelligence Authorization Act for Fiscal Year 2002 (Intelligence Authorization Act), P.L. 107-108, 115 Stat. 1394, 1402 (2001), further amended some of the time limits relating to FISA surveillance and physical searches, extending from 24 hours to 72 hours: (a) the time period during which agents might disseminate or use information secured pursuant to a FISA surveillance or search order but otherwise protected from dissemination or use by the order’s minimization requirements; and (b) the permissible duration of emergency surveillance or searches after which surveillance or the search must stop or a FISA order application filed (50 U.S.C. 1801(h)(4), 1821(4)(D), 1805(f), 1824(e)).

\(^{37}\) *See e.g.*, S.Rep.No. 106-352, at 3, 6, 7 (2000) (“The Office of Intelligence Policy and Review (OIPR) in the Department of Justice is responsible for advising the Attorney General on matters relating to the national security of the United States. As part of its responsibilities, the OIPR prepares and presents to the Foreign Intelligence Surveillance Court (FISC) all applications for electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act . . . . Agencies have informed the Committee that the FISA application
Intelligence with the responsibility to formulate requirements and priorities for the use of FISA to collect foreign intelligence information. He is also charged with the responsibility of assisting the Attorney General in the efficient and effective dissemination of FISA generated information (50 U.S.C. 403-3(c)).

**Pen Registers and Trap and Trace Devices for Intelligence Gathering.** Section 214 grants the request of the Department of Justice by dropping requirements which limited FISA pen register and trap and trace device orders to facilities used by foreign agents or those engaged in international terrorist or clandestine intelligence activities, 50 U.S.C. 1842(c)(3)(2000 ed.). It is enough that the order is sought as part of an investigation to protect against international terrorism or clandestine intelligence activities and is not motivated solely by an American’s exercise of his or her First Amendment rights. Elsewhere (section 505), the Act drops a similar limitation for intelligence officials’ access to telephone records, 18 U.S.C.

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process, as interpreted by the OIPR is administratively burdensome and, at times, extremely slow. Many applications undergo months of scrutiny before submission to the court because the OIPR prescribes standards and restrictions not imposed by the statute. . . . In particular, the OIPR has been criticized for an overly restrictive interpretation of the FISA ‘currency’ requirement. This is the issue of how recent a subject's activities must be to support a finding of probable cause that the subject is engaged in clandestine intelligence gathering activities.

. . . While existing law does not specifically address “past activities,” it does not preclude, and legislative history supports, the conclusion that past activities may be part of the totality of circumstances considered by the FISC in making a probable cause determination. . . . By definition, information collected pursuant to a court order issued under the Foreign Intelligence Surveillance Act is foreign intelligence not law enforcement information. Accordingly, the Committee wants to clarify that the FISA ‘take’ can and must be shared by the Federal Bureau of Investigation with appropriate intelligence agencies. For the intelligence mission of the United States to be successful, there must be a cooperative and concerted effort among intelligence agencies. Any information collected by one agency under foreign intelligence authorities that could assist another agency in executing its lawful mission should be shared fully and promptly. Only then can the United States Government pursue aggressively important national security targets including, for example, counterterrorist and counternarcotics targets”); see also, 147 Cong.Rec. S799-803 (daily ed. Feb. 24, 2000)(remarks of Sens. Specter, Torricelli and Biden).

38 “When added to FISA two years ago, the pen register/trap and trace section was intended to mirror the criminal pen/trap authority defined in 18 U.S.C. §3123. The FISA authority differs from the criminal authority in that it requires, in addition to a showing of relevance, an additional factual showing that the communications device has been used to contact an ‘agent of a foreign power’ engaged in international terrorism or clandestine intelligence activities. This has the effect of making the FISA pen/trap authority much more difficult to obtain. In fact, the process of obtaining FISA pen/trap authority is only slightly less burdensome than the process for obtaining full electronic surveillance authority under FISA. This stands in stark contrast to the criminal pen/trap authority, which can be obtained quickly from a local court, on the basis of a certification that the information to be obtained is relevant to an ongoing investigation. The amendment simply eliminates the ‘agent of a foreign power’ prong from the predication, and thus makes the FISA authority more closely track the criminal authority,” DoJ at §155.
Except in the case of certain credit information, these are not court procedures, but written requests for third party records which would otherwise be entitled to confidentiality. Section 505, in response to the Justice Department’s suggestion, allows FBI field offices to make the requests, see DoJ at §157 (“At the present time, National Security Letter (NSL) authority exists in three separate statutes: the Electronic Communications Privacy Act (for telephone and electronic communications records), the Financial Right to Privacy Act (for financial records), and the Fair Credit Reporting Act (for credit records). Like the FISA pen register/trap and trace authority described above, NSL authority requires both a showing of relevance and a showing of links to an ‘agent of a foreign power.’ In this respect, they are substantially more demanding than the analogous criminal authorities, which require only a certification of relevance. Because the NSLs require documentation of the facts supporting the ‘agent of a foreign power’ predicate and because they require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. This is in stark contrast to criminal subpoenas, which can be used to obtain the same information, and are issued rapidly at the local level. In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority, and also clarify the FISA Court can issue orders compelling production of consumer reports”).

Third Party Cooperation and Tangible Evidence. As in the case of criminal investigations, the Act has several sections designed to encourage third party cooperation and to immunize third parties from civil liability for their assistance. FISA orders may include instructions directing specifically identified third parties to assist in the execution of the order, 50 U.S.C. 1805(c)(2)(B). The Act permits inclusion of a general directive for assistance when the target’s activities are designed to prevent more specific identification, section 206, and immunizes in 50 U.S.C. 1805(h), those who provide such assistance, section 225.40

40 When it requested the amendment, the Department of Justice explained that the “provision expands the obligations of third parties to furnish assistance to the government under FISA. Under current FISA provisions, the government can seek information and assistance from common carriers, landlords, custodians and other persons specified in court-ordered surveillance. Section 152 would amend FISA to expand existing authority to allow, ‘in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person that a common carrier, landlord, custodian or other persons not specified in the Court’s order be required to furnish the applicant information and technical assistance necessary to accomplish electronic surveillance in a manner that will protect its secrecy and produce a minimum of interference with the services that such person is providing to the target of electronic surveillance.’ This would enhance the FBI’s ability to monitor international terrorists and intelligence officers who are
Prior to the Act, FISA allowed federal intelligence officers to seek a court order for access to certain car rental, storage, and hotel accommodation records, 50 U.S.C. 1861 to 1863 (2000 ed.). The Justice Department asked that the authority be replaced with permission to issue administrative subpoenas for any tangible item regardless of the business (if any) of the custodian. The Act amends the provisions, preserving the court order requirement. Yet it allows the procedure to be used in foreign intelligence investigations, conducted to protect against international terrorism or clandestine intelligence activities, in order to seize any tangible item regardless of who is in possession of the item, and continues in place the immunity for good faith compliance by third party custodians, section 215.

In a related provision, Section 358 amends the –

- purposes section of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311);
- suspicious activities reporting requirements section of that Act (31 U.S.C. 5318(g)(4)(B);
- availability of records section of that Act (31 U.S.C. 5319);
- purposes section of the Bank Secrecy Act (12 U.S.C. 1829b(a);
- the Secretary of the Treasury’s authority over uninsured banks and other financial institutions under that Act (12 U.S.C. 1953(a);
- access provisions of the Right to Financial Privacy Act (12 U.S.C. 3412(2)(a), 3414(a)(1), 3420(a)(2); and
- access provisions of the Fair Credit Reporting Act (15 U.S.C. 1681u, 1681v;

trained to thwart surveillance by rapidly changing hotel accommodations, cell phones, Internet accounts, etc., just prior to important meetings or communications. Under the current law, the government would have to return to the FISA Court for an order that named the new carrier, landlord, etc., before effecting surveillance. Under the proposed amendment, the FBI could simply present the newly discovered carrier, landlord, custodian or other person with a generic order issued by the Court and could then effect FISA coverage as soon as technically feasible,” DoJ at 152.


41 "The ‘business records’ section of FISA (50 U.S.C. §§ 1861 and 1862) requires a formal pleading to the Court and the signature of a FISA judge (or magistrate). In practice, this makes the authority unavailable for most investigative contexts. The time and difficulty involved in getting such pleadings before the Court usually outweighs the importance of the business records sought. Since its enactment, the authority has been sought less than five times. This section would delete the old authority and replace it with a general ‘administrative subpoena’ authority for documents and records. This authority, modeled on the administrative subpoena authority available to drug investigators pursuant to Title 21, allows the Attorney General to compel production of such records upon a finding that the information is relevant,” DoJ at §156.

42 Section 314 of the Intelligence Authorization Act further amended the section to permit orders relating to investigations “to obtain foreign intelligence information not concerning a United States person” in addition to those conducted to protect against terrorism and clandestine activities, 50 U.S.C. 1861(a)(1).
to clarify and authorize access of federal intelligence authorities to the reports and information gathered and protected under those Acts.43

**Access to Law Enforcement Information.** Shortly after September 11, sources within both Congress and the Administration stressed the need for law enforcement and intelligence agencies to more effectively share information about terrorists and their activities. On September 14, the Senate Select Committee on Intelligence observed that, “effective sharing of information between and among the various components of the government-wide effort to combat terrorists is also essential, and is presently hindered by cultural, bureaucratic, resource, training and, in some cases, legal obstacles,” H.R.Rep.No. 107-63, at 10 (2001). The Justice Department’s consultation draft of September 20 offered three sections which would have greatly expanded the intelligence community's access to information collected as part of a criminal investigation. First, it suggested that information generated through the execution of a Title III order might be shared in connection with the duties of any executive branch official, *Draft* at §103.44

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43 H.R.Rep.No. 107-205, at 60-1 (2001)(“This section clarifies the authority of the Secretary of the Treasury to share Bank Secrecy Act information with the intelligence community for intelligence or counterintelligence activities related to domestic or international terrorism. Under current law, the Secretary may share BSA information with the intelligence community for the purpose of investigating and prosecuting terrorism. This section would make clear that the intelligence community may use this information for purposes unrelated to law enforcement.

“The provision would also expand a Right to Financial Privacy Act (RFPA) exemption, currently applicable to law enforcement inquiries, to allow an agency or department to share relevant financial records with another agency or department involved in intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. The section would also exempt from most provisions of the RFPA a government authority engaged in investigations of or analyses related to domestic or international terrorism. This section would also authorize the sharing of financial records obtained through a Federal grand jury subpoena when relevant to intelligence or counterintelligence activities, investigations, or analyses related to domestic or international terrorism. In each case, the transferring governmental entity must certify that there is reason to believe that the financial records are relevant to such an activity, investigation, or analysis.

“Finally, this section facilitates government access to information contained in suspected terrorists’ credit reports when the governmental inquiry relates to an investigation of, or intelligence activity or analysis relating to, domestic or international terrorism. Even though private entities such as lenders and insurers can access an individual’s credit history, the government is strictly limited in its ability under current law to obtain the information. This section would permit those investigating suspected terrorists prompt access to credit histories that may reveal key information about the terrorist’s plan or source of funding--without notifying the target. To obtain the information, the governmental authority must certify to the credit bureau that the information is necessary to conduct a terrorism investigation or analysis. The amendment would also create a safe harbor from liability for credit bureaus acting in good faith that comply with a government agency's request for information”).

44 *See also, DoJ* at §103, “This section facilities the disclosure of Title III information to other components of the intelligence community in terrorism investigations. At present, 18 U.S.C. §2517(1) generally allows information obtained via wiretap to be disclosed only to the extent that it will assist a criminal investigation. One must obtain a court order to disclose Title III information in non-criminal proceedings. Section 109 [103] would modify the
Second, it recommended a change in Rule 6(e) of the Federal Rules of Criminal Procedure that would allow disclosure of grand jury material to intelligence officials, Draft at §354.  

Third, it proposed elimination of all constraints on sharing foreign intelligence information uncovered during a law enforcement investigation, mentioning by name the constraints in Rule 6(e) and Title III, Draft at §154.

The Act combines versions of all three in section 203. Perhaps because of the nature of the federal grand jury, resolution of the grand jury provision proved especially difficult. The federal grand jury is an exceptional institution. Its purpose is to determine if a crime has been committed, and if so by whom; to indict the guilty; and to refuse to indict the innocent. Its probes may begin without probable cause or any other threshold of suspicion. It examines witnesses and evidence ordinarily secured in its name and questioned before it by Justice Department prosecutors. Its wiretap statutes to permit the disclosure of Title III-generated information to a non-law enforcement officer for such purposes as furthering an intelligence investigation. This will harmonize Title III standards with those of the Foreign Intelligence Surveillance Act (FISA), which allows such information-sharing. Allowing disclosure under Title III is particularly appropriate given that the requirements for obtaining a Title III surveillance order in general are more stringent than for a FISA order, and because the attendant privacy concerns in either situation are similar and are adequately protected by existing statutory provisions.”

See also, DoJ at §354, “This section makes changes in Rule 6(e) of the Federal Rules of Criminal Procedure, relating to grand jury secrecy, to facilitate the sharing of information with federal law enforcement, intelligence, protective, national defense, and immigration personnel in terrorism and national security cases. The section is in part complimentary to section 154 of the bill, relating to sharing of foreign intelligence information, and reflects a similar purpose of promoting a coordinated governmental response to terrorist and national security threats.” Contrary to the implication here section 154 deals with sharing information gathered by law enforcement officials not with information gathered by intelligence officers.

See also, DoJ at §154, “This section provides that foreign intelligence information obtained in criminal investigations, including grand jury and electronic surveillance information, may be shared with other federal government personnel having responsibilities relating to the defense of the nation and its interests. With limited exceptions, it is presently impossible for criminal investigators to share information obtained through a grand jury (including through the use of grand jury subpoenas) and information obtained from electronic surveillance authorized under Title III with the intelligence community. This limitation will be very significant in some criminal investigations. For example, grand jury subpoenas often are used to obtain telephone, computer, financial and other business records in organized crime investigations. Thus, these relatively basic investigative materials are inaccessible for examination by intelligence community analysts working on related transnational organized crime groups. A similar problem occurs in computer intrusion investigations: grand jury subpoenas and Title III intercepts are used to collect transactional data and to monitor the unknown intruders. The intelligence community will have an equal interest in such information, because the intruder may be acting on behalf of a foreign power.”

Blair v. United States, 250 U.S. 273, 281 (1919)(the grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime”).
These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

Critics may protest that the change could lead to the use of the grand jury for intelligence gathering purposes, or less euphemistically, to spy on Americans. The proposal was never among those scheduled to sunset, but earlier versions of the section followed the path used for most other disclosures of grand jury material: prior

48 These officers may receive: (1) “foreign intelligence information” that is, information regardless whether it involves Americans or foreign nationals that “[a] relates to the ability of the United States to protect against – (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; (cc) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [b] “with respect to a foreign power or foreign territory that relates to – (aa) the national defense or security of the United States; or (bb) the conduct of the foreign affairs of the United States,” F.R.Crim.P. 6(e)(3)(C)(iv); (2) when the matters involve foreign intelligence or counterintelligence, that is, [a] “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” or [b] “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities,” 50 U.S.C. 401a(2),(3)(language added by section 902 of the Act in italics).

49 Beale & Felman, The Consequences of Enlisting Federal Grand Juries in the War on Terrorism: Assessing the USA PATRIOT Act’s Changes to Grand Jury Secrecy, 25 Harvard Journal of Law & Public Policy 699, 719-20 (2002)(“There is a significant danger that the rule permitting disclosure will be treated as the de facto authorization of an expansion of the grand jury’s investigative role to encompass seeking material relevant only to matters of national security, national defense, immigration, and so forth. The grand jury’s awesome powers should not be unwittingly extended to a much wider range of issues. . . Since the grand jury operates in secret, there are no public checks on the scope of its investigations, and witnesses are not permitted to challenge its jurisdiction. Only the supervising court is in a position to keep the grand jury’s investigation within proper bounds. Requiring judicial approval of foreign intelligence and counterintelligence information disclosures would provide a natural check against the temptation to manipulate the grand jury to develop information for unauthorized purposes”); but see, Scheidegger et al., Federalist Society White Paper on The USA PATRIOT Act of 2001: Criminal Procedure Sections 6 (Nov. 2001)(“The grand jury secrecy rule is a rule of policy which has always had exceptions, and it has been frequently modified. The secrecy rule has no credible claim to constitutional stature”).
Law enforcement officials may share Title III information with the intelligence community under the same conditions, section 203(b), although the grand jury and Title III sharing provisions differ in at least three important respects. The court need not be notified of Title III disclosures. On the other hand, the authority for sharing Title III information expires on December 31, 2005, section 224, and agencies and their personnel guilty of intentional improper disclosures may be subject to a claim for damages and disciplinary action, 18 U.S.C. 2520.

The third subsection of section 203 remains something of an enigma. It speaks in much the same language as its counterparts. It allows law enforcement officials to share information with the intelligence community, “notwithstanding any other provisions of law,” section 203(d). It either swallows the other subsections, or supplements them. Several factors argue for its classification as a supplement. Congress is unlikely to have crafted subsections (a), (b) and (c) only to completely

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50 Information derived from a Title III interception may be shared with any other federal law enforcement, intelligence, protective, immigration, national defense, or national security officer if it regards: (1) “foreign intelligence information” that is, information irrespective of whether it involves Americans or foreign nationals that “[A] relates to the ability of the United States to protect against – (i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; (iii) clandestine intelligence activities by an intelligence service or network of a foreign power;” or [B] “with respect to a foreign power or foreign territory that relates to – (i) the national defense or security of the United States; or (ii) the conduct of the foreign affairs of the United States;” (2) when the matters involve foreign intelligence or counterintelligence as defined by 50 U.S.C. 401a (as amended by section 902 of the Act), i.e., “As used in this Act: (1) The term ‘intelligence’ includes foreign intelligence and counterintelligence. (2) The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities. (3) The term ‘counterintelligence’ means information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” (language added by section 902 in italics).

51 “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. ) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information,” §203(d)(1). The subsection goes to define “foreign intelligence information” in the same terms used to define that phrase in Title III (18 U.S.C. 2510(19)) and in Rule 6(e)(F.R.Crim.P.6(e)(3)(C)(iv)), §203(d)(2).
nullify them in subsection (d). Without a clear indication to the contrary, the courts are unlikely to find that Congress intended nullification.\(^{52}\) By gathering the three into a single section Congress avoided the suggestion that the phrase “notwithstanding any other provision of law” constitutes surplusage. The Title III and grand jury sharing procedures are not in other provisions of law, they are now subsections of the same provision of law. Moreover, Congress seemed to signal an intent for the subsections to operate in tandem when it dropped the language of the original Justice Department proposal which expressly identified Title III and Rule 6(e) as examples of the restrictions to be overcome by the universal sharing language.\(^{53}\)

Section 203 deals with earlier legal impediments to sharing foreign intelligence information unearthed during the course of a criminal investigation. Section 905 looks to dissolve the barriers may be more cultural than legal. Under it, the Attorney General is to issue guidelines governing the transmittal to the Director of Central Intelligence of foreign intelligence information that surfaces in the course of a criminal investigation. The section also instructs the Attorney General to promulgate guidelines covering reports to the Director of Central Intelligence on whether a criminal investigation has been initiated or declined based on an intelligence community referral, 50 U.S.C. 403-5b. To ensure effective use of increased information sharing, section 908 calls for training of federal, state and local officials to enable them to recognize foreign intelligence information which they encounter in their work and how to use it in the performance of their duties, 28 U.S.C. 509 note.

**Increasing Institutional Capacity.** As noted elsewhere, the Act liberalizes authority for the FBI to hire translators, section 203, which enhances its capacity to conduct both criminal and foreign intelligence investigations. The Act also reflects sentiments expressed earlier concerning coordinated efforts to develop a

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\(^{52}\) *Duncan v. Walker*, 121 S.Ct. 2120, 2125 (2001)(internal quotation marks and parallel citations omitted) (“It is our duty to give effect, if possible, to every clause and word of a statute. *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)); see also *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing this rule as a cardinal principle of statutory construction); *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879)(As early as in Bacon's Abridgment, sect. 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). We are thus reluctant to treat statutory terms as surplusage in any setting. *Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687, 698 (1995); see also *Ratzlaf v. United States*, 510 U.S. 135, 140 (1994)”.

\(^{53}\) *Draft* at §154, “Notwithstanding any other provision of law, it shall be lawful for foreign intelligence information obtained as part of a criminal investigation (including, without limitation, information subject to Rule 6(e) of the Federal Rules of Criminal Procedure and information obtained pursuant to chapter 119 of title 18, United States Code [i.e. Title III]) to be provided to any federal law enforcement, intelligence, protective, or national defense personnel, or any federal personnel responsible for administering the immigration laws of the United States, or to the President and the Vice President of the United States.”
computerized translation capability to be used in foreign intelligence gathering.\textsuperscript{54} Section 907 instructs the Director of the Central Intelligence, in consultation with the Director of the FBI, to report on the creation of a National Virtual Translation Center. The report is to include information concerning staffing, allocation of resources, compatibility with comparable systems to be used for law enforcement purposes, and features which permit its efficient and secure use by all of the intelligence agencies.

**Money Laundering**

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, international cooperation, criminal sanctions, and forfeiture.\textsuperscript{55} The Act bolsters federal efforts in each area.

**Regulation.** Prior to passage of the Act, the Treasury Department already enjoyed considerable authority to impose reporting and record-keeping standards on financial institutions generally and with respect to anti-money laundering matters in particular.\textsuperscript{56}

\begin{itemize}
  \item \textsuperscript{54}“The Committee is concerned that intelligence in general, and intelligence related to terrorism in particular, is increasingly reliant on the ability of the Intelligence Community to quickly, accurately and efficiently translate information in a large number of languages. Many of the languages for which translation capabilities are limited within the United States Government are the languages that are of critical importance in our counterterrorism efforts. The Committee believes that this problem can be alleviated by applying cutting-edge, internet-like technology to create a ‘National Virtual Translation Center.’ Such a center would link secure locations maintained by the Intelligence Community throughout the country and would apply digital technology to network, store, retrieve, and catalogue the audio and textual information. Foreign intelligence could be collected technically in one location, translated in a second location, and provided to an Intelligence Community analyst in a third location.

  \item “The Committee notes that the CIA, FBI NSA and other intelligence agencies have applied new technology to this problem. The Committee believes that these efforts should be coordinated so that the solution can be applied on a Community-wide basis. Accordingly, the Committee directs the Director of Central Intelligence, in consultation with the Director of the FBI, and other heads of departments and agencies within the Intelligence Community, to prepare and submit to the intelligence committees by June 1, 2002, a report concerning the feasibility and structure of a National Virtual Translation Center, including recommendations regarding the establishment of such a center and the funding necessary to do so,” S.Rep.No. 107-63, at 11 (2001).


  \item See e.g., 12 U.S.C. 1829b (retention or records by insured depository institutions), 1951-1959 (record-keeping by financial institutions); 31 U.S.C. 5311 (“It is the purpose of this subchapter [31 U.S.C. 5311 et seq.] (except section 5315 [relating to foreign current transaction reports]) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings”).
\end{itemize}
**Records and Reports.** For instance, under the Currency and Financial Transaction Reporting Act, a component of the Bank Secrecy Act, anyone who transports more than $10,000 into or out of the United States must report that fact to the Treasury Department, 31 U.S.C. 5316. Banks, credit unions, and certain other financial institutions must likewise report identifying information relating to cash transactions in excess of $10,000 to the Treasury Department (CTRs), 31 U.S.C. 5313, 31 C.F.R. §103.22. Other businesses are required to report to the Internal Revenue Service the particulars relating to any transaction involving more than $10,000 in cash, 26 U.S.C. 6050I. Banks must file suspicious activity reports (SARs) with the Treasury Department's Financial Crimes Enforcement Network (FinCEN) for any transactions involving more than $5,000 which they suspect may be derived from illegal activity, 31 U.S.C. 5318(g), 31 C.F.R. §103.18. Money transmission businesses and those that deal in traveler's checks or money orders are under a similar obligation for suspicious activities involving more than $2,000, 31 U.S.C. 5318(g), 31 C.F.R. §103.18.

Among other things, the Act expands the authority of the Secretary of the Treasury over these reporting requirements. He is to promulgate regulations, pursuant to sections 356 and 321, under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports, 31 U.S.C. 5318 note; 31 U.S.C. 5312(2)(c)(1). Businesses which were only to report cash transactions involving more than $10,000 to the IRS are now required to file SARs as well, reflecting Congress’ view that the information provided the IRS may be valuable for other law enforcement purposes. This concern is likewise

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58 H.R.Rep.No. 107-250, at 38-9 (2001)(“Most importantly, the Committee found significant shortcomings in the use of information already in possession of the government. Section 6050I of the Internal Revenue Code requires that any person engaged in a trade or business (other than financial institutions required to report under the Bank Secrecy Act) file a report with the Federal government on cash transactions in excess of $10,000. Reports filed pursuant to this requirement provide law enforcement authorities with a paper trail that can, among other things, lead to the detection and prosecution of money laundering activity.

Under current law, non-financial institutions are required to report cash transactions exceeding $10,000 to the Internal Revenue Service (IRS) on IRS Form 8300. Because the requirement that such reports be filed is contained in the Internal Revenue Code, Form 8300 information is considered tax return information, and is subject to the procedural and record-keeping requirements of section 6103 of the Internal Revenue Code. For example, section 6103(p)(4)(E) requires agencies seeking Form 8300 information to file a report with the Secretary of the Treasury that describes the procedures established and utilized by the agency for ensuring the confidentiality of the information. IRS requires that agencies requesting Form 8300 information file a ‘Safeguard Procedures Report’ which must be approved by the IRS before any such information can be released. For that reason, Federal, State and local law enforcement agencies are not given access to the Form 8300s as Congress anticipated when it last amended this statute. See 26 U.S.C. 6103(l)(15).

While the IRS uses Form 8300 to identify individuals who may be engaged in tax evasion, Form 8300 information can also be instrumental in helping law enforcement authorities trace cash payments by drug traffickers and other criminals for luxury cars, jewelry, and other expensive merchandise. Because of the restrictions on their dissemination outlined above, however, Form 8300s are not nearly as accessible to law enforcement
reflected in section 357 which asks the Secretary of the Treasury to report on the Internal Revenue Service’s role in the administration of the Currency and Foreign Transaction Reporting Act (31 U.S.C. 5311 et seq.), and what transfers of authority, if any, are appropriate.

Sections 351 and 355 address the liability for disclosure of suspicious activity reports (SARs). Prior to the Act, federal law prohibited financial institutions and their officers and employees from tipping off any of the participants in a suspicious transaction, 31 U.S.C. 5318(g)(2)(2000 ed.). Federal law, however, immunized the institutions and their officers and employees from liability for filing the reports and for failing to disclose that they had done so, 31 U.S.C. 5318(g)(3)(2000 ed.). Section 351 makes changes in both the immunity and the proscription. It adds government officials who have access to the reports to the anti-tip ban, 31 U.S.C. 5318(g)(2)(A). It allows, but does not require, institutions to reveal SAR information in the context of employment references to other financial institutions, 31 U.S.C. 5318(g)(2)(B). Finally, it makes clear that the immunity does not extend to immunity from governmental action.59 Section 355 expands the immunity to cover disclosures in

authorities as the various reports mandated by the Bank Secrecy Act, which can typically be retrieved electronically from a database maintained by the Treasury Department. The differential access to the two kinds of reports is made anomalous by the fact that Form 8300 elicits much the same information that is required to be disclosed by the Bank Secrecy Act. For example, just as Form 8300 seeks the name, address, and social security number of a customer who engages in a cash transaction exceeding $10,000 with a trade or business, Currency Transaction Reports (CTRs) mandated by the Bank Secrecy Act require the same information to be reported on a cash transaction exceeding $10,000 between a financial institution and its customer”).

59 “Subsection (a) of section [351] makes certain technical and clarifying amendments to 31 U.S.C. 5318(g)(3), the Bank Secrecy Act’s ‘safe harbor’ provision that protects financial institutions that disclose possible violations of law or regulation from civil liability for reporting their suspicions and for not alerting those identified in the reports. The safe harbor is directed at Suspicious Activity Reports and similar reports to the government and regulatory authorities under the Bank Secrecy Act.

“First, section [351](a) amends section 5318(g)(3) to make clear that the safe harbor from civil liability applies in arbitration, as well as judicial, proceedings. Second, it amends section 5318(g)(3) to clarify the safe harbor’s coverage of voluntary disclosures (that is, those not covered by the SAR regulatory reporting requirement). The language in section 5318(g)(3)(A) providing that ‘any financial institution that *** makes a disclosure pursuant to *** any other authority *** shall not be liable to any person’ is not intended to avoid the application of the reporting and disclosure provisions of the Federal securities laws to any person, or to insulate any issuers from private rights of actions for disclosures made under the Federal securities laws.

“Subsection [351](b) amends section 5318(g)(2) of title 31—which currently prohibits notification of any person involved in a transaction reported in a SAR that a SAR has been filed—to clarify (1) that any government officer or employee who learns that a SAR has been filed may not disclose that fact to any person identified in the SAR, except as necessary to fulfill the officer or employee’s official duties, and (2) that disclosure by a financial institution of potential wrongdoing in a written employment reference provided in response to a request from another financial institution pursuant to section 18(v) of the Federal Deposit Insurance Act, or in a written termination notice or employment reference provided in accordance with the rules of a securities self-regulatory organization, is not prohibited simply because the
potential wrongdoing was also reported in a SAR,” H.R.Rep.No. 107-250, at 66 (2001).

31 U.S.C. 1828(w). “This section deals with the same employment reference issue addressed in section [351] but with respect to title 12. Occasionally banks develop suspicions that a bank officer or employee has engaged in potentially unlawful activity. These suspicions typically result in the bank filing a SAR. Under present law, however, the ability of banks to share these suspicions in written employment references with other banks when such an officer or employee seeks new employment is unclear. Section 208 would amend 12 U.S.C. 1828 to permit a bank, upon request by another bank, to share information in a written employment reference concerning the possible involvement of a current or former officer or employee in potentially unlawful activity without fear of civil liability for sharing the information, but only to the extent that the disclosure does not contain information which the bank knows to be false, and the bank has not acted with malice or with reckless disregard for the truth in making the disclosure,” H.R.Rep.No. 107-250, at 67 (2001).
These special measures may require U.S. financial institutions to:

- maintain more extensive records and submit additional reports relating to participants in foreign financial transactions with which they are involved
- secure beneficial ownership information with respect to accounts maintained for foreign customers
- adhere to “know-your-customer” requirements concerning foreign customers who use “payable-through accounts” held by the U.S. entity for foreign financial institutions
- keep identification records on foreign financial institutions’ customers whose transactions are routed through the foreign financial institution’s correspondent accounts with the U.S. financial institution
- honor limitations on correspondent or payable-through accounts maintained for foreign financial institutions.

31 U.S.C. 5318A. The circumstances considered in the case of a suspect jurisdiction are: evidence of organized crime or terrorist transactions there; the extent to which the jurisdiction’s bank secrecy or other regulatory practices encourage foreign use; the extent and effectiveness of the jurisdiction’s banking regulation; the volume of financial transactions in relation to the size of the jurisdiction’s economy; whether international watch dog groups (such as the Financial Action Task Force) have identified the jurisdiction as an offshore banking or secrecy haven; the existence or absence of a mutual legal assistance treaty between the U.S. and the jurisdiction; and the extent of official corruption within the jurisdiction. The institutional circumstances weighed before imposing special measures with respect to particular institutions or types of accounts or transactions include the intent to which the suspect institution or types of accounts or transactions are particularly attractive to money launderers, the extent to which they can be used by legitimate businesses, and the extent to which focused measures are likely to be successful.

The House report describes these measures in greater detail: “Section [311] adds a new section 5318A to the Bank Secrecy Act, authorizing the Secretary of the Treasury to require domestic financial institutions and agencies to take one or more of five ‘special measures’ if the Secretary finds that reasonable grounds exist to conclude that a foreign jurisdiction, a financial institution operating outside the United States, a class of international transactions, or one or more types of accounts is a ‘primary money laundering concern.’ Prior to invoking any of the special measures contained in section 5318A(b), the Secretary is required to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Securities and Exchange Commission, the National Credit Union Administration Board, and, in the sole discretion of the Secretary, such other agencies and interested parties as the Secretary may find to be appropriate. Among other things, this consultation is designed to ensure that the Secretary possesses information on the effect that any particular special measure may have on the domestic and international banking system. In addition, the Committee encourages the Secretary to consult with non-governmental ‘interested parties,’ including, for example, the Bank Secrecy Act Advisory Group, to obtain input from those who may be subject to a regulation or order under this section.

“Prior to invoking any of the special measures contained in section 5318A, the Secretary must consider three discrete factors, namely (1) whether other countries or multilateral groups have taken similar action; (2) whether the imposition of the measure would create a significant competitive disadvantage, including any significant cost or burden associated with compliance, for firms organized or licensed in the United States; and (3) the extent to which the action would have an adverse systemic impact on the payment system or legitimate
business transactions.

“Finally, subsection (a) makes clear that this new authority is not to be construed as superseding or restricting any other authority of the Secretary or any other agency.

“Subsection (b) of the new section 5318A outlines the five ‘special measures’ the Secretary may invoke against a foreign jurisdiction, financial institution operating outside the U.S., class of transaction within, or involving, a jurisdiction outside the U.S., or one or more types of accounts, that he finds to be of primary money laundering concern.

“The first such measure would require domestic financial institutions to maintain records and/or file reports on certain transactions involving the primary money laundering concern, to include any information the Secretary requires, such as the identity and address of participants in a transaction, the legal capacity in which the participant is acting, the beneficial ownership of the funds (in accordance with steps that the Secretary determines to be reasonable and practicable to obtain such information), and a description of the transaction. The records and/or reports authorized by this section must involve transactions from a foreign jurisdiction, a financial institution operating outside the United States, or class of international transactions within, or involving, a foreign jurisdiction, and are not to include transactions that both originate and terminate in, and only involve, domestic financial institutions.

“The second special measure would require domestic financial institutions to take such steps as the Secretary determines to be reasonable and practicable to ascertain beneficial ownership of accounts opened or maintained in the U.S. by a foreign person (excluding publicly traded foreign corporations) associated with what has been determined to be a primary money laundering concern.

“The third special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘payable-through account’ for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. A ‘payable-through account’ is defined for purposes of the legislation as an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a sub-account, in banking activities usual in connection with the business of banking in the United States.

“The fourth special measure the Secretary could impose in the case of a primary money laundering concern would require domestic financial institutions, as a condition of opening or maintaining a ‘correspondent’ account for a foreign financial institution, to identify each customer (and representative of the customer) who is permitted to use or whose transactions flow through such an account, and to obtain for each customer (and representative) information that is substantially comparable to the information it would obtain with respect to its own customers. With respect to a bank, the term ‘correspondent account’ means an account established to receive deposits from and make payments on behalf of a foreign financial institution.

“The fifth measure the Secretary could impose in the case of a primary money laundering concern would prohibit or impose conditions (beyond those already provided for in the third and fourth measures) on domestic financial institutions’ correspondent or payable-through accounts with foreign banking institutions. In addition to the required consultation with the Chairman of the Board of Governors of the Federal Reserve, prior to imposing this measure the Secretary is also directed to consult with the Secretary of State and the Attorney General.

“The five special measures authorized by this section may be imposed in any sequence or combination as the Secretary determines. The first four special measures may be imposed
**Due Diligence.** Section 312 demands that all U.S. financial institutions have policies, procedures, and controls in place to identify instances where their correspondent and private banking accounts with foreign individuals and entities might be used for money laundering purposes, 31 U.S.C. 5318(i). They must establish enhanced due diligence standards for correspondent accounts held for offshore banking institutions (whose licenses prohibit them from conducting financial activities in the jurisdiction in which they are licensed) or institutions in money laundering jurisdictions designated by the Secretary of the Treasury or by international watch dog groups such as the Financial Action Task Force. The standards must at least involve reasonable efforts to identify the ownership of foreign institutions which are not publicly held; closely monitor the accounts for money laundering activity; and to hold any foreign bank, for whom the U.S. institution has a correspondent account, to the same standards with respect to other correspondent accounts maintained by the foreign bank. In the case of private banking accounts of $1 million or more, U.S. financial institutions must keep records of the owners of the accounts and the source of funds deposited in the accounts. They must report suspicious transactions and, when the accounts are held for foreign officials, guard against transactions involving foreign official corruption.63

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63 See generally, H.R.Rep. No. 107-250, at 71-2 (“Section [312] amends 31 U.S.C. 5318 to require financial institutions that establish, maintain, administer, or manage private banking or correspondent accounts for non-U.S. persons to establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls to detect and report instances of money laundering through those accounts.

“The section requires financial institutions to apply enhanced due diligence procedures when opening or maintaining a correspondent account for a foreign bank operating (1) under a license to conduct banking activities which, as a condition of the license, prohibits the licensed entity from conducting banking activities with the citizens of, or with the local currency of, the country which issued the license; or (2) under a license issued by a foreign country that has been designated (a) as non-cooperative with international anti-money laundering principles by an intergovernmental group or organization of which the United States is a member, with which designation the Secretary of the Treasury concurs, or (b) by the Secretary as warranting special measures due to money laundering concerns.

“The enhanced due diligence procedures include (1) ascertaining the identity of each of the owners of the foreign bank (except for banks that are publicly traded); (2) conducting enhanced scrutiny of the correspondent account to guard against money laundering and report any suspicious activity; and (3) ascertaining whether the foreign bank provides correspondent accounts to other foreign banks and, if so, the identity of those foreign banks and related due diligence information.

“For private banking accounts requested or maintained by a non-United States person, a financial institution is required to implement procedures for (1) ascertaining the identity of the nominal and beneficial owners of, and the source of funds deposited into, the account as needed to guard against money laundering and report suspicious activity; and (2) conducting enhanced scrutiny of any such account requested or maintained by, or on behalf of, a senior foreign political figure, or his immediate family members or close associates, to prevent,
detect and report transactions that may involve the proceeds of foreign corruption. A private bank account is defined as an account (or any combination of accounts) that requires a minimum aggregate deposit of funds or other assets of not less than $1 million; is established on behalf of one or more individuals who have a direct or beneficial ownership in the account; and is assigned to, or administered or managed by, an officer, employee or agent of a financial institution acting as a liaison between the institution and the direct or beneficial owner of the account.

“This section directs the Secretary of the Treasury, within 6 months of enactment of this bill and in consultation with appropriate Federal functional regulators, to further define and clarify, by regulation, the requirements imposed by this section”.

64 Or more exactly, a bank which has no physical presence in any country; a “physical presence” for a foreign bank is defined as “a place of business that – (i) is maintained by a foreign bank; (ii) is located at a fixed address (other than solely an electronic address) in a country in which the foreign bank is authorized to conduct banking activities, at which location the foreign bank – (I) employs 1 or more individuals on a full-time basis; and (II) maintains operating records relating to its banking activities; and (iii) is subject to inspection by the banking authority which licensed the foreign bank to conduct banking activities,” 31 U.S.C. 5318(j)(4).


66 The Act does not define “concentration accounts,” although the House Financial Services Committee report provides some incite into the section’s intent, H.R.Rep.No. 107-250, at 72-3 (2001) (“This section gives the Secretary of the Treasury discretionary authority to prescribe regulations governing the maintenance of concentration accounts by financial institutions, to ensure that these accounts are not used to prevent association of the identity of an individual customer with the movement of funds of which the customer is the direct or beneficial owner. If promulgated, the regulations are required to prohibit financial institutions from allowing clients to direct transactions into, out of, or through the concentration accounts of the institution; prohibit financial institutions and their employees from informing customers of the existence of, or means of identifying, the concentration accounts of the institution; and to establish written procedures governing the documentation of all transactions involving a concentration account.”)
keeping and to recommend a means to effectively verify the identification of foreign customers.\textsuperscript{67}

\textsuperscript{67}31 U.S.C. 5318(l); H.R.Rep.No. 107-250, at 62-3 (2001)(“Section [326](a) amends 31 U.S.C. 5318 by adding a new subsection governing the identification of account holders. Paragraph (1) directs Treasury to prescribe regulations setting forth minimum standards for customer identification by financial institutions in connection with the opening of an account. By referencing ‘customers’ in this section, the Committee intends that the regulations prescribed by Treasury take an approach similar to that of regulations promulgated under title V of the Gramm-Leach-Bliley Act of 1999, where the functional regulators defined ‘customers’ and ‘customer relationship’ for purposes of the financial privacy rules. Under this approach, for example, where a mutual fund sells its shares to the public through a broker-dealer and maintains a ‘street name’ or omnibus account in the broker-dealer's name, the individual purchasers of the fund shares are customers of the broker-dealer, rather than the mutual fund. The mutual fund would not be required to ‘look through’ the broker-dealer to identify and verify the identities of those customers. Similarly, where a mutual fund sells its shares to a qualified retirement plan, the plan, and not its participants, would be the fund's customers. Thus, the fund would not be required to ‘look through’ the plan to identify its participants.

Paragraph (2) requires that the regulations must, at a minimum, require financial institutions to implement procedures to verify (to the extent reasonable and practicable) the identity of any person seeking to open an account, maintain records of the information used to do so, and consult applicable lists of known or suspected terrorists or terrorist organizations. The lists of known or suspected terrorists that the Committee intends financial institutions to consult are those already supplied to financial institutions by the Office of Foreign Asset Control (OFAC), and occasionally by law enforcement and regulatory authorities, as in the days immediately following the September 11, 2001, attacks on the World Trade Center and the Pentagon. It is the Committee's intent that the verification procedures prescribed by Treasury make use of information currently obtained by most financial institutions in the account opening process. It is not the Committee's intent for the regulations to require verification procedures that are prohibitively expensive or impractical.

Paragraph (3) requires that Treasury consider the various types of accounts maintained by various financial institutions, the various methods of opening accounts, and the various types of identifying information available in promulgating its regulations. This would require Treasury to consider, for example, the feasibility of obtaining particular types of information for accounts opened through the mail, electronically, or in other situations where the accountholder is not physically present at the financial institution. Millions of Americans open accounts at mutual funds, broker-dealers, and other financial institutions in this manner; it is not the Committee's intent that the regulations adopted pursuant to this legislation impose burdens that would make this prohibitively expensive or impractical. This provision allows Treasury to adopt regulations that are appropriately tailored to these types of accounts.

“Current regulatory guidance instructs depository institutions to make reasonable efforts to determine the true identity of all customers requesting an institution's services. (See, e.g., FDIC Division of Supervision Manual of Exam Policies, section 9.4 VI.) The Committee intends that the regulations prescribed under this section adopt a similar approach, and impose requirements appropriate to the size, location, and type of business of an institution.

Paragraph (4) requires that Treasury consult with the appropriate functional regulator in developing the regulations. This will help ensure that the regulations are appropriately tailored to the business practices of various types of financial institutions, and the risks that such practices may pose.

Paragraph (5) gives each functional regulator the authority to exempt, by regulation or order, any financial institution or type of account from the regulations prescribed under paragraph (1).
Federal regulatory authorities must approve the merger of various financial institutions under the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Deposit Insurance Act, 12 U.S.C. 1828. Section 327 requires consideration of an institution’s anti-money laundering record when such mergers are proposed, 12 U.S.C. 1842(c)(6), 1828(c)(11).

Section 314 directs the Secretary of the Treasury to promulgate regulations in order to encourage financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities, 31 U.S.C. 5311 note.

Section 319(b) requires U.S. financial institutions to respond to bank regulatory authorities’ requests for anti-money laundering records (within 120 hours) and to Justice or Treasury Department subpoenas or summons for records concerning foreign deposits (within 7 days), 31 U.S.C. 5318(k). Section 319 also calls for civil penalties of up to $10,000 a day for financial institutions who have failed to terminate correspondent accounts with foreign institutions that have ignored Treasury or Justice Department subpoenas or summons, 31 U.S.C. 5318(k)(3).

Section 352 directs the Secretary of the Treasury to promulgate regulations, in consultation with other appropriate regulatory authorities, requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature.

Section 359 subjects money transmitters to the regulations and requirements of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 5311 et seq.) and directs the Secretary of the Treasury to report on the need for additional legislation relating to domestic and international underground banking systems.

Federal law obligates the Administration to develop a national strategy for combating money laundering and related financial crimes, 31 U.S.C. 5341. Section 354 insists that the strategy contain data relating to the funding of international terrorism and efforts to prevent, detect, and prosecute such funding, 31 U.S.C. 5341(b)(12).

Section 364 authorizes the Board of Governors of the Federal Reserve to hire guards to protect members of the Board, as well as the Board’s property and personnel and that of any Federal Reserve bank. The guards may carry firearms and make arrests, 12 U.S.C. 248(q).

**Reports to Congress.** Section 366 instructs the Secretary of the Treasury to report on methods of improving the compliance of financial institutions with the currency transaction reporting requirements and on the possibility of expanding

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“Paragraph (6) requires that Treasury's regulations prescribed under paragraph (1) become effective within one year after enactment of this bill”).

exemptions to the requirements with an eye to improving the quality of data available for law enforcement purposes and reducing the number of unnecessary filings.\textsuperscript{69}

Section 324 instructs the Secretary of the Treasury to report on the execution of authority granted under the International Counter Money Laundering and Related Measures subtitle (III-A) of the Act and to recommend any appropriate related legislation, 31 U.S.C. 5311 note.

**International Cooperation.** Reflecting concern about the ability of law enforcement officials to trace money transfers to this country from overseas, section 328 instructs the Secretary of the Treasury, Secretary of State and Attorney General to make every effort to encourage other governments to require identification of the originator of international wire transfers.\textsuperscript{70}

Section 330 expresses the sense of the Congress that the Administration should seek to negotiate international agreements to enable U.S. law enforcement officials to track the financial activities of foreign terrorist organizations, money launderers and other criminals.

Section 360 authorizes the Secretary of the Treasury to direct the U.S. Executive Directors of the various international financial institutions (\textit{i.e.,} the International Monetary Fund, the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the African Development Bank, the African Development Fund, the Asian Development Bank, the Bank for Economic Development and Cooperation in the Middle East and North Africa, and the InterAmerican Investment Corporation): (1) to support the loan and other benefit efforts on behalf of countries that the President determines have supported our anti-terrorism efforts, and (2) to vote to ensure that funds from those institutions are not used to support terrorism.

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\textsuperscript{70} H.R.Rep.No. 107-250, at 67 (2001)(“This section directs the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to (1) take all reasonable steps to encourage foreign governments to require the inclusion of the name of the originator in wire transfer instructions sent to the U.S. and other countries; and (2) report annually to Congress on Treasury’s progress in achieving this objective, and on impediments to instituting a regime in which all appropriate identification about wire transfer recipients is included with wire transfers from their point of origination until disbursement.

“The Committee is concerned that inadequate information on the originator of wire transfers from a number of foreign jurisdictions makes it difficult for both law enforcement and financial institutions to properly understand the source of funds entering the United States in wire transfers. Such a lack of clarity could aid money launderers or terrorists in moving their funds into the United States financial system. Additionally, while arguments have been made that there are technical impediments to requiring that complete addressee information appear on all wire transfers terminating in or passing through the United States, the Committee believes that having such information is technically feasible and would aid both financial institutions in performing due diligence and law enforcement in tracking or seizing money that is the derivative of or would be used in the commission of a crime”).
**Crimes.** Federal criminal money laundering statutes punish both concealing the fruits of old offenses and financing new ones. They proscribe financial transactions which:

- involve more than $10,000 derived from one of a list of specified underlying crimes, 18 U.S.C. 1957, or
- are intended to promote any of the designated predicate offenses, or
- are intended to evade taxes, or
- are designed to conceal the proceeds generated by any of the predicate offenses, or
- are crafted to avoid transaction reporting requirements, 18 U.S.C. 1956.

They also condemn transporting funds into, out of, or through the United States with the intent to further a predicate offense, conceal its proceeds, or evade reporting requirements, 18 U.S.C. 1956. Offenders face imprisonment for up to twenty years, fines of up to $500,000, civil penalties, 18 U.S.C. 1956, 1957, and confiscation of the illicit funds involved in a violation or in any of the predicate offenses, 18 U.S.C. 981, 982.

The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for existing crimes. Section 315, for example, adds several crimes to the federal money laundering predicate offense list of 18 U.S.C. 1956. The newly added predicate offenses include crimes in violation of the laws of the other nations when the proceeds are involved in financial transactions in this country: crimes of violence, public corruption, smuggling, and offenses condemned in treaties to which we are a party, 18 U.S.C. 1956(c)(7)(B). Additional federal crimes also join the predicate list:

- 18 U.S.C. 541 (goods falsely classified)
- 18 U.S.C. 922(1) (unlawful importation of firearms)
- 18 U.S.C. 924(n) (firearms trafficking)
- 18 U.S.C. 1030 (computer fraud and abuse)

As the report accompanying H.R. 3004 explains:

This amendment enlarges the list of foreign crimes that can lead to money laundering prosecutions in this country when the proceeds of additional foreign crimes are laundered in the United States. The additional crimes include all crimes of violence, public corruption, smuggling, and offenses covered by existing bilateral extradition treaties. The Committee intends this provision to send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities. H.R.Rep.No. 107-250, at 55 (2000).

In this same vein, section 376 adds the crime of providing material support to a terrorist organization (18 U.S.C. 2339B) to the predicate offense list and section 318
Section 329 makes it a federal crime to corruptly administer the money laundering regulatory scheme. Offenders are punishable by imprisonment for not more than 15 years and a fine of not more than three times the amount of the bribe.

Section 5326 of title 31 authorizes the Secretary of the Treasury to impose temporary, enhanced reporting requirements upon financial institutions in areas victimized by substantial money laundering activity (geographic targeting regulations and orders). Section 353 makes it clear that the civil sanctions, criminal penalties, and prohibitions on smurfing (structuring transactions to evade reporting requirements) apply to violations of the regulations and orders issued under 31 U.S.C. 5326. It also extends the permissible length of the temporary geographical orders from 60 to 180 days.

Violations of the special measures and special due diligence requirements of sections 311 and 312 are subject to both civil and criminal penalties by virtue of section 363's amendments to 31 U.S.C. 5321(a) and 5322. The amendments authorize civil penalties and criminal fines of twice the amount of the transaction but not more than $1 million. Criminal offenders would be subject to a fine in the same amount.

71 “[S]ection 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. 5312. See 18 U.S.C. 1956(c)(6); 18 U.S.C. 1957(f).

“The definition of ‘financial institution’ in 5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of ‘commercial bank’ or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either 1956 or 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad--say to a Mexican bank--and launders them through a series of financial transactions, the government conceivably could not rely on the definition of a ‘financial institution’ in 1956(c)(6) to establish that the transaction was a ‘financial transaction’ within the meaning of 1956(c)(4)(B) (defining a ‘financial transaction’ as a transaction involving the use of a ‘financial institution’), or that it was a ‘monetary transaction’ within the meaning of 1957(f) (defining ‘monetary transaction’ as, inter alia, a transaction that would be a ‘financial transaction’ under 1956(c)(4)(B)).

“Similarly, the money laundering laws in effect in most countries simply make it an offense to launder the proceeds of any crime, foreign or domestic. In the United States, however, the money laundering statute is violated only when a person launderers the proceeds of one of the crimes set forth on a list of ‘specified unlawful activities.’ 18 U.S.C. 1956(c)(7). Currently only a handful of foreign crimes appear on that list. See 1956(c)(7)(B),” H.R.Rep.No. 107-250, at 38 (2000).

Earlier federal law prohibited the operation of illegal money transmitting businesses, 18 U.S.C. 1960. Section 373 amends the proscription to make it clear that the prohibition must be breached “knowingly” and to cover businesses which are otherwise lawful but which transmit funds they know are derived from or intended for illegal activities. It also amends 18 U.S.C. 981(a)(1)(A) to permit civil forfeiture of property involved in a transaction in violation of 18 U.S.C. 1960.73

Sections 374 and 375 of the Act seek to curtail economic terrorism by increasing and making more uniform the penalties for counterfeiting U.S. or foreign currency and by making it clear that the prohibitions against possession of counterfeiting paraphernalia extend to their electronic equivalents.74 They increase the maximum terms of imprisonment for violation of:

- 18 U.S.C. 471 (obligations or securities of the U.S.) from 15 to 20 years;
- 18 U.S.C. 472 (uttering counterfeit obligations and securities) from 15 to 20 years;
- 18 U.S.C. 473 (dealing in counterfeit obligations and securities) from 10 to 20 years;

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73 "The operation of an unlicensed money transmitting business is a violation of Federal law under 18 U.S.C. 1960. First, section 104 clarifies the scienter requirement in 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that an offense under 1960 is a general intent crime for which a defendant is liable if he knowingly operates an unlicensed money transmitting business. For purposes of a criminal prosecution, the Government would not have to show that the defendant knew that a State license was required or that the Federal registration requirements promulgated pursuant to 31 U.S.C. 5330 applied to the business.

“Second, section 104 expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another.

“Finally, when Congress enacted 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and allows the government to obtain forfeiture of property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive,” H.R.Rep.No. 107-250, at 54 (2001).

74 “This section makes it a criminal offense to possess an electronic image of an obligation or security document of the United States with intent to defraud. The provision harmonizes counterfeiting language to clarify that possessing either analog or digital copies with intent to defraud constitutes an offense. This section mimics existing language that makes it a felony to possess the plates from which currency can be printed, and takes into account the fact that most counterfeit currency seized today is generated by computers or computer-based equipment. The section also increases maximum sentences for a series of counterfeiting offenses,” H.R.Rep.No. 107-250, at 75-6 (2001).
For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).

Aliens believed to have engaged in money laundering may not enter the United States, section 1006 (8 U.S.C. 1182(a)(2)(I)). The same section directs the Secretary of State to maintain a watchlist to ensure that they are not admitted, 8 U.S.C. 1182 note.

**Bulk Cash.** Customs officials ask travelers leaving the United States whether they are taking $10,000 or more in cash with them. Section 1001 of title 18 of the United States Code makes a false response punishable by imprisonment for not more than 5 years. Section 5322 of title 31 makes failure to report taking $10,000 or more to or from the United States punishable by the same penalties. The Act’s bulk cash smuggling offense, section 371, augments these proscriptions with a somewhat unique feature, 31 U.S.C. 5332 – a criminal forfeiture of the smuggled cash in lieu of a criminal fine. The basic offense outlaws smuggling cash into or out of the United States. The concealment element of the offense seems to cover everything but in-sight possession as long as an amount $10,000 or more is carried in manner to evade reporting.\(^75\)

The section appears to be the product of reactions to the Supreme Court’s decision in *United States v. Bajakian*, 524 U.S. 321 (1998). There officials had confiscation $350,000 because Bajakian attempted to leave the country without declaring it, a violation of 31 U.S.C. 5322. In the view of the Court, the confiscation was grossly disproportionate to the gravity of the offense and consequently contrary to the Constitution’s excessive fines clause, 524 U.S. at 337. The Committee Report accompanying H.R. 3004 explains the Justice Department’s assurance that casting surreptitious removal of cash from the United States as a smuggling rather than a false reporting offense will avoid the adverse consequences of the Supreme Court’s

\(^75\) “For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual,” 31 U.S.C. 5332(a)(2).
As recent Congressional hearings have demonstrated, currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency—representing the proceeds of drug trafficking and other criminal offenses—is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad.

Presently, the only law enforcement weapon against such smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United States without filing a report with the United States Customs Service. The effectiveness of section 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S.Ct. 2028 (1998), the Supreme Court held that section 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

“Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against currency smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute,” H.R.Rep.No. 107-250 at 36-7 (2001).

Extraterritorial Jurisdiction. The Act makes 18 U.S.C. 1029, the federal statute condemning various crimes involving credit cards, PIN numbers and other access devices, applicable overseas if the card or device is issued by or controlled by an American bank or other entity and some article is held in or transported to or through the United States during the course of the offense, section 377. The change was part of the original Justice Department proposals. Justice explained that, “[financial crime] admits of no border, utilizing the integrated global financial network for ill purposes. This provision would apply the financial crimes prohibitions to conduct committed abroad, so long as the tools or proceeds of the crimes pass through or are in the United States,” DoJ at §408. The section, however, appears to limit the otherwise applicable extraterritorial jurisdiction implicit in section 1029, since federal courts would likely recognize extraterritorial jurisdiction over a violation

Section 5317 of title 31 once called for civil forfeiture of property traceable to a violation of 31 U.S.C. 5316 (reports on exporting or importing money instruments worth $10,000 or more). Section 372 of the Act recasts section 5317 to provide for civil and criminal forfeitures for violations of 31 U.S.C. 5316, of 31 U.S.C. 5313 (reports on domestic coins and currency transactions involving $10,000 or more) and of 31 U.S.C. 5324 (structuring transactions to evade reporting requirements (smurfing)).
under either circumstance (issued by a U.S. entity or physical presence in the U.S.) as well as a number of others.\textsuperscript{77}

**Venue.** Section 1004 relies on dicta in United States v. Cabrales, 524 U.S. 1, 8 (1998), in order to permit a money laundering prosecution to be brought in the place where the crime which generated the funds occurred, “if the defendant participated in the transfer of the proceeds,” 18 U.S.C. 1956(i).

Ordinarily, the Constitution requires that a crime be prosecuted in the state and district in which it occurs, in the case of money laundering,\textsuperscript{78} in the state and district in which the monetary transaction takes place. The Supreme Court in Cabrales held that a charge of money laundering in Florida, of the proceeds of a Missouri drug trafficking, could not be tried in Missouri. The Court declared in dicta, however, that “money laundering . . . arguably might rank as a continuing offense, triable in more than one place, if the launderer acquired the funds in one district and transported them into another,” 524 U.S. at 8.\textsuperscript{79}

**Forfeiture.** Forfeiture is the government confiscation of property as a consequence of crime.\textsuperscript{80} The forfeiture amendments of the Act fall into two categories. Some make adjustments to those portions of federal forfeiture law which govern the confiscation of property derived from, or used to facilitate, various federal crimes. Others follow the pattern used for the war-time confiscation of the property of enemy aliens under the Trading With the Enemy Act, 50 U.S.C.App. 1 et seq. (TWEA), forfeitures which turn on the ownership of the property rather than upon its proximity to any particular crime.

**Constitutional Considerations.** The Act adds TWEA-like amendments to the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 et seq., which already allowed the President to freeze the assets of foreign terrorists under certain conditions. Under IEEPA, as amended by section 106 of the Act, the President or his delegate may confiscate and dispose of any property, within the


\textsuperscript{78} “The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed,” U.S.Const. Art.III, §2, cl.3.

“If in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed; which district shall have been previously ascertainment by law,” U.S.Const. Amend. VI.

\textsuperscript{79} See also, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999) (holding that acquiring and using a firearm in Maryland in connection with a kidnaping in New Jersey might constitutionally be prosecuted in New Jersey under a statute which outlawed possession of a firearm “during and in relation to” a crime of violence.

\textsuperscript{80} For general background information, see, Doyle, Crime and Forfeiture, CRS REP.NO. 97-139A (Oct. 11, 2000).
jurisdiction of the United States, belonging to any foreign individual, foreign entity, or foreign country whom they determine to have planned, authorized, aided, or engaged in an attack on the United States by a foreign country or foreign nationals. The section also permits the government to present secretly (ex parte and in camera) any classified information upon which the forfeiture was based should the decision be subject to judicial review. The Justice Department requested the section as a revival of the President's powers in times of unconventional wars. By virtue of section 316, property owners may initiate a challenge to a confiscation by filing a claim under the rules applicable in maritime confiscations. The section permits two defenses to forfeiture—that the property is not subject to confiscation under section 106 or that the claimant is entitled to the innocent owner defense of 18 U.S.C. 983(d). The characterization of the defenses as “affirmative defense” indicates that the claimant bears the burden of proof. The innocent owner defenses of 18 U.S.C. 983(d) are probably not available in cases under section 106, since that section is explicitly

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81 “This section is designed to accomplish two principal objectives. First, the section restores to the President, in limited circumstances involving armed hostilities or attacks against the United States, the power to confiscate and vest in the United States property of enemies during times of national emergency, which was contained in the Trading with the Enemy Act, 50 App. U.S.C. §5(b)(TWEA) until 1977. Until the International Economic Emergency Act (IEEPA) was passed in 1977, section 5(b) permitted the President to vest enemy property in the United States during time of war or national emergency. When IEEPA was passed, it did not expressly include a provision permitting the vesting of property in the United States, and section 5(b) of TWEA was amended to apply only ‘during the time of war.’ 50 App.U.S.C. §5(b).

“This new provision tracks the vesting language currently in section 5(b) of TWEA and permits the President, only in the limited circumstances when the United States is engaged in military hostilities or has been subject to an attack, to confiscate property of any foreign country, person, or organization involved in hostilities or attacks on the United States. Like the original provision in TWEA, it is an exercise of Congress's war power under Article I, section 8, clause 11 of the Constitution and is designed to apply to unconventional warfare where Congress has not formally declared war against a foreign nation.

“The second principal purpose of this amendment to IEEPA is to ensure that reviewing courts may base their rulings on an examination of the complete administrative record in sensitive national security or terrorism cases without requiring the United States to compromise classified information. New section (c) would authorize a reviewing court, in the process of verifying that determinations made by the executive branch were based upon substantial evidence and were not arbitrary or capricious, to consider classified evidence ex parte and in camera. This would ensure that reviewing courts have the best and most complete information upon which to base their decisions without forcing the United States to choose between compromising highly sensitive intelligence information or declining to take action against individuals or entities that may present a serious threat to the United States or its nationals. A similar accommodation mechanism was enacted by Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996, 8 U.S.C. §1189(b)(2),” DoJ at §159.

82 “An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that—(1) the property is not subject to confiscation under such provision of law; or (2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case,” Sec. 316(a).
excepted from the coverage of 18 U.S.C. 983. The challenge proceedings permit the court to admit evidence, such as hearsay evidence, that would not otherwise be admissible under the Federal Rules of Evidence if the evidence is reliable and if national security might be imperiled should dictates of the Federal Rules be followed, §316(b). The section recognizes the rights of claimants to proceed alternatively under the Constitution or the Administrative Procedure Act.

The Justice Department also recommended enactment of an overlapping provision which ultimately passed as section 806 of the Act without any real discussion of the relationship of the two sections. Section 806 authorizes confiscation of all property, regardless of where it is found, of any individual, entity, or organization engaged in domestic or international terrorism (as defined in 18 U.S.C. 2331), against the United States, Americans or their property, 18 U.S.C.

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83 18 U.S.C. 983(i)(2)(D).

84 “The exclusion of certain provisions of Federal law from the definition of the term ‘civil forfeiture statute’ in section 983(i) of title 18, United States Code, shall not be construed to deny an owner of property the right to contest the confiscation of assets of suspected international terrorists under – (A) subsection (a) of this section; (B) the Constitution; or (C) subchapter II of chapter 5 of title 5, United States Code (commonly known as the ‘Administrative Procedure Act’).” Sec. 316(c)(1).

85 “Current law does not contain any authority tailored specifically to the confiscation of terrorist assets. Instead, currently, forfeiture is authorized only in narrow circumstances for the proceeds of murder, arson, and some terrorism offenses, or for laundering the proceeds of such offenses. However, most terrorism offenses do not yield ‘proceeds,’ and available current forfeiture laws require detailed tracing that is quite difficult for accounts coming through the banks of countries used by many terrorists.

‘This section increases the government’s ability to strike at terrorist organizations’ economic base by permitting the forfeiture of its property regardless of the source of the property, and regardless of whether the property has actually been used to commit a terrorism offense. This is similar in concept to the forfeiture now available under RICO. In parity with the drug forfeiture laws, the section also authorizes the forfeiture of property used or intended to be used to facilitate a terrorist act, regardless of its source. There is no need for a separate criminal forfeiture provision because criminal forfeiture is incorporated under current law by reference. The provision is retroactive to permit it to be applied to the events of September 11, 2001,” DoJ, at §403. The House Report on H.R. 2975 which contained versions of both sections is no more explicit on the relation of the two sections.

86 “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct
Section 806 as discussed below also calls for the more common confiscation of property derived from and or facilitating acts of domestic or international terrorism against the United States or its citizens. Confiscations under 806 may be challenged under the procedures of 18 U.S.C. 983, since they are not exempted there. To the extent that forfeiture under section 806 is based on international rather than domestic terrorism, claimants may also use the procedures of section 316.

Confiscation based solely on the fact that the property is owned by a criminal offender, rather than that it is derived from or facilitates some crime is fairly uncommon. It is the mark of common law forfeiture of estate. At common law, a felon forfeited all of his property. Most contemporary forfeiture statutes employ statutory forfeiture, a more familiar presence in American law, which consists of the confiscation of things whose possession is criminal, of the fruits of crime, and of the means of crime – untaxed whiskey, the drug dealer’s profits, and the rum runner’s ship.

Three characteristics set forfeiture of estate apart. The property is lost solely by reason of its ownership by a felon. All of a felon’s property is confiscated, not merely that which is related to the crime for which he is convicted. Finally, it occasions attainder which negates the felon’s right to hold property or for title to property to pass through him to his heirs. It was with this in mind, that the Framers declared that “no attainder of treason shall work corruption of blood or forfeiture exception during the life of the person attainted.” And for this reason, President Lincoln insisted that the confiscated real estate of Confederate supporters should revert their heirs at death.

of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1),(5) (as amended by section 802 of the Act).

87 Austin v. United States, 509 U.S. 602, 611-12 (1993) (“Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture, and statutory forfeiture . . . . Of England’s three kinds of forfeiture, only the third took hold in the United States”).


89 12 Stat. 589, 627 (1862). Some would suggest a fourth distinction: that it follows a felony conviction. This is hardly a distinction, since over time legislation creating statutory forfeitures has employed criminal in personam proceedings following criminal conviction as a means of accomplishing confiscation.
Neither section 106 nor 806 require conviction of the terrorist property owner.\textsuperscript{90} Both call for forfeiture of all of the terrorist’s property, without requiring any nexus to the terrorist’s offenses other than terrorist ownership. Neither makes any explicit provision for the terrorist’s heirs. Section 106 applies only to foreign persons, organizations, or countries, but section 806 recognizes no such distinction.

Of course, the Supreme Court long ago confirmed the constitutional validity of a seemingly similar pattern in TWEA under the President’s war powers.\textsuperscript{91} The Court was careful to point out, however, that the TWEA procedure was not really forfeiture or confiscation for the benefit of the United States, but by express statutory provision a liquidation measure to protect the creditors of enemy property owners.\textsuperscript{92} Neither section 106 nor 806 are part of TWEA and neither explicitly treats the proceeds of confiscation as a fund for the benefit of creditors. Moreover, broad as the President’s war powers may be, they would hardly seem to provide a justification for section 806, which embraces domestic terrorism and is neither limited to foreign offenders nor predicated upon war-like hostilities.

Criminal forfeitures, civil forfeitures with punitive as well as remedial purposes, and civil forfeitures whose effect is so punitive as to negate any presumption of remedial purpose, all raise other constitutional points of interest. The Eighth Amendment’s excessive fines clause prohibits criminal forfeitures, and civil forfeitures with at least some punitive purposes, that are grossly disproportionate to the gravity of the crimes which trigger them.\textsuperscript{93} The Fifth Amendment’s double jeopardy clause applies to criminal forfeitures and civil forfeitures which are so punitive as to negate

\textsuperscript{90} Although by operation of law property subject to civil forfeiture of section 806 may be confiscated upon conviction of the property owner for any crime of domestic or international terrorism, 28 U.S.C. 2461(c) (“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act”).

\textsuperscript{91} Silesian American Corp. V. Clark, 332 U.S. 469 (1947); cf., Societe Internationale v. Rogers, 357 U.S. 197, 211 (1958) (“this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure”).

\textsuperscript{92} Zittman v. McGrath, 341 U.S. 471, 473-74 (1951)(citing 50 U.S.C.App. 34) (“While the statute under which the funds are to be ‘held, administered and accounted for’ authorizes the vesting of such foreign-owned property in the custodian and its administration ‘in the interest of and for the benefit of the United States,’ it is not a confiscation measure, but a liquidation measure for the protection of American creditors. It provides for the filing and proving of claims and states that the funds ‘shall be equitably applied for the payments of debts’”).

any presumption of remedial purposes.\(^\text{94}\) The same has been said of the applicability of the ex post facto clause.\(^\text{95}\)

The limitations on criminal forfeitures would apply to the forfeitures under section 806 when prosecuted as criminal forfeitures by operation of 28 U.S.C. 2461(c). The offenses that activate section 106 and 806 confiscations, however, are of such gravity that successful excessive fine clause challenges are unlikely, even if the value of confiscated property were extraordinarily high.

On the other hand, there is more than a little support for the argument that section 106 and 806 constitute punitive rather than remedial measures. They are potentially severe. Section 806 calls for the total impoverishment of those to whom it applies (all assets foreign and domestic), while section 106 anticipates confiscation of all assets within the jurisdiction of the United States. They seem to undermine any claim to remedial purpose by reaching those assets that neither facilitate the commission of terrorism nor constitute its fruits. Moreover, in its analysis of the language of section 806, the Justice Department described it as conceptually akin to the criminal forfeiture provisions of RICO.\(^\text{96}\) If the courts find section 106 or 806 are civil in name but criminal in nature, they may well conclude that efforts to enforce the sections are bound by the limitations of the double jeopardy and ex post facto clauses.

Other Forfeiture Amendments. In order to more effectively enforce money laundering penalties and prosecute civil forfeiture actions involving foreign individuals or entities, section 317 of the Act establishes a procedure for long-arm jurisdiction over individuals and entities located overseas and for the appointment of a federal receiver to take control of contested assets during the pendency of the proceedings.\(^\text{97}\)

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\(^{95}\) See e.g., United States v. Certain Funds (Hong Kong and Shanghai Banking Corp.), 96 F.3d 20, 26-7 (2d Cir. 1996). Where the ex post facto clauses do not apply, the validity of retroactive statutes is judged by due process clause standards. There is a presumption against retroactive application in such instances absent a clear indication of contrary Congressional intent grounded in the view that due process demands certain minimal notice of the law’s demands, Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994).

\(^{96}\) DoJ, at §403.

\(^{97}\) 18 U.S.C. 1956(b). Cf., H.R.Rep.No. 107-250, at 54-5 (2001)(“The first provision in this section creates a long arm statute that gives the district court jurisdiction over a foreign person, including a foreign bank, that commits a money laundering offense in the United States or converts laundered funds that have been forfeited to the Government to his own use. Thus, if the Government files a civil enforcement action under section 1956(b), or files a civil lawsuit to recover forfeited property from a third party, the district court would have jurisdiction over the defendant if the defendant has been served with process pursuant to the applicable statutes or rules of procedure, and the constitutional requirement of minimum contacts is satisfied in one of three ways: the money laundering offense took place in the United States; in the case of converted property, the property was the property of the United States by virtue of a civil or criminal forfeiture judgment; or in the case of a financial institution, the defendant maintained a correspondent bank account at another bank in the United States. Under this provision, for example, the district courts would have had jurisdiction over the defendant in the circumstances described in United States v. Swiss
In the case of inter-bank accounts where a bank in a foreign nation has an account in a bank located in the United States, section 319(a) allows seizure of funds in an account here when the foreign bank has received money laundering or drug trafficking deposits overseas. Confiscation proceedings are conducted pursuant to 18 U.S.C. 953.

Federal law has for some time permitted criminal forfeiture orders to reach substitute assets if the property of the defendant subject to confiscation has become unavailable. Section 319(d) establishes a procedure under which a convicted American Bank, 191 F.3d 30 (1st Cir. 1999).

“The second provision, modeled on 18 U.S.C. 1345(b), gives the district court the power to restrain property, issue seizure warrants, or take other action necessary to ensure that a defendant in an action covered by the statute does not dissipate the assets that would be needed to satisfy a judgment.

“This section also authorizes a court, on the motion of the Government or a State or Federal regulator, to appoint a receiver to gather and protect assets needed to satisfy a judgment under sections 1956 and 957, and the forfeiture provisions in sections 981 and 982. This authority is intended to apply in three circumstances: (1) when there is a judgment in a criminal case, including an order of restitution, following a conviction for a violation of section 1956 or 1957; (2) when there is a judgment in a civil case under section 1956(b) assessing a penalty for a violation of either section 1956 or 1957; and (3) when there is a civil forfeiture judgment under section 981 or a criminal forfeiture judgment, including a personal money judgment, under section 982.

“The amendment also makes section 1956(b) applicable to violations of section 1957. It applies to conduct occurring before the effective date of the Act”).

18 U.S.C. 981(k). H.R.Rep.No. 107-250, at 57-8 (2001)(“Section 114 creates a new provision in the civil forfeiture statute, 18 U.S.C. 981(k), authorizing the forfeiture of funds found in an interbank account. The new provision is necessary to reconcile the law regarding the forfeiture of funds in bank accounts with the realities of the global movement of electronic funds and the use of off-shore banks to insulate criminal proceeds from forfeiture. To prevent drug dealers and other criminals from taking advantage of certain nuances of forfeiture law to insulate their property from forfeiture even though it is deposited in a bank account in the United States, it is necessary to change the law regarding the location of the debt that a bank owes to its depositor, and the identity of the real party in interest with standing to contest the forfeiture. The amendment in this section addresses the location issue by treating a deposit made into an account in a foreign bank that has a correspondent account at a U.S. bank as if the deposit had been made into the U.S. bank directly. Second, the section treats the deposit in the correspondent account as a debt owed directly to the depositor, and not as a debt owed to the respondent bank. In other words, the correspondent account is treated as if it were the foreign bank itself, and the funds in the correspondent account were debts owed to the foreign bank's customers.

“Under this arrangement, if funds traceable to criminal activity are deposited into a foreign bank, the Government may bring a forfeiture action against funds in that bank's correspondent account, and only the initial depositor, and not the intermediary bank, would have standing to contest it.

“The section authorizes the Attorney General to suspend or terminate a forfeiture in cases where there exists a conflict of laws between the U.S. and the jurisdiction in which the foreign bank is located, where such suspension or termination would be in the interest of justice and not harm U.S. national interests”).
defendant may be ordered to transfer property to this country from overseas if the property is subject to confiscation.\textsuperscript{99}

Prior to enactment of the Act, federal law permitted confiscation of any property in the United States that could be traced to a drug offense committed overseas, if the offense was punishable as a felony under the laws of the nation where it occurred and if the offense would have been a felony if committed here.\textsuperscript{100} Section 320 enlarges this provisions to cover not only drug offenses but any of the crimes in the money laundering predicate offense list of 18 U.S.C. 1956(c)(7)(B), and continues the reciprocal felony requirements.\textsuperscript{101} This treatment is comparable to the early coverage of the federal statute, 28 U.S.C. 2467, which permitted enforcement of foreign confiscation orders in the case of drug offenses or the crimes on the money laundering predicate offense list. Section 323 of the Act amends the foreign forfeiture enforcement statute to (1) expand the grounds for enforcement to include any crime which would have provided the grounds for confiscation had the offense been committed in the United States; (2) to authorize restraining orders to freeze the target property while enforcement litigation is pending; and (3) to limit the absence-of-timely-notice defense.\textsuperscript{102}

\begin{itemize}
\item \textsuperscript{99} Cf., H.R.Rep.No. 107-250, at 58-9 (2001) (“Section 116 authorizes a court to order a criminal defendant to repatriate his property to the United States in criminal cases. In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of ‘substitute assets’ when the defendant has placed the property otherwise subject to forfeiture ‘beyond the jurisdiction of the court.’ Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

“This section amends 21 U.S.C. 853 to make clear that a court in a criminal case may issue a repatriation order--either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. 853(e) to restrain property--so that they will be available for forfeiture. Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both”.

\item \textsuperscript{100} 18 U.S.C. 981(a)(1)(B).

\item \textsuperscript{101} H.R.Rep.No. 107-250, at 56 (2001)(“This section is intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under 1956(c)(7)(B). This section will permit the forfeiture of property involved in conduct occurring before the effective date of the Act”).

\item \textsuperscript{102} H.R.Rep.No. 107-250, at 59-60 (2001)(“Under current law, 28 U.S.C. 2467(d) gives Federal courts the authority to enforce civil and criminal forfeiture judgments entered by foreign courts. This section amends that provision to include a mechanism for preserving property subject to forfeiture in a foreign country.

“Specifically, a Federal court could issue a restraining order under 18 U.S.C. 983(j) or register and enforce a foreign restraining order, if the Attorney General certified that such foreign order was obtained in accordance with the principles of due process. A person seeking
A fugitive may not challenge a federal forfeiture. Section 322 applies this fugitive disentitlement to corporations whose major shareholder is a fugitive or whose representative in the confiscation proceedings is a fugitive.

Section 906 instructs the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence to submit a joint report with recommendations relating to the reconfiguration of the Foreign Terrorist Asset Tracking Center, the Office of Foreign Assets Control, and possibly FinCEN in “order to establish a capability to provide for the effective and efficient analysis and dissemination of foreign intelligence relating to the financial capabilities and resources of international terrorist organizations.”

to contest the restraining order could do so on the ground that 28 U.S.C. 2467 was not properly applied to the particular case, but could not oppose the restraining order on any ground that could also be raised in the proceedings pending in a foreign court. This provision prevents a litigant from taking ‘two bites at the apple’ by raising objections to the basis for the forfeiture in the Federal court that he also raised, or is entitled to raise, in the foreign court where the forfeiture action is pending. It complements the existing provision in section 2467(e) providing that the Federal court is bound by the findings of fact of the foreign court, and may not look behind such findings in determining whether to enter an order enforcing a foreign forfeiture judgment.

“This section also amends 28 U.S.C. 2467 to make clear that it is not necessary to prove that the person asserting an interest in the property received actual notice of the forfeiture proceedings. As is the case with respect to forfeitures under U.S. law, it is sufficient if the foreign nation takes steps to provide notice, in accordance with the principles of due process. See Gonzalez v. United States, 1997 WL 278123 (S.D.N.Y. 1997) (‘the [G]overnment is not required to ensure actual receipt of notice that is properly mailed’); Albajon v. Gugliotta, 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (notice sent to various addresses on claimant’s identifications, and mailed after claimant released from jail, is sufficient to satisfy due process, even if claimant never received notice); United States v. Schiavo, 897 F. Supp. 644, 648 49 (D. Mass. 1995) (sending notice to fugitive's last known address is sufficient; due process satisfied even if he did not receive the notice).

“Finally, 28 U.S.C. 2467 is amended to authorize the enforcement of a forfeiture judgment based on any foreign offense that would constitute an offense giving rise to a civil or criminal forfeiture of the same property if the offense had been committed in the United States. This is one of two safeguards that the statute contains against the enforcement of judgments that the United States does not consider appropriate for enforcement: if the judgment is based on an act that would not constitute a crime in the United States, such as removing assets from the reach of a repressive regime, it could not be enforced. In addition, section 2467 already provides that a foreign judgment may only be enforced by a Federal court at the request of the United States, and only after the Attorney General has certified that the judgment was obtained in accordance with the principles of due process. Thus, neither a foreign Government nor a foreign private party could enforce a foreign judgment on its own under this provision.”). Note that the safeguard to which the report refers is the range of foreign offenses that will support an enforceable confiscation order, i.e., drug offenses and crimes on the money laundering predicate offense list, and that the amendment narrows that safeguard by adding additional foreign offenses, i.e., any foreign equivalent of a federal crime which would support a confiscation order.

Alien Terrorists and Victims

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

**Border Protection.** The border protection provisions:

- authorize the appropriations necessary to triple the number of Border Patrol, Customs Service, and Immigration and Naturalization Service (INS) personnel stationed along the Northern Border, section 401

- authorize appropriations of an additional $50 million for both INS and the Customers Service to upgrade their border surveillance equipment, section 402

- remove for fiscal year 2001 the $30,000 ceiling on INS overtime pay for border duty, section 404

- authorize appropriations of $2 million for a report to be prepared by the Attorney General on the feasibility of enhancing the FBI’s Integrated Automated Fingerprint Identification System (IAFIS) and similar systems to improve the reliability of visa applicant screening, section 405

- authorize the appropriations necessary to provide the State Department and INS with criminal record identification information relating to visa applicants and other applicants for admission to the United States, section 403.

- instruct the Attorney General to report on the feasibility of the use of a biometric identifier scanning system with access to IAFIS for overseas consular posts and points of entry into the United States, section 1007

- direct the Secretary of State to determine whether consular shopping is a problem, to take any necessary corrective action, and to report the action taken, section 418

- express the sense of the Congress that the Administration should implement the integrated entry and exit data system called for by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1365a), section 414

- add the White House Office of Homeland Security to the Integrated Entry and Exit Data System Task Force (8 U.S.C. 1365a note), section 415

- call for the implementation and expansion of the foreign student visa monitoring program (8 U.S.C. 1372), section 416

- limit countries eligible to participate in the visa waiver program to those with machine-readable passports as of October 1, 2003 (8 U.S.C. 1187(c)), section 417
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• instruct the Attorney General to report on the feasibility of using biometric scanners to help prevent terrorists and other foreign criminals from entering the country, section 1008\(^{104}\)

• authorize appropriations of $250,000 for the FBI to determine the feasibility of providing airlines with computer access to the names of suspected terrorists, section 1009

• authorize reciprocal sharing of the State Department’s visa lookout data and related information with other nations in order to prevent terrorism, drug trafficking, slave marketing, and gun running, section 413

Detention and Removal. Foreign nationals (aliens) are deportable from the United States, among other grounds, if they were inadmissible at the time they entered the country or if they have subsequently engaged in terrorist activity, 8 U.S.C. 1227 (a)(1)(A), (a)(4)(B), 1182(a)(3)(B)(iv). Aliens may be inadmissible for any number of terrorism-related reasons, 8 U.S.C. 1182 (a)(3)(B). Section 411 of the Act adds to the terrorism-related grounds upon which an alien may be denied admission into the United States and consequently upon which he or she may be deported.


Section 411 defines “terrorist organization” to include not only organizations designated under section 219 but also organizations which the Secretary of State has identified in the Federal Register as having provided material support for, committed, incited, planned, or gathered information on potential targets of, terrorist acts of violence, 8 U.S.C. 1182(a)(3)(B)(vi), (a)(3)(B)(iv). It then recasts the definition of engaging in terrorist activities to include solicitation on behalf of such organizations, or recruiting on their behalf, or providing them with material support, 8 U.S.C.

\(^{104}\) As the House Judiciary Committee explained, “A biometric fingerprint scanning system is a sophisticated computer scanning technology that analyzes a person’s fingerprint and compares the measurement with a verified sample digitally stored in the system. The accuracy of these systems is claimed to be above 99.9%. The biometric identifier system contemplated by this section would have access to the database of the Federal Bureau of Investigation Integrated Automated Fingerprint Identification System,” H.R.Rep.No. 107-236, at 78 (2001).
Nevertheless, section 411 permits the Secretary of State or Attorney General to conclude that the material support prohibition does not apply to particular aliens, 8 U.S.C. 1182(a)(3)(B)(vi).

Prior law made representatives of terrorist organizations designated by the Secretary under section 219 (8 U.S.C. 1189) inadmissible, 8 U.S.C. 1182(a)(3)(B)(i)(IV)(2000 ed.). And so they remain. Section 411 makes representatives of political, social or similar groups, whose public endorsements of terrorist activities undermines U.S. efforts to reduce or eliminate terrorism, inadmissible as well, 8 U.S.C. 1882(a)(3) (B)(i)(IV).

An individual who uses his or her place of prominence to endorse, espouse, or advocate support for terrorist activities or terrorist organizations in a manner which the Secretary of State concludes undermines our efforts to reduce or eliminate terrorism becomes inadmissible under section 411, 8 U.S.C. 1182(a)(3)(B)(i)(VI).

The spouse or child of an alien, who is inadmissible on terrorist grounds for activity occurring within the last 5 years, is likewise inadmissible, unless the child or spouse was reasonably unaware of the disqualifying conduct or has repudiated the disqualifying conduct, 8 U.S.C. 1182(a)(3)(B)(i)(VII), 1182(a)(3)(B)(ii).

Finally, any alien, whom the Secretary of State or the Attorney General conclude has associated with a terrorist organization and intends to engage in conduct dangerous to the welfare, safety, security of the United States while in this country, is inadmissible, 8 U.S.C. 1182(a)(3)(F).

Section 219 of the Immigration and Nationality Act (8 U.S.C. 1189) permits the Secretary to designate as terrorist organizations any foreign group which he finds to have engaged in terrorist activities. A second subsection 411(c) permits him to designate groups which as subnational groups or clandestine agents, engage in “premeditated, politically motivated violence perpetrated against noncombatant targets,” or groups which retain the capacity and intent to engage in terrorism or terrorist activity, 8 U.S.C. 1189(a)(1)(B).

Section 412 permits the Attorney General to detain alien terrorist suspects for up to seven days, 8 U.S.C. 1226a. He must certify that he has reasonable grounds to believe that the suspects either are engaged in conduct which threatens the national security of the United States or are inadmissible or deportable on grounds of terrorism, espionage, sabotage, or sedition. Within seven days, the Attorney General must initiate removal or criminal proceedings or release the alien. If the alien is held, the determination must be reexamined every six months to confirm that the alien's release would threaten national security or endanger some individual or the general public. The Attorney General's determinations are subject to review only under writs of habeas corpus issued out of any federal district court but appealable only to the United States Court of Appeals for the District Columbia. The Attorney General must report to the Judiciary Committee on the details of the operation of section 412.

Uncertain is the relationship between section 412 and the President's Military Order of November 13, 2001, which allows the Secretary of Defense to detain designated alien terrorist suspects, within the United States or elsewhere, without
express limitation or condition except with regard to food, water, shelter, clothing, medical treatment, religious exercise, and a proscription on invidious discrimination, 66 Fed.Reg. 57833, 57834 (Nov. 16, 2001).

Victims. The Act contains a number of provisions designed to provide immigration relief for foreign nationals, victimized by the attacks of September 11. It provides for:

- permanent resident alien status for eligible aliens and members of their family who but for the events of September 11 would have been eligible for employer-sponsored permanent resident alien status, section 421

- extended filing deadlines for aliens prevented from taking timely action because of immigration office closures, airline schedule disruptions or other similar impediments, section 422

105 “The Act provides permanent resident status through the special immigrant program to an alien who was the beneficiary of a petition filed (on or before September 11) to grant the alien permanent residence as an employer-sponsored immigrant or of an application for labor certification (filed on or before September 11), if the petition or application was rendered null because of the disability of the beneficiary or loss of employment of the beneficiary due to physical damage to, or destruction of, the business of the petitioner or applicant as a direct result of the terrorist attacks on September 11, or because of the death of the petitioner or applicant as a direct result of the terrorist attacks. Permanent residence would be granted to an alien who was the spouse or child of an alien who was the beneficiary of a petition filed on or before September 11 to grant the beneficiary permanent residence as a family-sponsored immigrant (as long as the spouse or child follows to join not later than September 11, 2003). Permanent residence would be granted to the beneficiary of a petition for a nonimmigrant visa as the spouse or the fiancé (and their children) of a U.S. citizen where the petitioning citizen died as a direct result of the terrorist attack. The section also provides permanent resident status to the grandparents of a child both of whose parents died as a result of the terrorist attacks, if either of such deceased parents was a citizen of the U.S. or a permanent resident,” H.R.Rep.No. 107-236, at 66-7 (2001).

106 “The Act provides that an alien who was legally in a nonimmigrant status and was disabled as a direct result of the terrorist attacks on September 11 (and his or her spouse and children) may remain lawfully in the U.S. (and receive work authorization) until the later of the date that his or her status normally terminates or September 11, 2002. Such status is also provided to the nonimmigrant spouse and children of an alien who died as a direct result of the terrorist attacks.

“The Act provides that an alien who was lawfully present as a nonimmigrant at the time of the terrorist attacks will be granted 60 additional days to file an application for extension or change of status if the alien was prevented from so filing as a direct result of the terrorist attacks. Also, an alien who was lawfully present as a nonimmigrant at the time of the attacks but was then unable to timely depart the U.S. as a direct result of the attacks will be considered to have departed legally if doing so before November 11. An alien who was in lawful nonimmigrant status at the time of the attacks (and his or her spouse and children) but not in the U.S. at that time and was then prevented from returning to the U.S. in order to file a timely application for an extension of status as a direct result of the terrorist attacks will be given 60 additional days to file an application and will have his or her status extended 60 days beyond the original due date of the application.

“Under current law, winners of the fiscal year 2001 diversity visa lottery must enter the U.S. or adjust status by September 30, 2001. The Act provides that such an alien may enter
the U.S. or adjust status until April 1, 2002, if the alien was prevented from doing so by September 30, 2001 as a direct result of the terrorist attacks. If the visa quota for the 2001 diversity visa program has already been exceeded, the alien shall be counted under the 2002 program. Also, if a winner of the 2001 lottery died as a direct result of the terrorist attacks, the spouse and children of the alien shall still be eligible for permanent residence under the program. The ceiling placed on the number of diversity immigrants shall not be exceeded in any case.

“Under the Act, in the case of an alien who was issued an immigrant visa that expires before December 31, 2001, if the alien was unable to timely enter the U.S. as a direct result of the terrorist attacks, the validity shall be extended until December 31.

“Under the Act, in the case of an alien who was granted parole that expired on or after September 11, if the alien was unable to enter the U.S. prior to the expiration date as a direct result of the terrorist attacks, the parole is extended an additional 90 days.


107 “Current law provides that an alien who was the spouse of a U.S. citizen for at least 2 years before the citizen died shall remain eligible for immigrant status as an immediate relative. This also applies to the children of the alien. The Act provides that if the citizen died as a direct result of the terrorist attacks, the 2 year requirement is waived.

“The Act provides that if an alien spouse, child, or unmarried adult son or daughter had been the beneficiary of an immigrant visa petition filed by a permanent resident who died as a direct result of the terrorist attacks, the alien will still be eligible for permanent residence. In addition, if an alien spouse, child, or unmarried adult son or daughter of a permanent resident who died as a direct result of the terrorist attacks was present in the U.S. on September 11 but had not yet been petitioned for permanent residence, the alien can self-petition for permanent residence.

“The Act provides that an alien spouse or child of an alien who 1) died as a direct result of the terrorist attacks and 2) was a permanent resident (petitioned-for by an employer) or an applicant for adjustment of status for an employment-based immigrant visa, may have his or her application for adjustment adjudicated despite the death (if the application was filed prior to the death),” H.R.Rep.No. 107-236, at 68 (2001).

108 “Under current law, certain visas are only available to an alien until the alien’s 21st birthday. The Act provides that an alien whose 21st birthday occurs this September and who is a beneficiary for a petition or application filed on or before September 11 shall be considered to remain a child for 90 days after the alien’s 21st birthday. For an alien whose 21st birthday occurs after this September, (and who had a petition for application filed on his or her behalf on or before September 11) the alien shall be considered to remain a child for 45 days after the alien’s 21st birthday,” H.R.Rep.No. 107-236, at 68 (2001).
• a denial of benefits of the Act to terrorists and their families, section 427

• authority for the Attorney General to establish evidentiary standards to implement the alien victim provisions of the Act, section 426.

**Other Crimes, Penalties, & Procedures**

**New Crimes.** The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law filling gaps and increasing penalties.

Pre-existing federal law criminalized, among other things, wrecking trains, 18 U.S.C. 1992, damaging commercial motor vehicles or their facilities, 18 U.S.C. 33, or threatening to do so, 18 U.S.C. 35, destroying vessels within the navigable waters of the United States, 18 U.S.C. 2273, destruction of vehicles or other property used in or used in activities affecting interstate or foreign commerce by fire or explosives, 18 U.S.C. 844(i), possession of a biological agent or toxin as a weapon or a threat, attempt, or conspiracy to do so, 18 U.S.C. 175, use of a weapon of mass destruction affecting interstate or foreign commerce or a threat, attempt, or conspiracy to do so, 18 U.S.C. 2332a, commission of a federal crime of violence while armed with a firearm, or of federal felony while in possession of an explosive, 18 U.S.C. 924(c), 844(h), conspiracy to commit a federal crime, 18 U.S.C. 371.

The Act outlaws terrorist attacks and other actions of violence against mass transportation systems. Offenders may be imprisoned for life or any term of years, if the conveyance is occupied at the time of the offense, or imprisoned for not more than twenty years in other cases, section 801. Under its provisions, it is a crime to willfully:

• wreck, derail, burn, or disable mass transit;
• place a biological agent or destructive device on mass transit recklessly or with the intent to endanger;
• burn or place a biological agent or destructive device in or near a mass transit facility knowing a conveyance is likely to be disabled;
• impair a mass transit signal system;
• interfere with a mass transit dispatcher, operator, or maintenance personnel in the performance of their duties recklessly or with the intent to endanger;
• act with the intent to kill or seriously injure someone on mass transit property;
• convey a false alarm concerning violations of the section;
• attempt to violate the section;
• threaten or conspire to violate the section
when the violation involves interstate travel, communication, or transportation of materials or that involves a carrier engaged in or affecting interstate or foreign commerce, 18 U.S.C. 1993.

Prior to enactment of the Act, federal law proscribed the use of biological agents or toxins as weapons, 18 U.S.C. 175. As suggested by the Justice Department, the Act, in section 817, makes two substantial changes. It makes it a federal offense, punishable by imprisonment for not more than ten years and/or a fine of not more than $250,000, to possess a type or quantity of biological material that cannot be justified for peaceful purposes, 18 U.S.C. 175(b). Second, consistent with federal prohibitions on the possession of firearms, 18 U.S.C. 922(g), and explosives, 18 U.S.C. 842(i), it makes it a federal offenses for certain individuals – such as convicted felons, illegal aliens, and fugitives – to possess biological toxins or agents, 18 U.S.C. 175b. Offenders face the same sanctions, imprisonment for not more than ten years and/or a fine of not more than $250,000.

It is a federal crime to harbor aliens, 8 U.S.C. 1324, or those engaged in espionage, 18 U.S.C. 792; or to commit misprision of a felony (which may take the form of harboring the felon), 18 U.S.C. 4; or to act as an accessory after the fact to a federal crime (including by harboring the offender), 18 U.S.C. 3. The Justice Department had asked that a terrorist harboring offense be added to the espionage section. It also recommended venue and extraterritorial auxiliaries.

109 “Current law prohibits the possession, development, acquisition, etc. of biological agents or toxins for use as a weapon. 18 U.S.C. §175. This section amends the definition of ‘for use as a weapon’ to include all situations in which it can be proven that the defendant had a purpose other than a prophylactic, protective, or peaceful purpose. This will enhance the government’s ability to prosecute suspected terrorists in possession of biological agents or toxins, and conform the scope of the criminal offense in 18 U.S.C. §175 more closely to the related forfeiture provision in 18 U.S.C. §176 [which permits confiscations in cases where the amounts possessed exceed the quantities justifiable for peaceful purposes]. Moreover, the section adds a subsection to 18 U.S.C. §175 which defines an additional offense of possessing a biological agent or toxin of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective or other peaceful purpose. This section also enacts a new statute, 18 U.S.C. 175b, which generally makes it an offense for a person to possess a listed biological agent or toxin if the person is disqualified from firearms possession under 18 U.S.C. §922(g). . . .” DoJ at §305.

110 The section covers those under felony indictment, those convicted of a felony, fugitives, drug addicts, illegal aliens, mental defectives, aliens from countries which support terrorism, and those dishonorably discharged from the U.S. armed forces, 18 U.S.C. 175b(b)(2).

111 “18 U.S.C. §792 makes it an offense to harbor or conceal persons engaged in espionage. There is no comparable provision for terrorism, though the harboring of terrorists creates a risk to the nation readily comparable to that posed by harboring spies. This section accordingly amends 18 U.S.C. §792 to make the same prohibition apply to harboring or concealing persons engaged in federal terrorism offenses as defined in section 309 of the bill,” DoJ at §307; Draft at §307(2)(“There is extraterritorial Federal jurisdiction over any violation (including, without limitation, conspiracy or attempt) of this section. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in Federal judicial district as provided by law”).
The Act, in section 803, instead establishes a separate offense which punishes harboring terrorists by imprisonment for not more than ten years and/or a fine of not more than $250,000, 18 U.S.C. 2339. The predicate offense list consists of:

- destruction of aircraft or their facilities, 18 U.S.C. 32;
- biological weapons offenses, 18 U.S.C. 175;
- chemical weapons offenses, 18 U.S.C. 229;
- nuclear weapons offenses, 18 U.S.C. 831;
- bombing federal buildings, 18 U.S.C. 844(f);
- destruction of an energy facility, 18 U.S.C. 1366;
- violence committed against maritime navigational facilities, 18 U.S.C. 2280;
- offenses involving weapons of mass destruction, 18 U.S.C. 2232a;
- international terrorism, 18 U.S.C. 2232b;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

It grants the Justice Department request to permit prosecution either in the place where the harboring occurred or where the underlying act of terrorism committed by the sheltered terrorist might be prosecuted. The Constitution, however, may insist that prosecution take place where the crime of harboring occurred.\footnote{United States v. Cabrales, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts).}

Sections 2339A and 2339B of the title 18 of the United States Code ban providing material support to individuals and to organizations that commit various crimes of terrorism. The Act amends the sections in several ways in section 805. Section 2339B (support of a terrorist organization) joins section 2339A (support of a terrorist) as a money laundering predicate offense, 18 U.S.C. 1956(c)(7)(D). The predicate offense list of 18 U.S.C. 2339A (support to terrorists) grows to include:

\footnote{United States Const. Art.III, §2, cl.3 (“The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed . . . .”); Amend. IV (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . .”); United States v. Cabrales, 524 U.S. 1 (1998)(a defendant charged with one count of conspiracy to launder the proceeds of a Missouri drug operation and two counts of laundering in Florida could not be prosecuted in Missouri on the laundering counts). The Court might be thought to have retreated somewhat from Cabrales when it later approved prosecution for carrying a firearm in relation to a crime of violence in federal court in New Jersey (where the underlying kidnaping occurred) notwithstanding the fact that the firearm had been acquired in Maryland after the defendants left New Jersey with their victim in tow, United States v. Rodriguez-Moreno, 526 U.S. 275, 280-81 n.4 (1999)(“By way of comparison, last Term in Cabrales we considered whether venue for money laundering, in violation of 18 U.S.C. 1956(a)(1)(B) (ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe the anterior criminal conduct that yielded the funds allegedly laundered. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct – defendant’s money laundering activity – occurred after the fact of an offense begun and completed by others. Here, by contrast, given the ‘during and in relation to’ language [of section 924], the underlying crime of violence is a critical part of the §924(c)(1) offense”).}
The Justice Department sought the expansion along with the enlargement of the predicate offense list, “18 U.S.C. §2339A prohibits providing material support or resources to terrorists. The existing definition of ‘material support or resources’ is generally not broad enough to encompass expert services and assistance – for example, advice provided by a person with expertise in aviation matters to facilitate an aircraft hijacking, or advice provided by an accountant to facilitate the concealment of funds used to support terrorist activities. This section accordingly amends 18 U.S.C. §2339A to include expert services and assistance, making the offense applicable to experts who provide services or assistance knowing or intending that the services or assistance is to be used in preparing for or carrying out terrorism crimes. This section also amends 18 U.S.C. §2339A to conform its coverage of terrorism crimes to the more complete list specified in section 309 of the bill (‘Federal terrorism offenses’),” DoJ at §306.

Section 813 of the Act also accepts the Justice Department's suggestion that various terrorism offenses be added to the predicate offense list for RICO (racketeer influenced and corrupt organizations) which proscribes acquiring or operating, through the patterned commission of any of a series of predicate offenses, an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1961.


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115 “The list of predicate federal offenses for RICO, appearing in 18 U.S.C. §1961(1), includes none of the offenses which are most likely to be committed by terrorists. This section adds terrorism crimes to the list of RICO predicates, so that RICO can be used more frequently in the prosecution of terrorist organizations. As in various other provisions, the list of offenses in section 309 of the bill (‘Federal terrorism offenses’) is used in identifying the relevant crimes,” DoJ, at §304.

New Penalties. The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

The Justice Department suggested an alternative term of imprisonment up to life imprisonment for anyone convicted of an offense designated a terrorist crime. It characterized its proposal as analogous to the standard fine provisions of 18 U.S.C. 3571(b),(c). Section 3571 sets a basic maximum fine of $250,000 for any individual who convicted of a federal felony notwithstanding any lower maximum fine called for in the statute that outlaws the offense.\footnote{Under existing law, the maximum prison terms for federal offenses are normally determined by specifications in the provisions which define them. These provisions can provide inadequate maxima in cases where the offense is aggravated by its terrorist character or motivation. This section accordingly adds a new subsection (e) to 18 U.S.C. §3559 which provides alternative maximum prison terms, including imprisonment for any term of years or for life, for crimes likely to be committed by terrorists. This is analogous to the maximum fine provisions of 18 U.S.C. §3571(b)-(c) – which supersedes lower fine amounts specified in the statutes defining particular offenses – and will more consistently ensure the availability of sufficiently high maximum penalties in terrorism cases. As in several other provisions of this bill, the list of the serious crimes most frequently committed by terrorists set forth in section 309 of the bill (‘Federal terrorism offenses’ is used in defining the scope of the provision,” DoJ, at §302.}

The proposal, however, failed to identify the critical elements that would trigger the alternative.\footnote{A person convicted of any Federal terrorism offense may be sentenced to imprisonment for any term of years or for life, notwithstanding any maximum term of imprisonment specified in the law describing the offense. The authorization of imprisonment under this subsection is supplementary to, and does not limit, the availability of any other penalty authorized by the law describing the offense, including the death penalty, and does not limit the applicability of any mandatory minimum term of imprisonment, including any mandatory life term, provided by the law describing the offense;” Draft at §302.} Both practical and constitutional challenges might be thought to attend this failure to distinguish between those convicted of some “garden variety” crime of terrorism and the more serious offender meriting the alternative, supplementary penalty. Perhaps for this reason, the Act opted to simply increase the maximum penalties for various crimes of terrorism, particularly those which involve the taking of a human life and are not already capital offenses, section 810. Thus, it increases the maximum terms imprisonment for:

- for life-threatening arson or arson of a dwelling committed within a federal enclave, from 20 years to any term of years or life, 18 U.S.C. 81;

- for causing more than $100,000 in damage to, or significantly impairing the operation of an energy facility, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 1366;
The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §§846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

This section accordingly adds a new §2332c to the terrorism chapter of the criminal code – parallel to the drug crime conspiracy provision in 21 U.S.C. §846 – which provides maximum penalties for conspiracies to commit terrorism crimes that are equal to the maximum penalties authorized for the objects of such conspiracies. This will more consistently provide adequate penalties for terrorist conspiracies. As in various other provisions of this bill, the relevant class of offenses is specified by the notion of ‘Federal terrorism offense,’ which is defined in section 309 of the bill,” DoJ at §303.

- for providing material support to a terrorist or a terrorist organization, from 10 to 15 years (or any term of years or life, if death results), 18 U.S.C. 2339A, 2339B;
- for destruction of national defense materials, from 10 to 20 years (or any term of years or life, if death results), 18 U.S.C. 2155;
- for sabotage of a nuclear facility, from 10 to 20 years (or any term of years or life, if death results), 42 U.S.C. 2284;
- for carrying a weapon or explosive abroad an aircraft with U.S. special aircraft jurisdiction, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 46505; and
- for sabotage of interstate gas pipeline facilities, from 15 to 20 years (or any term of years or life, if death results), 49 U.S.C. 60123.

It is a separate federal offense punishable by imprisonment for not more than five years to conspire to commit any federal felony, 18 U.S.C. 371. Co-conspirators are likewise subject to punishment for the underlying offense and for any other crimes committed in furtherance of the conspiracy. Nevertheless, some federal criminal statutes impose the same penalties for both the crimes they proscribe and any conspiracy to commit them. The Justice Department urged similar treatment for crimes of terrorism. Again, the Act, in section 811, opts for a less sweeping approach and establishes equivalent sanctions for conspiracy and the underlying offense in cases of:

- arson committed within a federal enclave, 18 U.S.C. 81;
- killing committed while armed with a firearm in a federal building, 18 U.S.C. 930(c);
- destruction of communications facilities, 18 U.S.C. 1362;
- destruction of property within a federal enclave, 18 U.S.C. 1363;
- causing a train wreck, 18 U.S.C. 1922;
- providing material support to a terrorist, 18 U.S.C. 2339A;
- torture committed overseas under color of law, 18 U.S.C. 2340A;
- sabotage of a nuclear facility, 42 U.S.C. 2284;

119 “The maximum penalty under the general conspiracy provision of federal criminal law (18 U.S.C. §371) is five years, even if the object of the conspiracy is a serious crime carrying a far higher maximum penalty. For some individual offenses and types of offense, special provisions authorize conspiracy penalties equal to the penalties for the object offense – see e.g., 21 U.S.C. §§846 (drug crimes) – but there is no consistently applicable provision of this type for the crimes that are likely to be committed by terrorists.

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• interfering with a flight crew within U.S. special aircraft jurisdiction, 49 U.S.C. 46504;
• carrying a weapon or explosive abroad an aircraft within U.S. special aircraft jurisdiction, 49 U.S.C. 46505; and
• sabotage of interstate gas pipeline facilities, 49 U.S.C. 60123.

When federal courts impose a sentence of a year or more upon a convicted defendant, they must also impose a term of supervised release, 18 U.S.C. 3583; U.S.S.G. §5D1.1. Supervised release is not unlike parole, except that it is ordinarily imposed in addition to (rather than in lieu of) a term, or portion of a term, of imprisonment. The term may be no longer than 5 years for most crimes and violations of the conditions of release may result in imprisonment for up to an additional 5 years, 18 U.S.C. 3583(e). The terms of supervisory release for drug dealers, however, are often cast as mandatory minimums with no statutory ceiling. Thus, for example, a dealer convicted of distributing more than a kilogram of heroin must receive a term of supervised release of “at least 5 years” in addition to a term of imprisonment imposed for the offense, 21 U.S.C. 841(b). Although a majority feel that the more specific drug provisions of 21 U.S.C. 841 trump the more general limitations of 18 U.S.C. 3583, some of the federal appellate courts believe the two should be read in concert where possible (e.g., at least but not more than 5 years).120 The Justice Department recommended a maximum supervisory term of life for those convicted of acts of terrorism (subject to the calibrations of the Sentencing Commission),121 a recommendation which the Act accepted in section 812 but only in the case of terrorists whose crimes resulted in death or were marked by a foreseeable risk of death or serious bodily injury, 18 U.S.C. 3583(j).

120 Compare, United States v. Barragan, 263 F.3d 919, 925-26 (9th Cir. 2001); United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir. 2001); United States v. Heckard, 238 F.3d 1222, 1237 (10th Cir. 2001); and United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000); with, United States v. Meshack, 225 F.3d 556, 578 (5th Cir. 2001); and United States v. Samour, 199 F.3d 821, 824-25 (6th Cir. 2001).

121 “Existing federal law (18 U.S.C. 3583(b)) generally caps the maximum period of post-imprisonment supervision for released felons at 3 or 5 years. Thus, in relation to a released but still unreformed terrorist, there is no means of tracking the person or imposing conditions to prevent renewed involvement in terrorist activities beyond a period of a few years. The drug laws (21 U.S.C. §841) mandate longer supervision periods for persons convicted of certain drug trafficking crimes, and specify no upper limit on the duration of supervision, but there is nothing comparable for terrorism offenses.

“This section accordingly adds a new subsection to 18 U.S.C. 3583 to authorize longer supervision periods, including potentially lifetime supervision, for persons convicted of terrorism crimes. This would permit appropriate tracking and oversight following release of offenders whose involvement with terrorism may reflect lifelong ideological commitments. As in other provisions in this bill, the covered class of crimes is federal terrorism offenses, which are specified in section 390 of the bill.

“This section affects only the maximum periods of post-release supervision allowed by statute. It does not limit the authority of the Sentencing Commission and the courts to tailor the supervision periods imposed in particular cases to offense and offender characteristics, and the courts will retain their normal authority under 18 U.S.C. §3583(e)(1) to terminate supervision if it is no longer warranted,” DoJ at §308.
Sometime ago, Congress outlawed computer fraud and abuse (cybercrime) involving “federal protected computers” (i.e., those owned or used by the federal government or by a financial institution or used in interstate or foreign commerce), 18 U.S.C. 1030. Section 814 of the Act increases the penalty for intentionally damaging a protected computer from imprisonment for not more than 5 years to imprisonment for not more than 10 years (from not more than 10 to not more than 20 years for repeat offenders).\(^{122}\)

Finally, section 1011 increases the penalty for fraudulently impersonating a Red Cross member or agent (18 U.S.C. 917) from imprisonment for not more than 1 year to imprisonment for not more than 5 years.

**Other Procedural Adjustments.** In other procedural adjustments designed to facilitate criminal investigations, the Act:

- increases the rewards for information in terrorism cases
- expands the Posse Comitatus Act exceptions
- authorizes “sneak and peek” search warrants
- permits nationwide and perhaps worldwide execution of warrants in terrorism cases
- eases government access to confidential information
- allows the Attorney General to collect DNA samples from prisoners convicted of any crime of violence or terrorism
- lengthens the statute of limitations applicable to crimes of terrorism
- clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas
- adjusts federal victims’ compensation and assistance programs

A section found in the Senate bill, but ultimately dropped, would have changed the provision of law that required Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B.\(^{123}\)

\(^{122}\) It provides a comparable increase to not more than 20 years (from not more than 10 years) for those who recklessly damage a protected computer following a prior computer abuse conviction. Civil and criminal liability for simply causing protected computer damage (as opposed to intentionally or recklessly causing the damage) is limited to special circumstances, e.g., damage in excess of $5000, damage causing physical injury, etc.; section 814 adds to the list of circumstances upon which liability may be predicated. To the list of predicate circumstances, it adds causing damage to a computer used by the government for the administration of justice, national defense, or national security.

\(^{123}\) When presenting the final bill to the House, the Chairman of the Judiciary Committee noted, “the Senate bill contained revisions of the so-called McDade law. This compromise version does not contain those changes, and I agreed to review this subject in a different context,” 147 Cong.Rec. H7196 (daily ed. Oct. 23, 2001) (remarks of Rep. Sensenbrenner); for general background, see, Doyle, *McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys*, CRS REP.NO. RL30060 (Dec. 14, 2001).
**Rewards.** The Attorney General already enjoys the power to pay rewards in criminal cases, but his powers under other authorities is often subject to caps on the amount he might pay. Thus as a general rule, he may award amounts up to $25,000 for the capture of federal offenders, 18 U.S.C. 3059, and may pay rewards in any amount in recognition of assistance to the Department of Justice as long as the Appropriations and Judiciary Committees are notified of any rewards in excess of $100,000, 18 U.S.C. 3059B. Although he has special reward authority in terrorism cases, individual awards were capped at $500,000, the ceiling for the total amount paid in such rewards was $5 million, and rewards of $100,000 or more required his personal approval or that of the President, 18 U.S.C. 3071-3077. Over the last several years, annual appropriation acts have raised the $500,000 cap to $2 million and the $5 million ceiling to $10 million, e.g., P.L. 106-553, 114 Stat. 2762-67 (2000); P.L. 106-113, 113 Stat. 1501A-19 (1999); P.L. 105-277, 112 Stat. 2681-66 (1998).

The Act supplies the Attorney General with the power to pay rewards to combat terrorism in any amount and without an aggregate limitation, but for rewards of $250,000 or more it insists on personal approval of the Attorney General or the President and on notification of the Appropriations and Judiciary Committees, section 501 (18 U.S.C. 3071). In addition, the counterterrorism fund of section 101 can be used “without limitation” to pay rewards to prevent, investigate, or prosecute terrorism.\(^\text{124}\)

The Secretary of State's reward authority was already somewhat more generous than that of the Attorney General. He may pay rewards of up to $5 million for information in international terrorism cases as long as he personally approves payments in excess $100,000, 22 U.S.C. 2708. The Act removes the $5 million cap and allows rewards to be paid for information concerning the whereabouts of terrorist leaders and facilitating the dissolution of terrorist organizations, section 502.

**Posse Comitatus.** The Posse Comitatus Act and its administrative auxiliaries, 18 U.S.C. 1385, 10 U.S.C. 375, ban use of the armed forces to execute civilian law, absent explicit statutory permission. One existing statutory exception covers Department of Justice requests for technical assistance in connection with emergencies involving biological, chemical or nuclear weapons, 18 U.S.C. 2332e, 10 U.S.C. 382. The Act enlarges the exception to include emergencies involving other weapons of mass destruction, section 104.\(^\text{125}\)

**Delayed notification of a search (sneak and peek).** Rule 41 of the Federal Rules of Criminal Procedure seemed to preclude “sneak and peek” warrants before passage of the Act. A sneak and peek warrant is one that authorizes officers to secretly enter, either physically or virtually; conduct a search, observe, take

\(^{124}\text{The fund is otherwise available to reestablish capacity lost in terrorist attacks, to conduct threat assessments for federal agencies, and to reimburse federal agencies for the costs of detaining terrorist suspects overseas.}\)

\(^{125}\text{For a general discussion of the Posse Comitatus Act, see, Doyle, }\textit{The Posse Comitatus Act} \& \textit{Related Matters: The Use of the Military to Execute Civilian Law}, \textit{CRS Rep. No. 95-964} (June 1, 2000).\)
measurements, conduct examinations, smell, take pictures, copy documents, download or transmit computer files, and the like; and depart without taking any tangible evidence or leaving notice of their presence. The Rule required that after the execution of a federal search warrant officers leave a copy of the warrant and an inventory of what they have seized (tangible or intangible), and they were to advise the issuing court what they had done, F.R.Crim.P. 41(d). To what extent did Rule 41 portray the standards for a reasonable search and seizure for purposes of the Fourth Amendment?

The Fourth Amendment clearly requires officers to knock and announce their purpose before entering to execute a warrant, *Richards v. Wisconsin*, 520 U.S. 385 (1997), but with equal clarity recognizes exceptions for exigent circumstances such as where compliance will lead to the destruction of evidence, flight of a suspect, or endanger the officers, *Wilson v. Arkansas*, 514 U.S. 927 (1995). It is undisputed that Title III (the federal wiretap statute) is not constitutionally invalid because it permits delayed notice of the installation of an interception device, *Dalia v. United States*, 441 U.S. 238 (1979). Finally, there is no doubt that the Fourth Amendment imposes no demands where it does not apply. Thus, chapter 121 (court authorization for disclosure of the contents of e-mail stored with third party service providers) may permit delayed notification of the search of e-mail in remote storage with a third party for more than 180 days without offending the Fourth Amendment, because there is no Fourth Amendment justifiable expectation of privacy under such circumstances, *cf.*, *United States v. Miller*, 425 U.S. 435 (1976).

The lower federal courts are divided over the extent to which the Rule reflects Fourth Amendment requirements. The Ninth Circuit saw the Fourth Amendment reflected in Rule 41, *United States v. Freitas*, 800 F.2d 1451, 1453 (9th Cir. 1986).126

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126 The district court held that a search warrant permitting agents to observe, but not seize tangible property was impermissible under Rule 41. That holding conflicts with language in *United States v. New York Telephone Co.*, 434 U.S. 159, 169 (1977): Although Rule 41(h) defines property to include documents, books, papers, and any other tangible objects, it does not restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41. . . . Rule 41 is not limited to tangible items. That case held seizures of intangibles were not precluded by the definition of property appearing in Rule 41(b). Without doubt there was a search in this case. Its purpose, we hold, was to seize intangible, not tangible, property. The intangible property to be seized was information regarding the status of the suspected clandestine methamphetamine laboratory. The search was authorized by a warrant supported by what the district court concluded was probable cause. . . . The question remains, however, whether a warrant lacking both a description of the property to be seized and a notice requirement conforms to Rule 41. . . . we hold that there was no compliance with Rule 41 under the facts of this case. . . . While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy. We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity. We take this position because surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment. The mere thought of strangers walking through and visually examining the center of our privacy interests, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth
The Second Circuit was less convinced and preferred to hold sneak and peek searches to the demands of Rule 41, *United States v. Pangburn*, 983 F.2d 449 (2d Cir. 1993). The Fourth Circuit was, if anything, less convinced. Moreover, the facts in the case demonstrate the potential impact of the issue on computer privacy, *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000).

Amendment, demands that surreptitious entries be closely circumscribed,” *United States v. Freitas (Freitas I)*, 800 F.2d 1451, 1455-456 (9th Cir. 1986). The court remanded the case for a determination of whether grounds existed for a good faith exception to application of the exclusionary rule. It subsequently declined to exclude the evidence on those grounds, *United States v. Freitas (Freitas II)*, 856 F.2d 1425 (9th Cir. 1988).

127 “No provision specifically requiring notice of the execution of a search warrant is included in the Fourth Amendment. Accordingly, in *Dalia v. United States*, 441 U.S. 238, 247 (1979), the Supreme Court found no basis for a constitutional rule proscribing all covert entries. Resolving the particular issue raised in *Dalia*, the Court determined that the Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Rule 41 of the Federal Rules of Criminal Procedure does require notice of the execution of a search warrant but does not prescribe when the notice must be given. Rule 41 by its terms provides for notice only in the case of seizures of physical property. . . . The Supreme Court also has held that the authority conferred by Rule 41 is not limited to the seizure of tangible items. *See United States v. New York Telephone Co.*, 434 U.S. 159, 169 (1977). Despite the absence of notice requirements in the Constitution and Rule 41, it stands to reason that notice of a surreptitious search must be given at some point after the covert entry. . . . Although the *Freitas I* court specifically determined that the warrant was constitutionally defective for failure to include a notice requirement, we made no such determination in *United States v. Villegas*, 899 F.2d 1324 (1999). Although the *Freitas I* court found that covert entry searches without physical seizure strike at the very heart of the Fourth Amendment-protected interests, we used no such language in *Villegas*. Indeed, it was our perception that a covert entry search for intangibles is less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property. . . . We prefer to root out notice requirement in the provisions of Rule 41 rather than in the somewhat amorphous Fourth Amendment interests concept developed by the *Freitas I* court. The Fourth Amendment does not deal with notice of any kind, but Rule 41 does. It is from the Rule's requirements for service of a copy of the warrant and for provision of an inventory that we derive the requirements of notice in cases where a search warrant authorizes covert entry to search and to seize intangibles,” *United States v. Pangburn*, 983 F.2d 449, 453-55 (2d Cir. 1993).

128 In *Simons*, a search team entered Simons’ office at night in his absence and “copied the contents of Simons’ computer; computer diskettes found in Simons’ desk drawer; computer files stored on the zip drive or on zip drives diskettes; videotapes; and various documents, including personal correspondence. No original evidence was removed from the office. Neither a copy of the warrant nor a receipt for the property seized was left in the office or otherwise given to Simons at that time, and Simons did not learn of the search for approximately 45 days.” A property list, however, was returned to the magistrate. In the view of the Fourth Circuit, “[t]here are two categories of Rule 41 violations; those involving constitutional violations and all others. The violations termed ‘ministerial’ in our prior cases obviously fall into the latter category. Nonconstitutional violations of Rule 41 warrant suppression only when the defendant is prejudiced by the violation, or when there is evidence of intentional and deliberate disregard of a provision in the Rule. First, we conclude that the failure of the team executing the warrant to leave either a copy of the warrant or a receipt for the items taken did not render the search unreasonable under the Fourth Amendment. The
The Justice Department urged that the conflict be resolved with a uniform rule which permitted sneak and peek warrants under the same circumstances that excused delayed notification of government access to e-mail to longer-term, remote, third party storage.129

The Act, in section 213, stops short of the Justice Department proposal. Characterized as a codification of the Second Circuit decision, 147 Cong.Rec. H7197 (daily ed. Oct. 23, 2001), the Act extends the delayed notification procedure of chapter 121, which operates in an area to which the Fourth Amendment is inapplicable, to cases to which the Fourth Amendment applies, 18 U.S.C. 3103a. Its sneak and peek authorization reaches all federal search and seizure warrants where the court finds reasonable cause to believe that notification would have the kind of adverse results depicted in 18 U.S.C. 2705. Section 2705 describes both exigent circumstances (e.g., risk of destruction of evidence or bodily injury) and circumstances that are not likely to excuse notification when it is required by the Fourth Amendment (e.g., jeopardizing an investigation; delaying a trial). The sneak and peek authorization, however, does not reach tangible evidence, or wire or electronic communication unless the court finds the seizure “reasonably necessary.” It is not clear whether reasonable necessity means a seizure necessary to the investigation that is also reasonable in a Fourth Amendment sense, i.e., in the presence of exigent circumstances, or whether it means a seizure which a reasonable judge might find necessary for the investigation.130 The doctrine of constitutional avoidance argues against the latter interpretation. By the same token, when the Act permits delay for a reasonable period, it should probably be understood to mean

Fourth Amendment does not mention notice, and the Supreme Court has stated that the constitution does not categorically proscribe covert entries, which necessarily involve a delay in notice. And insofar as the August search satisfied the requirements of the Fourth Amendment, i.e., it was conducted pursuant to a warrant based on probable cause issued by a neutral and detached magistrate, we perceive no basis for concluding that the 45-day delay in notice rendered the search unconstitutional. Having concluded that the Rule 41(d) violation at issue here did not infringe on Simons’ constitutional rights, we must now evaluate his argument that the violation was deliberate. . . . The district court did not address the intent issue when it ruled on Simons’ motion to suppress. . . . We therefore remand for the district court to consider whether the Government intentionally and deliberately disregarded the notice provision of Rule 41(d) when it carried out the August 6, 1998 search,” 206 F.3d at 403.

129 “The law that currently governs notice to subjects of warrants where there is a showing to the court that immediate notice would jeopardize an ongoing investigation or otherwise interfere with lawful law enforcement activities, is a mix of inconsistent rules, practices, and court decisions varying widely from jurisdiction to jurisdiction across the country. This greatly hinders the investigation of many terrorism cases and other cases. This section resolves this problem by establishing a statutory, uniform standard for all such circumstances. It incorporates by reference the familiar, court-enforced standards currently applicable to stored communications under 18 U.S.C. §2705, and applies them to all instances where the court is satisfied that immediate notice of execution of a search warrant would jeopardize an ongoing investigation or otherwise interfere with lawful law-enforcement activities,” DoJ at §353.

130 Since neither the restriction nor its reasonable necessity exception appeared in the Justice Department’s initial proposal, the Department’s justification does not address the question.
constitutionally “reasonable,” that is, a brief period reasonable in light of the exigent circumstances which allow the delay or their like.

**Nationwide terrorism search warrants.** The Fourth Amendment demands that warrants be issued by a neutral magistrate, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); the Sixth Amendment, that crimes be prosecuted in the districts where they occur, *United States v. Cabrales*, 524 U.S. 1 (1998). The Federal Rules direct magistrates to issue warrants only for property within their judicial district, although they permit execution outside the district for property located in the district when the warrant is sought but removed before execution can be had, F.R.Crim.P. 41(a).

The Act, in section 219, allows a magistrate in the district in which a crime of terrorism has occurred to issue a search warrant to be executed either “within or outside the district,” (F.R.Crim.P. 41(a)(3)) in domestic and international terrorism cases. The provision may anticipate execution both in this country and overseas. The Fourth Amendment does not apply to the overseas searches of the property of foreign nationals, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). It does apply to the search of American property overseas involving American authorities, although the lower federal courts are divided over the exact level of participation required to trigger coverage. Neither Rule 41 nor any other provision of federal

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131 The amended rule uses the definitions of domestic and international terrorism found in 18 U.S.C. 2331, as modified by section 802 of the Act: “(1) the term ‘international terrorism’ means activities that – (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum. . . . (5) the term ‘domestic terrorism’ means activities that – (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States,” 18 U.S.C. 2331(1), (5).

132 The Justice Department, with whom the proposal originated, was somewhat cryptic on this point. Its analysis suggests execution in one of the several judicial districts of the United States, but not so precisely as to negate any other construction. “The restrictiveness of the existing rule creates unnecessary delays and burdens for the government in the investigation of terrorist activities and networks that span a number of districts, since warrants must be separately obtained in each district. This section resolves that problem by providing that warrants can be obtained in any district in which activities related to the terrorism may have occurred, regardless of where the warrants will be executed,” DoJ at §351.

133 *United States v. Barona*, 56 F.3d 1087, 1092 (9th Cir. 1995)(“United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials”); *United States v. Behety*, 32 F.3d 503, 510 (11th Cir. 1994)(“if American law enforcement officials substantially participated in the search or if the
law apparently contemplated extraterritorial execution, cf., F.R.Crim.P. 41, Advisory Committee Notes: 1990 Amendment (discussing a proposal for extraterritorial execution that the Supreme Court rejected).  

If the Act anticipates overseas execution there may be some question whether it creates a procedure to be used in lieu of extradition when the person for whom the search warrant has been issued is located outside the United States. The section refers to warrants for “search of property or for a person within or outside the district,” §219 (emphasis added). The Judicial Conference in 1990 recommended an amendment to Rule 41, which the Supreme Court rejected, that would have permitted the overseas execution of federal search warrants. In doing so, the Conference suggested extraterritorial execution be limited to warrants to search for property and not reach warrants to search for persons, “lest the rule be read as a substitute for extradition proceedings,” F.R.Crim.P. 41, Advisory Committee Notes: 1990 Amendment. There is no indication, however, that the section is at odds with either the Fourth or Sixth Amendment.

Terrorists’ DNA. The courts have generally concluded that the collection of DNA information from convicted prisoners does not offend constitutional standards per se. Existing federal law allowed the Attorney General to collect samples from

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134 The Code still carries remnants of the consular courts which speak of the overseas execution of arrest warrants in places where the United States has “extraterritorial jurisdiction,” 18 U.S.C. 3042. The history of the provisions makes it clear that the phrase “extraterritorial jurisdiction” was intended to coincide with those places in which the U.S. had consular courts, see, S.Rep. 217, 73d Cong., 2d Sess. 3 (1934), reprinted, 78 Cong.Rec. 4982-983 (1934)(“The countries to which the proposed bill, if enacted into law, would relate are the following, in which the United States exercises extraterritorial jurisdiction: China, Egypt, Ethiopia, Muscat, and Morocco”); 22 U.S.C. 141 (1926 ed.)(conferring judicial powers on consular courts there identified as those located in China, Egypt, Ethiopia, Muscat, Morocco, Siam and Turkey).

135 Roe v. Marcotte, 193 F.3d 72 (2d Cir. 1999); Shaffer v. Saffle, 148 F.3d 1180 (10th Cir. 1998); Rise v. Oregon, 59 F.3d 1556 (9th Cir. 1995); Jones v. Murray, 962 F.2d 302 (4th Cir. 1992).
Summarizing the law in place at the time, the Department of Justice argued that, “The statutory provisions governing the collection of DNA samples form convicted federal offenders (42 U.S.C. §14135a(d)) are restrictive, and do not include persons convicted for the crimes that are most likely to be committed by terrorists. DNA samples cannot now be collected even from persons federally convicted of terrorist murders in most circumstances. For example, 49 U.S.C. §46502, which applies to terrorists who murder people by hijacking aircraft, 18 U.S.C. §844(i), which applies to terrorists who murder people by blowing up buildings, and 18 U.S.C. 2332, which applies to terrorists who murder U.S. nationals abroad, are not included in the qualifying federal offenses for purposes of DNA sample collection under existing law. This section addresses the deficiency of the current law in relation to terrorists by extending DNA sample collection to all persons convicted of terrorism crimes,” DoJ at §353.

For a general discussion, see, Fischer, DNA Identification: Applications and Issues, CRS REP.NO. RL30717 (Jan. 12, 2001).

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137 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 37 (violence at international airports), 112 (assaults on foreign dignitaries), 351 (crimes of violence against Members of Congress), 1116 (killing foreign dignitaries), 1203 (hostage taking), 1361 (destruction of federal property), 1751 (crimes of violence against the President), 2280 (violence against maritime navigation), 2281 (violence on maritime platforms), 2332 (terrorist violence against Americans overseas), 2332a (use of weapons of mass destruction), 2332b (acts of terrorism transcending national boundaries), 2340A (torture); 49 U.S.C. 46502 (air piracy), 46504 (interference with a flight crew), 46505 (carrying a weapon aboard an aircraft), and 46506 (assault, theft, robbery, sexual abuse, murder, manslaughter or attempted murder or manslaughter in the special aircraft jurisdiction of the United States).

138 “This section amends 18 U.S.C. §3286 to provide that terrorism of offenses may be prosecuted without limitation of time. This will make it possible to prosecute the perpetrators of terrorist acts whenever they are identified and apprehended.

“This section expressly provides that it is applicable to offenses committed before the date of enactment of the statute, as well as those committed thereafter. This retroactivity provision ensures that no limitation period will bar the prosecution of crimes committed in
The Act takes less dramatic action in section 809. It eliminates the statute of limitations for any crime of terrorism\textsuperscript{139} that risks or results in a death or serious bodily injury, 18 U.S.C. 3286. In the absence of such a risk or result, all other terrorism offenses become subject to the eight year statute of limitations unless already covered by the ten year statute for explosives and arson offenses, 18 U.S.C. 3286.

Application of the statute of limitations rarely provokes a constitutional inquiry. Nevertheless, due process precludes prosecution when it can be shown that pre-indictment delay “caused substantial prejudice to [a defendant’s] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.”\textsuperscript{140} Moreover, a judicial difference of opinion has appeared in those cases

connection with the September 11, 2001 terrorist attacks. The constitutionality of such retroactive applications of changes in statutes of limitations is well-settled. See, e.g., \textit{United States v. Grimes}, 142 F.3d 1342, 1350-51 (11th Cir. 1998); \textit{People v. Frazer}, 982 P.2d 180 (Cal. 1999).

“Existing federal law (18 U.S.C. §3282) bars prosecuting most offenses after five years. 18 U.S.C. §3286, as currently formulated, extends the limitation period for prosecution for certain offenses that may be committed by terrorists – but only to eight years. While this is a limited improvement over the five-year limitation period for most federal offenses, it is patently inadequate in relation to the catastrophic human and social costs that frequently follow from such crimes as destruction of aircraft (18 U.S.C. §32), aircraft hijackings ([49] U.S.C. §§46502, 46504-06, attempted political assassinations (18 U.S.C. §§351, 1116, 1751), or hostage taking (18 U.S.C. §1203). These are not minor acts of misconduct which can properly be forgiven or forgotten merely because the perpetrator has avoided apprehension for some period of time. Anomalously, existing law provides longer limitation periods for such offenses as bank frauds and certain artwork thefts (18 U.S.C. §§3293-94) than it does for crimes characteristically committed by terrorists.

“In many American jurisdictions, the limitation periods for prosecution for serious offenses are more permissible than those found in federal law, including a number of states which have no limitation period for the prosecution of felonies generally. While this section does not go so far, it does eliminate the limitation period for prosecution of the major crimes that are most likely to be committed by terrorists (‘Federal terrorism offenses’), as specified in section 309 of this bill,” DoJ at 301.

\textsuperscript{139} As defined by 18 U.S.C. 2332b(g)(5)(B), with the amendments of §808, this includes, in addition to the offenses already listed in 18 U.S.C. 3296 – 18 U.S.C. 81 (arson within U.S. special maritime and territorial jurisdiction); 175 & 175b (biological weapons); 229 (chemical weapons); 831 (nuclear weapons); 842(m) & (n) (plastic explosives); 844(f)(bombing federal property where death results); 844(i)(bombing property used in interstate commerce); 930(c)(possession of a firearm in a federal building where death results), 956(a)(conspiracy within the U.S. to commit murder, kidnapping, or to maim overseas); 1030(a) (1), (5)(A)(i), (5)(B)(ii)-(v)(computer abuse); 1114 (killing federal officers or employees); 1362 (destruction of communications facilities); 1363 (malicious mischief within the U.S. special maritime and territorial jurisdiction); 1366(a)(destruction of an energy facility); 1992 (train wrecking); 1993 (terrorist attack on mass transit); 2155 (destruction of national defense materials); 2339 (harboring terrorists); 2339A (material support to terrorists), 2339B (material support to terrorist organizations); 42 U.S.C. 2284 (sabotage of nuclear facilities); and 49 U.S.C. 60123(b)(destruction of pipeline facilities).

when an existing period of limitation is enlarged legislatively and the new period made applicable to past offenses. The lower federal courts have long noted that the Constitution poses no impediment to enlarging a period of limitation as long as it does not revive an expired period.\(^{141}\) Recently, however, the California Supreme Court held that retroactive revival of an expired statute of limitations offended neither the California nor the United States Constitution.\(^{142}\)

Section 809 applies “to the prosecution of any offense committed before, on, or after the date of enactment of this section,” the very words used in the Justice Department proposal. The Justice Department, in describing its proposal, cited both federal law (Grimes, where the court held that extensions may be applied where the earlier period of limitations has not expired) and California law (Frazer, where the court held that extensions may revive an expired period of limitations). The implication is that the Justice Department understood its proposal to apply to past offenses whether the earlier statute of limitations had expired or not. Other than its use of identical terminology, Congress gave no hint of whether it intended to adopt this view for section 809. Whether the federal courts could be persuaded to overcome their previously expressed constitutional reservations is equally uncertain.

**Extraterritoriality.** Crime is usually outlawed, prosecuted and punished where it is committed. In the case of the United States, this is ordinarily a matter of practical and diplomatic preference rather than constitutional necessity. Consequently, although prosecutions are somewhat uncommon, a surprising number of federal criminal laws have extraterritorial application. In some instances, the statute proscribing the misconduct expressly permits the exercise of extraterritorial jurisdiction, 18 U.S.C. 2381 (treason) (“Whoever, owing allegiance to the United States . . . within the United States or elsewhere. . .”). In others, such as those banning assassination of Members of Congress, 18 U.S.C. 351, or the murder of federal law enforcement officers, 18 U.S.C. 1114, the courts have assumed Congress intended the prohibitions to have extraterritorial reach.\(^{143}\)

The Act touches upon extraterritoriality only to a limited extent and in somewhat unusual ways. Congress has made most common law crimes – murder, sexual abuse, kidnaping, assault, robbery, theft and the like – federal crimes when committed within the special maritime and territorial jurisdiction of the United States. The special maritime and territorial jurisdiction of the United States represents two variations of extraterritorial jurisdiction.

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\(^{141}\) United States v. De La Matta, 266 F.3d 1275, 1286 (11th Cir. 2001); United States v. Grimes, 142 F.3d 1342, 1351 (11th Cir. 1998); United States v. Morrow, 177 F.3d 272, 294 (5th Cir. 1999); Falter v. United States, 23 F.2d 420, 425-26 (2d Cir. 1928).

\(^{142}\) People v. Frazer, 24 Cal.4th 737, 759, 982 P.2d 180, 1294, 88 Cal.Rptr.2d 312, 327 (1999).

\(^{143}\) United States v. Layton, 855 F.2d 1388 (9th Cir. 1988)(at the time of the overseas murder of Congressman Ryan for which Layton was convicted the statute was silent as to its extraterritorial application; several years later Congress added an explicit extraterritorial provision, 18 U.S.C. 351(i)); United States v. Benítez, 741 F.2d 1312 (11th Cir. 1984)(18 U.S.C. 1114 has since expanded to protect all federal officers and employees, including members of the armed forces and those assisting them).
The special maritime jurisdiction of the United States extends to the vessels of United States registry. Historically, the territorial jurisdiction of the United States was thought to reach those areas over which Congress enjoyed state-like legislative jurisdiction. For some time, those territories were located exclusively within the confines of the United States, but over the years they came to include at least temporarily, Hawaii, the Philippines, and several other American overseas territories and possessions. Recently, the lower federal courts have become divided over the question of whether laws, enacted to apply on federal enclaves within the United States and within American territories overseas, might also apply to areas in foreign countries over which the United States has proprietary control. The Act resolves the conflict by declaring within the territory of the United States those overseas areas used by American governmental entities for their activities or residences for their personnel, at least to the extent that crimes are committed by or against an American, section 804 (18 U.S.C. 7 (9)). The section is inapplicable where it would otherwise conflict with a treaty obligation or where the offender is covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. 3261.

Victims. Federal law has provided for crime victim compensation and assistance programs for some time. Moreover, Congress enacted September 11th Victim Compensation Fund legislation before it passed the Act. Consequently, the Act’s victim provisions focus on adjustments to existing programs, primarily to those of the Victims of Crime Act of 1984, 42 U.S.C. 10601 et seq., and to those maintained for the benefit of public safety officers and their survivors, 42 U.S.C. 3796 et seq.

Public safety officers - police officers, firefighters, ambulance and rescue personnel - killed or disabled in the line of duty (and their heirs) are entitled to federal benefits. Prior to the Act, death benefits were set at $100,000 and the total amount available for disability benefits in a given year was capped at $5 million, 42 U.S.C. 3796 (2000 ed.). No benefits could be paid for suicides, if the officer was drunk or grossly negligent, if the beneficiary contributed to the officer’s death or injury, or if the officer were employed other than in a civilian capacity, 42 U.S.C. 3796 (2000 ed.). The Act increases the death benefit to $250,000 (retroactive to January 1, 2001), section 613; and for deaths and disability connected with acts of terrorism waives the $5 million disability cap and the disqualifications for gross negligence, contributing cause, or employment in a noncivilian capacity, section 611.

Most of fines collected for violation of federal criminal laws are deposited in the Crime Victims Fund which is available for child abuse prevention and treatment grants, victim services within the federal criminal justice system, and grants to state victim compensation and victim assistance programs, 42 U.S.C. 10601 to 10608. The Act:

• authorizes private contributions to the fund (42 U.S.C. 10601(b)), section 621(a)

• instructs the Department of Justice, which administers the fund, to distribute in every fiscal year (if amounts in the Fund are sufficient) amounts equal to between 90% and 110% of the amount distributed in the previous fiscal year (120% in any year when the amount on hand is twice the amount distributed the previous year) (42 U.S.C. 10601(c)), section 621(b)

• reduces by 1% the amounts available for compensation and assistance grants (from 48.5% to 47.5% after child abuse and federal victim priorities have been met), and increases from 3% to 5% the amount available for Justice Department discretionary spending for demonstration projects and services to assist the victims of federal crimes (42 U.S.C. 10601(d), 10603(c)), section 621(c)

• converts the general reserve fund to an antiterrorism reserve fund and reduces the cap on the reserve from $100 million to $50 million (42 U.S.C. 10601(d)(5)), section 621(d)

• waives the Fund’s availability caps with respect to funds transferred to it in response to the terrorist attacks of September 11 (42 U.S.C. 10601 note)), section 621(e)

• lowers the annual reduction rate on individual compensation program grants; beginning in 2003 individual grants are limited to 60% (rather than 40%) of the amount of awarded in the previous year (42 U.S.C. 10602(a)), section 622(a)

• eliminates the requirement that state compensation programs permit compensation for state residents who are the victims of terrorism overseas (42 U.S.C. 10602(b)(6)(B)), section 622(b)

• provides that compensation under the September 11th Victim Compensation Fund should be counted as income in considering eligibility for any federal indigent benefit program (42 U.S.C. 10602(c)), section 622(c)

• drops “crimes involving terrorism” from the definition of “compensable crime”; it is unclear whether the phrase was removed as redundant or pursuant to a determination to compensate victims other than through the Crime Victims Fund (42 U.S.C. 10602(d)), section 622(d)(1)

• makes it clear that the Virgin Islands is eligible to receive grants (42 U.S.C. 10602(d)), section 622(d)(2)

• adds the September 11th Victim Compensation Fund to the “double dipping” restriction that applies to the victim compensation programs and confirms that state compensation programs will not be rendered ineligible for grants by virtue of a refusal to pay dual compensation to September 11th Fund victims (42 U.S.C. 10602(e)), section 622(e)
• makes federal agencies performing law enforcement functions in the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories and possessions eligible for victim assistance grants (42 U.S.C. 10603(a)(6)), section 623(a)

• prohibits program discrimination against crime victims based on their disagreement with the manner in which the state is prosecuting the underlying offense (42 U.S.C. 10603(b)(1)(F)), section 623(b)

• allows Justice Department discretionary grants for purposes of program evaluation and compliance and for fellowships, clinical internships and training programs (42 U.S.C. 10603(c)(1)(A), (3)(E)), section 623(c),(e)

• reverses the preference for victim service grants over demonstration projects and training grants, so that not more than 50% of the amounts available for crime victim assistance grants shall be used for victim service grants and not less than 50% for demonstration projects and training grants (42 U.S.C. 10603(c)(2)), section 623(d)

• makes federal and local agencies and private entities eligible for supplemental grants for services relating to victims of terrorism committed within the U.S. (42 U.S.C. 10603b(b)), section 624(a)

• allows supplemental grants for services relating to victims of terrorism committed overseas regardless of whether the victims are eligible for compensation under Title VIII of the Omnibus Diplomatic Security and Antiterrorism Act (100 Stat. 879 (1986))(Title VIII victims were previously ineligible) (42 U.S.C. 10603b(a)(1)), section 624(b)

• establishes a “double dipping” restriction under which compensation to the victims of overseas terrorism is reduced by the amount received under Title VIII of the Omnibus Act (42 U.S.C. 10603c(b)), section 624(c)

**Increasing Institutional Capacity.** A major portion of the Act is devoted to bolstering the institutional capacity of federal law enforcement agencies to combat terrorism and other criminal threats. In addition to the counterterrorism discussed above in the context of the Attorney General's reward prerogatives, it increases funding authorization for an FBI technical support center, section 103, and allows the FBI to hire translators without regard to otherwise applicable employment restrictions such as citizenship, section 205.

In the area of cybercrime, the Attorney General is instructed to establish regional forensic laboratories, section 817, and the Secret Service, to establish a national network of electronic crime task forces, modeled after its New York Electronic Crimes Task Force, section 105. The Act likewise clarifies the Secret Service’s investigative jurisdiction with respect to computer crime (18 U.S.C. 1030) and to crimes involving credit cards, PIN numbers, computer passwords, or any frauds against financial institutions (18 U.S.C. 3056), section 506.
For a period of up to 180 days after the end of Operation Enduring Freedom, section 1010 allows the Department of Defense (DoD) to contract with state and local law enforcement authorities to perform various security functions on its military installations and facilities, 10 U.S.C. 2465.

The Act also authorizes appropriations for wide range anti-terrorism purposes including:

- $25 million a year for FY 2003 through FY 2007 for state and local terrorism prevention and antiterrorism training grants for first responders, section 1005 (28 U.S.C. 509 note)
- necessary sums (FY 2002 through FY 2007) for Office of Justice Programs (OJP) grants to state and local governments to enhance their capacity to respond to terrorist attacks, section 1014 (42 U.S.C. 3711)
- $250 million a year (FY 2002 through FY 2007) for OJP grants to state and local governments integrated information and identification systems, section 1015 (42 U.S.C. 14601)
- $50 million per fiscal year for the Attorney General to develop and support regional computer forensic laboratories (28 U.S.C. 509 note), section 816
- $50 million (FY 2002) and $100 million (FY 2003) for Bureau of Justice Assistance grants (42 U.S.C. 3796h) for federal-state-local law enforcement information sharing systems, section 701
- $20 million (FY 2002) for the activities of National Infrastructure Simulation and Analysis Center in DoD’s Defense Threat Reduction Agency, section 1016 (42 U.S.C. 5195c)
- $5 million for DEA police training in South and Central Asia, section 1007.

Miscellaneous. Finally, the Act addresses the issuance of licenses for the drivers of vehicles carrying hazardous materials and the use of trade sanctions against countries that support terrorism.

The Act requires background checks for criminal records and immigration status of applicants for licenses to operate vehicles carrying hazardous materials including chemical and biological materials (49 U.S.C. 5101a), section 1012.

The Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. 7201 to 7209, limits the President’s authority to unilaterally impose export restrictions on food and medical supplies. The limitations do not apply to restrictions on products that might be used for the development or production of chemical or biological weapons or of weapons of mass destruction, 22 U.S.C. 7203(2)(c). The Act expands the exception to include products that might to used for the design of chemical or biological weapons or of weapons of mass destruction as well, section 221(a)(1).
Only one year licenses may be issued for trade with countries that sponsor terrorism, 22 U.S.C. 7205. The Act brings areas of Afghanistan controlled by the Taliban within the same restriction, section 221(a)(2).

Neither of these changes or anything else in the trade sanctions legislation precludes the assessment of civil or criminal liability for violations of 18 U.S.C. 2339A (providing support to terrorists), of 18 U.S.C. 2339B (providing support to terrorist organizations), or of various presidential orders under the International Emergency Economic Powers Act, or of restrictions on foreign involvement in weapons of mass destruction or missile proliferation, sections 221(b), 807.

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145 *I.e.*, Executive Order No. 12947, 50 U.S.C. 1701 note (prohibiting transactions with terrorists); Executive Order No. 13224, 50 U.S.C. 1701 note (blocking property of persons who support terrorism); Executive Order No. 12978, 50 U.S.C. 1701 note (blocking assets of significant narcotics traffickers).